

The Fog of Law



An introduction to the legal erosion of British fighting power

Tom Tugendhat and Laura Croft

Foreword by the Rt Hon Lord Justice Moses



The Fog of Law

An introduction to the legal erosion
of British fighting power

Thomas Tugendhat and Laura Croft

Foreword by the Rt Hon Lord Justice Moses



Policy Exchange is the UK's leading think tank. We are an educational charity whose mission is to develop and promote new policy ideas that will deliver better public services, a stronger society and a more dynamic economy. Registered charity no: 1096300.

Policy Exchange is committed to an evidence-based approach to policy development. We work in partnership with academics and other experts and commission major studies involving thorough empirical research of alternative policy outcomes. We believe that the policy experience of other countries offers important lessons for government in the UK. We also believe that government has much to learn from business and the voluntary sector.

Trustees

Daniel Finkelstein (Chairman of the Board), Richard Ehrman (Deputy Chair), Theodore Agnew, Richard Briance, Simon Brocklebank-Fowler, Robin Edwards, Virginia Fraser, Edward Heathcoat Amory, David Meller, George Robinson, Robert Rosenkranz, Andrew Sells, Charles Stewart-Smith, Patience Wheatcroft and Simon Wolfson.

© Policy Exchange 2013

Published by

Policy Exchange, Clutha House, 10 Storey's Gate, London SW1P 3AY

www.policyexchange.org.uk

ISBN: 978-1-907689-60-4

Printed by Heron, Dawson and Sawyer

Designed by Soapbox, www.soapbox.co.uk

About the Authors

Thomas Tugendhat is a strategy consultant and a Territorial Army Lieutenant Colonel. His most recent period of active service was as Military Assistant to the Chief of the Defence Staff, General Sir David Richards. Previously, he served operationally in Afghanistan and Iraq. He was also a diplomat, serving as the adviser to Afghanistan's National Security Adviser and later to the Governor of Helmand province, during the period when British forces arrived in Southern Afghanistan (2006).

Immediately after the Afghan Government and ISAF forces recaptured Musa Qala, a town in northern Helmand with 30,000 inhabitants, Tom was acting governor. He was awarded the MBE (Military) for his efforts on operations.

In his civilian career, he has worked in energy, consulting, communications and journalism, in the Middle East and the UK.

Tom graduated in Theology from Bristol University and did his Master's degree in Islamic Studies at Cambridge University.

Laura Croft is a retired US Army Lieutenant Colonel who served as a lawyer in the Judge Advocate General's Corps. She served with the British Army on secondment as a member of the Strategy Branch for the Chief of the General Staff. Prior to that, while on secondment to Army Legal Services, she was responsible for teaching the Law of Armed Conflict, the Rules of Engagement, and Detention Operations to British Army personnel of all ranks. She also served as chairman of the NATO Law of Armed Conflict Training Working Group.

Lieutenant Colonel Croft deployed to Iraq and served as Deputy Staff Judge Advocate (DSJA) for the multi-national division in Mosul. Before that, she was legal adviser to the 173rd Airborne Brigade in Kirkuk and the DSJA for the 10th Mountain Division/Combined Joint Task Force-180 in Bagram, Afghanistan.

Laura graduated from Brown University in Providence. She received her J.D. from Louisiana State University Law School and her LL.M. in military law. She is a member of three Bars: the US Supreme Court, the Louisiana State Bar and the Court of Appeals for the Armed Forces. Her awards and decorations include the Legion of Merit, Bronze Star medal, the Combat Action Badge, the Airborne Badge, the Meritorious Service Ribbon (three awards); and the Joint Service Commendation Medal (two awards).

Laura is married to a British Army officer.

“It is of paramount importance that the work that the armed forces do in the national interest should not be impeded by having to prepare for or conduct active operations against the enemy under the threat of litigation if things should go wrong.”¹

Lord Hope, former Deputy President of the Supreme Court of the United Kingdom

“I know somebody ... who was heavily criticised by the coroner because he had to make a split-second decision without a complete intelligence picture, which you have to make in war, and someone was killed. The inquest on this boy who was killed blamed the company commander. That seemed to me absolutely wrong because if you are so worried about having a lawyer, or an international lawyer, following you around the battlefield, you will not do anything”.²

Field Marshal Lord Guthrie of Craigiebank, former Chief of the Defence Staff

Pale Ebenezer thought it wrong to fight, But Roaring Bill (who killed him) thought it right.³

Hilaire Belloc

1 Lord Hope, para 100: *Smith and Others v The Ministry of Defence* [2013] UKSC 41

2 Lord Guthrie of Craigiebank, Oral Evidence to the House of Lords Select Committee on the Constitution: Inquiry into the Constitutional Arrangements for the Use of Armed Force, 5 June 2013, p 22. www.parliament.uk/documents/lords-committees/constitution/Armed%20Force/COMPLETE%20armed%20force%20evidence%20volume.pdf

3 Hilaire Belloc, “The Pacifist”, 1938

Contents

Acknowledgments	6
Foreword	7
Executive Summary	10
Introduction: Legal siege – what it means and how it has come about	14
1 Coroners’ courts, judicial oversight and the imposition of civilian ‘duty of care’ standards upon the armed forces	22
2 <i>Smith and Others v the Ministry of Defence</i> : the apogee of judicial encroachment	28
3 The importance of detention in war	37
4 Risk taking, military judgment and decision making: the case of the Military Aviation Authority	43
5 ‘Train as you fight’ and the impact of legislation on readiness	47
Conclusion: the impact on operational effectiveness	54
Options	56
Appendix A: Glossary of terms	63
Appendix B: Timeline	64
Appendix C: Table of cases	70

Acknowledgments

Policy Exchange and the authors wish to acknowledge first and foremost the generous assistance of The Blavatnik Family Foundation and Krishna Rao in making this report possible.

This project would never have come to completion without the superlative help of Lynne Middleton, Research Fellow for Security Policy at Policy Exchange – for whom nothing was too much.

Two friends of Policy Exchange deserve particular thanks for their unstinting support and wisdom: Lord Carlile of Berriew, QC, CBE, former Independent Reviewer of Terrorism Legislation, whose understanding of the intersection of law, national security policy and politics is unmatched. A great debt is also owed to Lieutenant General Sir Paul Newton, KBE – one of the finest thinkers of his generation in the British Army and now Director of the Strategy and Security Institute at the University of Exeter. The Army's loss is Exeter's gain.

Brigadier Phil McEvoy, OBE, formerly deputy Director of the Service Prosecuting Authority, gave unstinting and invaluable guidance.

Appreciation is also owed to the following individuals who kindly helped us – not all of whom will necessarily agree with every recommendation here. They include: Sir Dan Bethlehem, KCMG, QC, former principal Legal Adviser of the FCO; Lord Faulks of Donnington, QC; Captain Thomas Hughes of St Antony's College, Oxford and the 9th/12th Royal Lancers; Dame Joan Higgins, DBE of the NHS Litigation Authority; the Rt Hon Lord Hutton; Major General Andrew Mackay, CBE, former Commander of the Helmand Task Force; Sir Michael Pakenham, KBE, CMG of The Blavatnik Family Foundation; Air Chief Marshal Sir Stuart Peach, Vice Chief of the Defence Staff; Air Vice-Marshal Edward Stringer; Jason Sugarman; His Honour Judge Peter Thornton, QC, Chief Coroner of England and Wales; and Robert Weir, QC.

Finally, we wish to thank all serving and past officers of all three branches of the armed services who shared their experiences of 'judicial creep', most of whom do not wish to be identified. We are also hugely indebted to many Ministry of Defence civil servants, whose dedication and care give the lie to the fashionable idea that MOD 'mandarins' are invariably part of the problem.

Foreword

By the Rt Hon Lord Justice Moses

None have succeeded in defeating the armed forces of the United Kingdom. Napoleon, Falkenhayn and Hitler could not. But where these enemies failed, our own legal institutions threaten to succeed. So argue the authors of this stimulating, well-reasoned and important paper. They recall that in 2009, soldiers carried twice the weight of the loads born by their predecessors during the Falklands. Now they demonstrate the even greater weight of judicial intervention imposed on the armed forces following the decision of the Supreme Court in June 2013 in the *Smith* case. The judges, by a majority of four to three, chose, in that case, to admit of the application of Article 2 of the European Convention on Human Rights to soldiers on the field of battle, should their death or injuries be attributable to some earlier decision relating to procurement. Only the dissenting speech of Lord Mance, with two lieutenants, escapes the authors' barrage.

It is piquant that, fearful of the consequences of that decision, the authors aim their not inconsiderable artillery at the judges. In my youth, the prisoner accused of felony need only to have stood in the dock wearing a regimental tie and a handful of campaign medals for the judge to halve the merited sentence and send him down with words of regretful praise. This paper sets out to demonstrate how what is described as 'judicial creep' (the authors have too much courtesy to add an 's') threatens the ability of the armed forces to exercise that essence of professional military skill, the ability to act with flexibility and instinct within the framework of a superior commander's intent. Judicial intervention, the authors assert, breaks the necessary chain of command between private and commander-in-chief, and reduces the necessary space for a commander's judgment, described as Nelson's 'sea-room'.

In forthright but reasoned tones, the authors seek to show the deadening (sometimes literally) effect of civilian, particularly judicial, oversight, or as they would put it, hindsight, over the conduct of combat operations. Save for the dissenting speech of Lord Mance, the judges have failed, they say, to appreciate that they have eroded the doctrine of Combat Immunity, and thereby left the field open to allegations which trench upon the conduct of war in the battle zone. Now that judges have accepted the possibility of bringing actions which relate to decisions as to procurement and the supply of materiel, how can they stem a flood of cases which relate to lack of care on the battlefield itself? True it is, the authors acknowledge, that *Smith* does not actually decide any of the cases brought by the soldiers or their relatives but only leaves the door open to the possibility of pursuing their claims, but it is that very possibility which will cause so much damage to the exercise of military judgment. And, if as their lordships hinted, the claimants may have considerable difficulty in winning, it is the damage in the meantime that our authors fear.

I have to say that I never did think much of the judge-made doctrine of Combat Immunity, introduced once immunity from suit, previously enshrined in the

Crown Proceedings Act 1947, was abolished. Immunity is designed to prevent actions being brought. A successful rule of immunity requires clear black lines to be drawn so that both claimant and defendant can see immediately when such lines are crossed without the need for lengthy and expensive litigation. But the doctrine of Combat Immunity could never have achieved such clarity, since, as Smith itself shows, it is not possible to identify or define precisely when combat begins and when it ends. How far back before a conflict erupts is it supposed to extend? Too far and it would cover every military decision which could possibly have an impact on future conflict; too near and the absence of immunity threatens the very actions of commanders, and even their juniors, in the field. Following Smith, only litigation may solve these problems, and once litigation is launched and maintained, the damage it is suggested, has already occurred.

The paper identifies the damage in a number of different respects. First in combat, by creating a risk-averse armed service, prone to all the pusillanimity we may already have seen in an over-defensive medical service. Second, in the intervention of systems analogous to the worst excesses of Health and Safety legislation which may stifle innovation, procurement and deployment, inhibiting quick victories in favour of slow defeat. Third, in the civilian and judicial interference with the military use of detention, where courts have granted injunctions to prevent detainees being handed over to the Afghan authorities, with damaging consequences to diplomatic relations and with the unintended consequence that shooting may be preferable, as a military solution, to capture. Above all, it is against the prospect of having to justify actions taken in the heat, smoke and dust of battle, in litigation, inquest or in public inquiry, that they give warning.

The reader, who I hope will read this paper thoroughly with care and with admiration, can hardly expect the author of any foreword to respond with a detailed rebuttal, least of all from a sitting judge, conscious of the existence of a boundary, but perplexed as to where it is to be found and one who may himself have to grapple with tragic cases. Rather, it is his function to whet the appetite of the reader, fill him with eager anticipation, and stress that the problems which the authors have recognised are anxious, urgent and affect us all. This I am more than glad to do.

But may I say that I venture to doubt whether the full force of the authors' attack should be directed at the judiciary, as much prone as the military to becoming confused in the fog, and to emerging with thick and damp solutions. The real problem lies in the expectations of the public and the response of the politician to those expectations. Nowadays the law is often called upon to attempt to find a solution to impenetrable problems that no politician, if he or she is ever to be elected again, can afford to solve. It is, dare I suggest, for that reason that no Secretary of State for Defence has sought to exercise his existing statutory power to re-introduce immunity from suit in specified conflicts. And judges can hardly be blamed if they remain conscious that there are too many examples of erosion to fundamental human rights in time of war which have persisted, uncorrected, into times of peace. You should, after all, never legislate in tears.

How can the legitimate demands of the relatives of those killed or injured through inadequacy be met without impeding the military skill and endeavour in the exercise of which those members of the armed forces gave their lives? How can standards of justice and of the law be maintained in conflict, without

litigation and inquiry? To these questions this paper seeks to provide trenchant answers. Many will, at least to some extent, differ as to the correct solution, as to where the balance should be struck, but none should fail to respect and to recognise the significance of this paper.

Alan Moses

The Rt Hon Lord Justice Moses is a Court of Appeal Judge, appointed in 2005. He was a High Court Judge (Queen's Bench Division) from 1996–2005.

Executive Summary

The problem

The customs and practices of Britain's armed forces are now under threat from an unexpected quarter: the law. Recent legal developments have undermined the armed forces' ability to operate effectively on the battlefield. The application of laws originally designed for domestic civilian cases to military operations overseas has changed the way the armed forces can act. As Lord Mance stated in his dissenting judgment in *Smith and Others v the Ministry of Defence* in June 2013, "the approach taken by the majority [in the Supreme Court] will in my view make extensive litigation almost inevitable after, as well as quite possibly during and even before, any active service operations undertaken by the British Army. It is likely to lead to the judicialisation of war".⁴ Even Lord Hope, despite being on the side of the majority, acknowledged that: "It is of paramount importance that the work that the armed forces do in the national interest should not be impeded by having to prepare for or conduct active operations against the enemy under the threat of litigation if things should go wrong".⁵

The opinion of Lord Mance is based on the cumulative impact, over the past decade, of a number of judgments and legal developments which have indeed prompted the "judicialisation of war". Training, procurement and now combat itself are all affected.

Concerns over the spread of judicial intervention have been variously referred to as "legal siege",⁶ "legal encirclement",⁷ "judicial creep" and even "lawfare".⁸ These all describe, somewhat dramatically, the growing body of law and regulation imposed upon or adopted by the armed forces. This creeping legal interest is caused by Parliament's incremental removal of the protections once granted to those who risked all for their country. Without a legislative firewall to hold back the cases, and with no other body stepping in to decide, the judiciary has been left in the unenviable position of having to hear cases and to decide what is, and what is not, right in battle. Slowly, civilian legal concepts are seeping into the military.

What this report is not

This report is not a call for the kind of freedom of action Joseph Conrad allowed his anti-hero Kurtz in *Heart of Darkness*.⁹ The armed forces neither should be, nor are, above or exempt from the law. Indeed, they have always prided themselves on their discipline. They display it on parades and reviews across the country and battlefields around the world. That discipline is what turns a group of individuals from a mob into one of the most respected fighting organisations in the world. It is based on many things: ethos, values, tradition of excellence and, most importantly, self-regulated standards that demand professionalism despite the chaos of battle. Together, these are what make the Royal Navy, the British Army and the Royal Air

4 Lord Mance, para 150: *Smith and Others v The Ministry of Defence* [2013] UKSC 41

5 Lord Hope, para 100: *Smith and Others v The Ministry of Defence* [2013] UKSC 41

6 Admiral Lord Boyce, House of Lords Debate of the AF Act, 14 July 2005, c1236. www.publications.parliament.uk/pa/ld200506/ldhansrd/vo050714/text/50714-08.htm

7 Christopher P.M. Waters, "Is the Military Legally Encircled?", *Defence Studies*, Volume 8, Issue 1, 19 February 2008, pp. 26–48. www.tandfonline.com/doi/abs/10.1080/14702430701812068?journalCode=fdef20#.ULbShVP6XE0

8 The House of Commons Defence Select Committee launched an inquiry in July 2013 into the 'UK Armed Forces personnel and the legal framework for future operations', looking at "the effects of the developing concepts and doctrines of 'lawfare' and universal jurisdiction". www.parliament.uk/business/committees/committees-a-z/commons-select/defence-committee/news/legal-framework-for-future-army-operations/

9 Joseph Conrad, *Heart of Darkness*, Blackwood's Magazine, 1899

Force examples for the rest of the world. But as with all organisations, individuals have sometimes failed to meet or maintain those standards. The armed forces have always understood this. From the *Souldiers Catechism* of 1644,¹⁰ written to instruct the Parliamentary army in good conduct during the English Civil War,¹¹ through to the Service Discipline Act of 2006, regulation of conduct in war and on operations has been recognised to be vital to the profession of arms. So, too is the Law of Armed Conflict (LOAC).

These legal regimes, both international and domestic, are needed precisely because of lapses from these high standards – of which Amritsar, Bloody Sunday and Baha Mousa are the worst examples. But, for the law to be just and fair to the Services, not all elements of domestic legislation should apply. The law at home must now be further modified for use on operations overseas – so as to ensure that the Government’s ability to act in defence of the nation’s interests is not undermined and so that commanders from the most junior upwards understand that decisions made in the confusion of battle will not be held to a standard designed for those who have never known such pressures.

The effect of all this on the armed forces is manifest. Recent legislation and judicial findings have extended the domestic law of negligence to the battle zone – where civilian norms of duty of care should not be applicable. Until recently, it was assumed that on the battlefield, a soldier had Combat Immunity.¹² This introductory report will provide evidence that these developments are eroding freedom of manoeuvre on the battlefield. It will also look at the ways in which the unintended and accidental outcome of ‘legal siege’ shapes military activity, from training to fighting. The proliferation of reviews and inquiries has led to trammelled thinking within the armed forces – rather than the creative innovation which grasps opportunities, wins battles and therefore saves lives. Unlike civilian employees, military commanders cannot say that the safety of their troops is their prime concern. If it were, they could never go on operations.

Unique bodies of law, such as the LOAC, have grown up to govern the conduct of operations. Today, these long-standing principles are being undermined, and not just in the United Kingdom. The United States *Law of War Manual*, which still remains to be officially published, demonstrates similar trends in the US. Its publication has been delayed following a debate around the primacy accorded to the LOAC in this document.¹³ This uncertainty constrains the ability of commanders to react, undermining their cooperation with allies and affecting the combat capability of the Services. Together, these weaken the defence of the realm. In the longer run, they are also a mortal threat to the culture and ethos of the military – which, unlike troop numbers, cannot easily be reversed.

Options

In order to address these concerns and to ensure that the utility of the military instrument remains intact, this report sets out a number of options.

Option 1

Parliament should legislate to define Combat Immunity. The judgment in *Smith* [2013] has significant implications for the doctrine of Combat Immunity. Potential liability now comprises both supporting commands and the frontline, stretching the MOD’s duty of care responsibilities. In order to reverse this

10 ‘*The Souldiers Catechisme*’: *Composed for the Parliaments Army*, by Oliver Cromwell MP, published by J Wright, London 1644

11 The modern British Army is the descendant not of Charles’s army but of Parliament’s. After early defeats, Oliver Cromwell MP reformed Parliament’s forces to create the New Model Army. In defeating the royalist forces, it is that body that has evolved to become the modern British Army. This is why it is called the British Army, not the Royal Army. Although regiments may have royal affiliation, the Army is the heir of Parliament’s men, not those of the defeated king. The Royal Navy was less affected by the Civil War, while the Royal Air Force was obviously founded in 1918

12 As the principle of Combat Immunity is a key consideration in this report, it is necessary to define the principle now. A more comprehensive discussion is included below at Section 2. Combat Immunity is a common law doctrine that operates to exclude civil liability for negligence and damage caused to property or person committed by the armed forces during certain combat operations. Oxford Reference, ‘Overview: Combat Immunity’, 2013, www.oxfordreference.com/view/10.1093/oi/authority.20110803095626210#

13 Edwin Williamson and Hays Parks, ‘Where is the Law of War Manual?’, *The Weekly Standard*, 22 July 2013. www.weeklystandard.com/articles/where-law-war-manual_739267.html?nopager=1

development, the MOD should define Combat Immunity through legislation to include the conduct of military operations, the materiel and physical preparation for military operations, and those persons affected by the military on operations. At the very least, Combat Immunity should apply when off-base on deployed operations.

Option 2

The MOD should revive Section 10 of the Crown Proceedings Act 1947 in times of national emergency or warlike operations. The Crown Proceedings (Armed Forces) Act 1987 repealed Crown Immunity, allowing Service personnel to pursue actions in tort against the Crown. However, Crown Immunity can be revived by order of the Secretary of State for Defence in certain circumstances: imminent national danger or for the purposes of any warlike operations in any part of the world outside the United Kingdom.

Option 3

Parliament should legislate to exempt the MOD from the Corporate Manslaughter and Corporate Homicide Act 2007. The law was not intended to apply on the battlefield, but the recent *Smith* [2013] judgment risks, through the narrowing of Combat Immunity, a re-evaluation of what constitutes 'military activities'. This has the potential to draw the MOD and armed forces within the ambit of the offence of Corporate Manslaughter.

Option 4

The UK should derogate from the European Convention on Human Rights during deployed operations. Case law and precedent have now pushed the ECHR into combat operations, leading to perverse outcomes. But there is no need for the ECHR to intrude in areas where its competence is limited and its authors did not intend it to apply as it does today. The LOAC is a robust body of law specifically designed for combat. The UK should therefore derogate from the application of the ECHR on operations overseas – and define the LOAC as the relevant body of law to govern operations. Application of the LOAC would ensure that the armed forces continue to operate under lawful control, with appropriate operational freedoms and permissions during operations.

Option 5

The UK should seek explicit language in future Chapter VII United Nations Security Council Resolutions in order to provide a legal basis for detention or internment acceptable to the ECHR. The European Court of Human Rights (ECtHR) held in *Al-Jedda* [2011] that as the UK was only authorised and not obliged to carry out internment, the ECHR would still apply, thus restricting the UK's detention capability to criminal, rather than military uses.

Option 6

When new legislation affecting the armed forces is being drafted, the Attorney General should write a letter to the MOD outlining any implications for operational effectiveness. This statement would allow the Ministry to seek an exemption, a change in the legislation or a veto. This would alert those drafting

legislation to guard against unintended consequences which could affect the conduct of military operations.

Option 7

Legal aid should not be available for lawsuits brought by non-UK persons against the Government, in line with recent Ministry of Justice proposals for reform.¹⁴ The introduction of a residency test would ensure that legal aid was only available for those with a 'strong connection' to the UK.

¹⁴ Ministry of Justice, Transforming Legal Aid: delivering a more credible and efficient system, London: The Stationery Office, 2013, p 27–28

Introduction

Legal siege: what it means and how it has come about

It all began with a tragic misunderstanding. In Pristina, Kosovo, on 2 July 1999, shortly after the liberation of the province by NATO troops, a car with eight people on board was driving around celebrating the allied victory and their own independence day. Their celebrations took a traditional form. Skender Bici was a rear passenger and Mohamet Bici was on the roof with a cousin, Fahri Bici, who was holding an AK47 and occasionally firing into the air. Fahri Bici also fired a pistol. He was a member of the Kosovo Liberation Army and, under an agreement with the allies, was not supposed to carry arms within two kilometres of the capital.

Three corporals from 1st Battalion, the Parachute Regiment saw them and became increasingly alarmed. The three shot Fahri Bici, claiming they were acting in self-defence. One said he shouted at Fahri Bici to put down his gun and gesticulated to him in order to show him what to do, but Fahri Bici ignored him and continued shooting. All three soldiers claimed that although Fahri Bici had his back to them, he turned and brought his rifle down so that it was aimed at them. Between them, they then fired a total of 15 shots.

Fahri Bici was hit in the back and died. Avni Dudi, who was in the back seat with Skender Bici, also died. Mohamet Bici and another passenger were wounded.¹⁵

Five years later, having undergone medical treatment in the UK, the two cousins, Skender and Mohamet Bici, brought an action against the British armed forces.¹⁶ Mr Justice Elias rejected the MOD's assertion that the soldiers had fired in self-defence and then denied the claim of Combat Immunity. The claimants reportedly received £2.4 million in compensation.¹⁷ The MOD did not appeal, and though the claimants' lawyers argued that it was not a "floodgates case",¹⁸ others disagreed. Phil Shiner, who had recently established the firm Public Interest Lawyers and who would later represent Baha Mousa (who was abused and subsequently died at a British detention facility in Iraq), said as the Bici case closed in 2004 that he had "at least" 12 Iraqi clients whom he was hoping to represent in similar campaigns against the MOD. There were more to follow.¹⁹

The Bici case did indeed open the floodgates. It represented the first substantive narrowing of the principle of Combat Immunity and inspired many others to use the courts to seek redress for wrongs that would once have been considered as part of the inevitable hazards of war.

This year, the UK Supreme Court went even further than could have been anticipated nearly a decade ago. Smith [2013] might turn out to be one of

15 Michael Smith, "MOD fights Kosovo deaths ruling", *The Daily Telegraph*, 8 April 2004. www.telegraph.co.uk/news/uknews/1458791/MOD-fights-Kosovo-deaths-ruling.html

16 *Bici and Another v Ministry of Defence* [2004] EWHC 786 QB

17 Matthew Hickley, "MOD pays £2.4m to a wounded Kosovan", *The Daily Mail*, 6 November 2008. www.dailymail.co.uk/news/article-1083393/MOD-pays-2-4m-wounded-Kosovan-EIGHTEEN-times-British-soldier-got-losing-legs.html

18 Jon Robins, "Soldiers of fortunes", *The Lawyer*, 19 April 2004. www.thelawyer.com/soldiers-of-fortunes/109617.article

19 Jon Robins, "Soldiers of fortunes", *The Lawyer*, 19 April 2004. www.thelawyer.com/soldiers-of-fortunes/109617.article

the most important legal judgments in military history. In it, the Court both narrowed the application of Combat Immunity and extended the jurisdiction of the European Convention for the Protection of Human Rights and Fundamental Freedoms (usually known by the shorter name of the European Convention on Human Rights or ECHR) to soldiers, sailors and airmen on the battlefield, while also extending the breadth of the duty of care owed to Service personnel in combat.²⁰ In making this determination, the Supreme Court followed the European Court of Human Rights (ECtHR) in its 2011 judgment in *Al-Skeini vs the United Kingdom* – where the Strasbourg Grand Chamber articulated that the jurisdiction of the ECHR extends even to third parties, such as civilians and detainees on the battlefield.²¹

Previously, the applicability of rights under the ECHR was considered an ‘all or nothing’ way. Either all rights were guaranteed, including those previously only thought applicable in a signatory state, or none. Rights could not be tailored for a particular set of circumstances. However, in *Al-Skeini* [2011] the ECtHR found that rights can in fact be tailored according to individual circumstances, and therefore some Articles of the ECHR can be made to apply even overseas.²² For example, an Iraqi citizen in Iraq can be guaranteed certain rights when detained by British forces, such as the Right to Life (Article 2) – though after release or in the custody of other authorities, no such rights would be guaranteed. [For more on the Smith [2013] case and the reasons behind it, see Section 2.]

Such legal innovation does not affect Britain alone. In the Netherlands, the Government is responding to a similar case involving extra-territorial responsibility following their troops’ deployment to Bosnia Herzegovina in the 1990s²³ – and the Supreme Court of the Netherlands invoked the same arguments that have been applied to British forces. Using the ECHR and referring directly to the *Al-Skeini* ruling of 2011, the Supreme Court of the Netherlands argued that peacekeepers are accountable for events that happen during their mission.²⁴ The Dutch Government said that such a judgment would deter future United Nations operations and make countries less willing to supply troops²⁵ – but the Supreme Court of the Netherlands nonetheless ruled that these were not valid reasons to exempt peacekeepers from judicial scrutiny.

This report will trace the legal changes from *Bici* [2004] in Kosovo through the Iraq and Afghan wars. It examines the position in which British Servicemen and women now find themselves – whereby military commanders at even the most junior levels are beginning to think about how their actions will be viewed by a court as well as how they will affect the enemy. Legal steps over the past decade have slowly undone the safeguards that Parliament put in place to give the Services what Admiral Nelson called “sea-room” – the space in which to decide and manoeuvre.

What has changed

In 1991 Private Richard Mulcahy, a soldier in the Royal Regiment of Artillery, was injured in Saudi Arabia when he was part of a team managing a gun in the course of the Gulf War. The gun crew were firing live rounds into Iraq, and he was standing in front of the weapon when it was inadvertently fired by the gun commander, injuring Private Mulcahy. The judge held at first instance that

20 *Smith and Others v The Ministry of Defence* [2013] UKSC 41

21 *Al-Skeini and Others v The United Kingdom* – 55721/07 [2011] ECHR 1093

22 *Ibid.*

23 *Nuhanovic and Mustafic v First Chamber*, 12/03324, 6 September 2013, Supreme Court of the Netherlands

24 *Nuhanovic and Mustafic v First Chamber*, 12/03324, 6 September 2013, Supreme Court of the Netherlands

25 Marlise Simons, “Dutch Peacekeepers are Found Responsible for Deaths”, *New York Times*, 6 September 2013. www.nytimes.com/2013/09/07/world/europe/dutch-peacekeepers-are-found-responsible-for-deaths.html?_r=0

26 *Mulcahy v Ministry of Defence* [1996] EWCA Civ 1323

27 *Multiple Claimants v Ministry of Defence* [2003] EWHC 1134 QB

28 Professor Gerry Rubin, "UK Military Law", *The University of Queensland Law Journal*, vol. 26, no. 366, 2007, p 48. This imposed law is in contrast to the 'civilianization' of military law, whereby the military has voluntarily incorporated civilian aspects of the law (criminal procedure for example) which suit the needs of the armed forces

29 Colin Scott (1998). "The Juridification of Regulatory Relations in the UK Utilities Sector", in J Black eds. *Commercial Regulation and Judicial Review* (Oxford: Hart Publishing, p 19 as cited in Professor Gerry Rubin (2007). "UK Military Law". *The University of Queensland Law Journal*, vol. 26, no. 366; Professor Anthony Forster (2012). "British judicial engagement and the juridification of the Armed Forces," *International Affairs*, vol. 88, no.2; Forster suggests that the process reflects the "colonization of the conduct of conflict by legal criteria which have drawn judges into arbitrating on issues previously based on trust". (p 295)

30 There is an analogy here with doctors forced to stay within the confines of standard procedure in order to avoid law suit and are therefore unable to explore the curative possibilities of innovation: so those at even the most junior levels of the military chain of command may be tempted towards risk-aversion – rather than the creativity that defeats enemies and saves lives. In May 2013 Maurice Saatchi introduced the Medical Innovation Bill in the House of Lords. The argument behind the Bill is that under present law, any deviation by a doctor from standard procedure is likely to result in a verdict of guilt for medical negligence – as the current law defines medical negligence as deviation from standard procedure. As innovation is deviation, non-deviation is non-innovation. "The present pre-eminence in law of the standard procedure provides no inducement to progress. It outlaws initiative. The self-interest of medical practitioners, as defined, for example, in doctors' insurance policies, means that innovation (ie deviation) is a form of self-harm". *A Guide to the Medical Innovation Bill: How can an Act of Parliament Cure Cancer*

31 Ministry of Defence (2011) Joint Doctrine Publication 0–01,

there should be a trial, before striking out the claim on the grounds of Combat Immunity. In the Court of Appeal, Lord Justice Neill ruled that no duty of care can be owed by one soldier to another on the battlefield, nor could safe conditions of work be required from any employer under such circumstances.²⁶ The concept of Combat Immunity was explored further in 2003 when dealing with post-traumatic stress disorder derived from a number of operational theatres. It was also extended to include not only combat cases, but those planning and preparing for military operations.²⁷

The past decade has seen these judgments first undermined and then reversed as legal intervention has gone from a trickle to a flood – applying civilian codes to barracks and the battlefield. These norms have often been imposed on the military, "as distinct from those that have been consensually" adopted by the military system.²⁸

The spread of law and legislation in this manner, sometimes referred to as 'juridification', points to what is really at stake. Broader than the legal and policy realm, this means that "relationships hitherto governed by other values and expectations come to be subjected to legal values and rules".²⁹ This is 'legal mission creep' and it is changing the character of the armed forces. Civilian coroners and judges have progressively extended their jurisdiction over previously exempt operations because Crown and Combat Immunity have diminished and their mandate has expanded to events overseas. But this new, expanded form of oversight has reached into the very heart of the military. In an earlier era, admirals, general and air marshals would carry the responsibility for all actions conducted under their command, apart from the most flagrant abuses. Today, decisions even at the most junior and tactical levels are being held to account by legally incisive minds with no expertise in combat. In the whole history of warfare, the ability to question those at every rank – while understanding neither the constraints nor the pressures of tactical command is, at the very least, novel.³⁰

For Britain's armed forces in particular, this represents a grave danger. In comparison with its rivals, the UK has traditionally maintained armed forces at levels which might easily seem inadequate for the tasks which they are expected to face. They have compensated by training and encouraging leaders at all levels to innovate. Historically, this has allowed the UK to maintain a smaller force than its rivals – and still more than match them on operations.

In the 2011 version of the military's professional instructions, the British Army states that: "a warfighting ethos, as distinct from a purely professional one, is absolutely fundamental to all those in the armed forces".³¹ This is not an arbitrary distinction. As the recently retired Commander of Force Development and Training, Lieutenant General Sir Paul Newton puts it: "The reason we make this particularly British distinction is that our armed forces are small; they do not enjoy unlimited resources; and we tend to commit the military only as a last resort so wresting control away from the adversary requires agility; confidence can be a life or death issue. As the doctrine states, 'this approach requires ... decentralised command, freedom and speed of action and initiative, but which is responsive to superior direction when a subordinate overreaches himself'".³² Small militaries must be creative and take calculated risks if they are to prevail. But this initiative, central to the British way of warfare, risks being undermined by juridically-inspired caution.

Professor Anthony Forster, in his 2012 article on the 'juridification' of the

armed forces, says that the spread of legal intervention has had one inescapable consequence. The armed forces are now permanently open to litigation. It is a “continuous confrontation” that affects those serving and alters the perceptions of the domestic and international audience. As all this spreads both to political leaders and tactical commanders, further legal challenges will impose greater restraints.³³

The main weapon used in the legal challenge against the MOD in the UK is the ECHR, which was incorporated into domestic British law through the Human Rights Act (1998) (HRA). Although the ECHR has applied since it came into force on 3 September 1953, the HRA gave individuals the ability to appeal to it directly through domestic courts. This, combined with two major and long-running operations in Afghanistan and Iraq, saw a rise in actions brought through domestic courts. The judicial precedents established through these cases are set to cause more.

International Human Rights Law

International Human Rights Law (IHRL) is the body of law designed to promote and protect the rights of individuals, and operates at a domestic, regional and international level. In Britain this includes the European Convention on Human Rights 1953 (ECHR), the Human Rights Act 1998, and the International Bill of Rights – including the International Covenant on Civil and Political Rights 1966. The rights contained in these statutes and conventions are broadly similar (the Human Rights Act 1998 incorporates the European Convention on Human Rights) and include the right to life, prohibition on torture and slavery, right to liberty and security and right to a fair trial. The ECHR is described as a “living instrument” (*Tyrer v UK* [1978]), and this initial report begins the analysis of its evolution and the ways it affects the British armed forces – in particular through its increasing extra-territorial application.

The armed forces have sought to mitigate to this ‘legal mission creep’ but, in doing so have further entrapped themselves. As Christopher Waters asserts, at times it can be the perception of “legal encirclement” which most affects the military – and much of this is self-imposed.³⁴ Perhaps the clearest example of this arose following the Haddon-Cave Inquiry into the Nimrod air accident in 2006 over Afghanistan. Following the MOD’s acceptance of liability, a key recommendation of the Nimrod Review was to establish the Military Aviation Authority (MAA), in a direct parallel to the Civil Aviation Authority.³⁵ This led to the MOD creating a new post: the Operational Duty Holder (ODH).³⁶

As will be shown later, this regulatory emulation of the civilian world has a powerful effect on the culture of military aviation in all three Services. First, it splits the role of operator (the in-theatre air commander) from that of the person responsible for setting the parameters for airworthiness (the ODH); and the whole process is overseen by a regulator outside the traditional chain of command (the MAA).³⁷ Although these divisions work well in civilian operations – where breaking the rules for routine flying would be exceptional and require studious investigation – in the military it is the reverse: there it is routine which is exceptional, and so such investigations could soon become needlessly onerous.

British Defence Doctrine (Fourth Edition), Development, Concepts and Doctrine Centre. www.gov.uk/government/uploads/system/uploads/attachment_data/file/33697/20111130jdp001_bdd_Ed4.pdf

32 Lieutenant General Sir Paul Newton KBE, Commander of Force Development and Training, British Army, 2010-12, in an interview for this paper, 9 September 2013

33 Professor Anthony Forster, “British judicial engagement and the juridification of the Armed Forces”, *International Affairs*, Volume 88, Issue 2, March 2012. onlinelibrary.wiley.com/doi/10.1111/j.1468-2346.2012.01071.x/abstract

34 Christopher P.M. Waters, “Is the Military Legally Encircled?”, *Defence Studies*, Volume 8, Issue 1, 19 February 2008, pp. 26–48. www.tandfonline.com/doi/abs/10.1080/14702430701812068?journalCode=fdef20#.UlbShVP6XE0 Waters suggested that legislation and the law had little to no impact on operations; rather, there existed a perception of legal encirclement that regulation and litigation by civilian actors, both domestic and international, was preventing the military from doing its job. He suggested that much of this perception is self-imposed and reflected an internal clash between operational commanders and the lawyers/military police with whom they interact, as well as a failure of leadership to take the issue in hand

35 Interview with Air Commodore Edward Stringer, previous operational commander in Afghanistan and Libya, 4 September 2012

36 The post of Operational Duty Holder was intended to make a single individual accountable for aviation safety, and responsible for inputs and outputs through controlling the budget and the tasking

37 In the civilian world the operator is the airline, while the person responsible for setting the parameters for airworthiness and the regulator outside the management chain is, to varying degrees, both the European Aviation Safety Agency and the Civil Aviation Authority

This is because unlike a civilian employer, military commanders cannot say that the safety of their staff is their prime concern. If it were, the employees would all stay at home. The prime concern must be the success of the mission. This does not mean that troops should be unprotected: not for nothing was the British Army manual once called, 'Survive to Fight'. But fighting means risk. The commander must be empowered to use tactical flexibility, even if that means loss of life. The commander must constantly evaluate the conflicting risks.

“This is because unlike a civilian employer, military commanders cannot say that the safety of their staff is their prime concern. If it were, the employees would all stay at home”

Previously this was the commander's responsibility – justified, if necessary, in front of a board of inquiry manned by his peers, who would understand the constraints and necessities of action. Today, without the presumption that the operational commander acted reasonably, the prospect of an inquiry

might persuade both the Operational Duty Holder and the commander to stick to rules designed to meet civilian, not military, perceptions of risk. That is dangerous for mission success; and, even more so, for the long-term ethos of the armed forces. As this introductory report will show, events in Afghanistan have already led to situations in which these differing perspectives have clashed (see chapter 4).

This transfer of perceived risk – from mission failure to lawsuits – is undermining the fundamental rationale for an armed force: the transfer of physical risk. At its core, this is what a military does. Volunteers, in the UK at least, take up the burden of protecting society and remove the requirement for self-defence from the wider community. They then train and deploy to put themselves deliberately in situations which others would not face. In return, society accepts a duty of care for them and their families and continues to do so should they be harmed. This social contract is summarised by the term 'the Armed Forces Covenant'.³⁸

In seeking to equalise both sides of this social contract, the judiciary too often seems to fail to understand the essential difference between those involved, and therefore the rights and responsibilities of each. In seeking to impose norms designed for civilians onto the military, it is weakening both.

Together, these judicial incursions into military terrain are not just changing legal oversight and the military ethos. They are placing huge bureaucratic burdens on military operations. By setting very wide-ranging precedents which can barely be satisfied in today's more limited conflicts, the courts risk paralysing the military if ever there were to be a war of national survival – with coroners' inquests, health and safety legislation and the full panoply of rights as guaranteed under the ECHR. The paperwork alone would simply overwhelm the MOD, even if the eventual findings of the inquiries ascribed no blame.

What we are not saying

Having set out the difficulties, it is worth stressing that none of this is a call for the kind of freedom of action Joseph Conrad allowed his anti-hero, the ivory trader Kurtz in *Heart of Darkness*.³⁹ The regulation of the armed forces has been known to be vital to the conduct of operations for centuries. Indeed in 1731 the Royal Navy,

38 When the Covenant was introduced in 2000 it was known as the 'military covenant' as it only applied to the Army. However, when it was re-introduced by the current Coalition Government, it became the 'Armed Forces Covenant' as it applied to all three Services. Despite only being introduced in 2000, the concept of a 'military covenant' is much older as demonstrated by the relationship between legionaries and Rome over 2000 years ago. www.gov.uk/the-armed-forces-covenant

39 Joseph Conrad, *Heart of Darkness*, Blackwood's Magazine, 1899

then the more professional of the two Services, introduced the first version of what is now known simply as Queen’s Regulations – the code of laws that applies to the Royal Navy, Army and Royal Air Force. In the second edition, it cites its reliance on Parliamentary legislation and its own precedent:

*All Court Martial are to be held, Offences tried, Sentence pronounced, and Execution of such Sentence to be done, according to the Articles and Orders contained in an Act of Parliament made in the Thirteenth Year of the Reign of King Charles the Second [1673], Entitled, An Act for the Establishing Articles and Orders for the Regulation and better Government of His Majesty’s Navy, Ships of War and Forces by Sea: Which Act all Officers concerned are duly to peruse, for their Instruction herein.*⁴⁰

Although the regulations were then for the Royal Navy alone, the concept of law as an essential part of disciplined service was clear. It is no less so today.

As Lord Bingham pointed out, military law already applies to Servicemen and women wherever they are deployed around the world. In *Al-Skeini* [2007] he said that the Human Rights Act 1998 did not have extra-territorial application. But this did not exempt British forces from justice: “This does not mean that members of the British armed forces serving abroad are free to murder, rape and pillage with impunity. They are triable and punishable for any crimes they commit under the three Service Discipline Acts already mentioned [the successors to the 1673 Act], no matter where the crime is committed or who the victim may be. They are triable for genocide, crimes against humanity and war crimes under the International Criminal Court Act 2001. The UK itself is bound, in a situation such as prevailed in Iraq, to comply with the Hague Convention of 1907 and the Regulations made under it. The [Hague] Convention provides (in Article 3) that a belligerent state is responsible for all acts committed by members of its armed forces, being obliged to pay compensation if it violates the provisions of the Regulations and if the case demands it. By Article 1 of the Geneva IV Convention the UK is bound to ensure respect for that convention in all circumstances and (Article 3) to prohibit (among other things) murder and cruel treatment of persons taking no active part in hostilities.”⁴¹

This report sees the legal underpinning of the armed forces as essential for the fighting capability of the UK’s military. It fully endorses the requirement for legal oversight and the benefits which this brings, including the additional safeguards introduced by the Service Discipline Act 2006 which replaced, and indeed strengthened, the three Service Discipline Acts referred to by Lord Bingham above. This new Act ensures that all criminal cases, wherever and however arising, are investigated by the Service police and where appropriate reviewed by the Independent Service Prosecuting Authority.

This is not where the confusion caused by legal innovation has arisen. Before the end of the Cold War, and the existential threat to the United Kingdom from the Soviet Bloc, military law (which includes domestic criminal law and the LOAC) held sway. Later, the International Criminal Court Act 2001 incorporated the Rome Statute of the International Criminal Court into UK domestic law, allowing members of the British armed forces to be tried for war crimes by court martial. This framework ensures that oversight is balanced with the necessary freedom of action required to achieve lawful objectives. The LOAC, with the

40 Of Courts Martial, Article 1: *Regulations and Instructions relating to His Majesty’s Service at Sea*, Established by His Majesty in Council, Second Edition, with Additions, London 1734. The first edition was printed in 1731

41 Lord Bingham, para 26: *Secretary of State for Defence v Al-Skeini and Others* [2007] UKHL 26

oversight provided by the International Committee of the Red Cross, provided a simple, yet clear and effective mechanism for the conduct of military operations.

What is significant is the emergence of a significant body of new case law – a legacy of more than a decade of continuous military operations in Iraq and Afghanistan. These cases, based on a small number of incidents, introduces the risk of confusion on the battlefield, as the specific situations it addresses fail to match operational reality.⁴² Whereas the LOAC can absorb much that is unforeseen, the ECHR, or rather its interpretation via recent British judgments, has built a rigid legal structure in an environment which is prone to constant and unpredictable change.⁴³

International Humanitarian Law

International Humanitarian Law (IHL) is the body of law that regulates the conduct of armed conflict. It is also known as the Law of Armed Conflict and includes, amongst other treaties, the four Geneva Conventions of 1949 and the Additional Protocols of 1977. There are two main sources of LOAC: ‘the law of Geneva’, which includes the Geneva Conventions of 1949 and the Additional Protocols and ‘the law of The Hague’, which includes the Hague Convention 1899, revised in 1907. The Additional Protocols to the Geneva Conventions of 1977 combined elements of both branches.

International Humanitarian Law was designed to prevent unnecessary suffering and destruction, while not impeding the effective waging of war. It applies in times of international armed conflict and in the conduct of military operations in other non-international armed conflicts – although, in this latter situation, its rules are more restrictive.

Categorisation of Conflict

The legal status of conflict is important, since it dictates both the applicable law and whether some (or all) of it should be applied. Applicable corpus of law might include domestic law, host nation law, International Human Rights Law and International Humanitarian Law. Conflict can range from internal (domestic) tensions, riots and insurrections to civil wars, conflicts between states, interventions, peace enforcement, peacekeeping and non-international and international armed conflict. While International Humanitarian Law contains guidance on determining the status of the conflict, this is not always clear and will usually depend upon the scale and intensity of the force used. Training for these conflicts involves the complete spectrum of operations – from riot control to full warfighting. Maintaining capability in these disciplines is a highly complex business.

Unlike the LOAC, which is configured for the broadest definition of combat operations, the growing application of the ECHR to the battlefield is being developed around the specific circumstances of a long-standing, well-established, largely land-based counter-insurgency campaign. The danger is that this new legal environment does not translate easily into a more dynamic and challenging future operating environment, where its prescriptions – now part of the lexicon of legal

42 Colonel Marc Warren, US Army, *The ‘Fog of Law’: The Law of Armed Conflict in Operation Iraqi Freedom*, International Law Studies, Volume 86, The War in Iraq: A Legal Analysis, Edited by Raul A. ‘Pete’ Pedrozo, 2010: “Soldiers deserve a clear and unambiguous legal framework. While their training and values will in most cases lead to soldiers doing the right thing at the tactical level of combat, they can be negatively impacted by the ‘fog of law’ created at the operational and strategic levels. Its effects can undermine public support, provide propaganda to the enemy, create distractions, and contribute to false assumptions and bad decisions.” archive.org/stream/wariniraqlegalan86pedr/wariniraqlegalan86pedr_djvu.txt

43 The whole basis of International Humanitarian Law (also known as the Law of Armed Conflict) has been to regulate the conduct of hostilities. Four fundamental principles underlie the law of armed conflict: military necessity, humanity, distinction, and proportionality. Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict*, JSP 383 London: JDC 2004, p 21–26

precedent – may constrain Britain’s armed forces in ways that undermine their speed, flexibility and effectiveness. Just as Governments train their soldiers to be able to adapt to the unexpected, so the law that governs the nature and conduct of military operations must be flexible enough to apply to new and potentially very different theatres of future struggle. This is not the fault of those who drafted the ECHR. It was, as the title suggests, intended for application within the territories of stable contracting European states. The novel reach it is now being accorded stretches into domains and into countries far beyond its original design. But, without clear legislative guidance, the judiciary feels bound to build on existing case law, including Conventions of which the United Kingdom is a signatory. This study questions the desirability of these legal trends.

44 Before 1915, repatriation of bodies from the front was allowed if the family could afford it. In 1915, France's Marshal Joffre banned repatriation on the grounds of hygiene and equality between the fallen. Eventually repatriation was banned by all nations as the scale of losses became too high. The ban on repatriation was not lifted until the Korean War, after which families were given the choice of having the remains brought back to the UK or buried in a military cemetery overseas. Kim Sengupta, "Diana effect' blamed for war weariness", *The Independent*, 5 April 2010. www.independent.co.uk/news/uk/home-news/diana-effect-blamed-for-war-weariness-1936009.html

45 *R v Her Majesty's Coroner for the Eastern District of the Metropolitan County of West Yorkshire, ex parte Ronald Smith [1982]*. Helen Smith was employed as a nurse in Jeddah, Saudi Arabia. She died on 20 May 1979 following a fall from one of the balconies in a block of flats in the city. Her father wished to have the circumstances of her death formally examined in order to determine the cause of her fall and subsequent death. However, Phillip Gill, the coroner for West Yorkshire, refused to hold an inquest on the grounds that the death occurred outside of the jurisdiction of the English Courts. On 30 July 1982 this decision was quashed by the Court of Appeal, which allowed the appeal to go ahead. On 16 August 1982, Phillip Gill formally opened the inquest into the death of Helen Smith

46 From 1 April 2007 – 1 September 2011 RAF Brize Norton was closed for redevelopment, and repatriation was conducted at RAF Lyneham in Wiltshire. For this period, inquests into multiple deaths fell within the jurisdiction of the Wiltshire coroner. The Rt Hon Dr Liam Fox, RAF Brize Norton, Hansard, 16 March 2011, Column 11WS. www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110316/wmstext/110316m0001.htm

47 "A cadre of coroners for Service deaths", Office of the Chief Coroner, www.judiciary.gov.uk/Resources/ICO/Documents/coroners/guidance/guidance-no7-a-cadre-of-coroners-for-service-deaths.pdf. See also: Hansard (House of Commons), Defence, Improved Support to Families, 7 June 2007, Column 28WS. www.publications.parliament.uk/

1

Coroners' courts, judicial oversight and the imposition of civilian 'duty of care' standards on the armed forces

Between 1915 and the Falklands conflict, coroners were rarely concerned with military casualties. The policy of successive governments, with very few exceptions, was that there should be no repatriation to the UK of those who fell in war.⁴⁴ However, following requests by bereaved families for the return of their kin from the South Atlantic, repatriation was permitted. Most of the British dead in 1982 have no grave but the sea. Of those whose remains were recovered, 65 came home while 16 were buried on the Falkland Islands. Since the Falklands conflict, the limited number of casualties returning at any one time means that it has become customary to repatriate all military casualties.

In 1982, the repatriation of Helen Smith – a British nurse who died in the Kingdom of Saudi Arabia – caused the Court of Appeal to require coroners to inquire into deaths overseas when the body was repatriated.⁴⁵ Together, these changes meant that for the first time, military deaths on operations were subject to the jurisdiction of the coroner.

Under the Queen's Regulations for each of the Services, an inquest into the unnatural death overseas of any member of the Services must be conducted by a coroner who has jurisdiction over the point of entry into England and Wales. Following the *Helen Smith [1982]* case, in the event of a single death overseas, the local coroner where the funeral is held is responsible for the inquest. However, in the case of multiple Service deaths, the inquest is held in the jurisdiction where the bodies enter the country – namely RAF Brize Norton.⁴⁶ This requirement consequently placed these cases within the jurisdiction of the Oxfordshire coroner. This policy was reconfirmed on 23 October 2006 by the Rt Hon Harriet Harman MP, then Minister of State at the Department of Constitutional Affairs.⁴⁷

Following the May 2010 election, the incoming Coalition Government pledged to scrap the new post of Chief Coroner.⁴⁸ However, on 22 November 2011, the then Secretary of State for Justice the Rt Hon Kenneth Clarke announced that having listened to concerns, the Office for the Chief Coroner was to be created.⁴⁹ The Royal British Legion said that the reform of coroners' procedures was vital to support bereaved Service personnel families who had too often failed to find

answers about a death. The Chief Coroner, His Honour Judge Peter Thornton, QC, in his inaugural speech recognised the importance of dealing with Service deaths stating: "It is expected, and rightly expected, that bereaved families of military personnel who die on active service for their country should be afforded the greatest consideration in the investigation into every single death."⁵⁰ He has since developed a specialist cadre of coroners for Service deaths. This cohort will consist of 11 specially trained and highly experienced coroners, including the Oxfordshire and Birmingham coroners, due to their location as the point of entry for troops returning to the UK and proximity to Selly Oak Hospital where many of the injured are treated.

Initially this was a dry legal process. But the introduction of narrative verdicts in 2004 – in which the coroner could record not only the cause of death but 'in what circumstances' without attributing the cause to a named individual – obliged Oxfordshire's Assistant Deputy Coroner, Andrew Walker, to comment on the conduct of operations and to analyse (often in critical terms) the Government and military for their policies.⁵¹ The unpopularity of the campaigns and the perception of "lions led by donkeys"⁵² provided a ready audience for a coroner's narrative of abuse about violated rights.

Crown Immunity

Until 1987, Section 10 of the Crown Proceedings Act 1947 provided a bar on the right of Service personnel to pursue actions in tort against the Crown. A Serviceman or woman injured while on duty could not sue the Ministry of Defence as his employer for compensation. Instead, the Serviceman or woman or his next of kin would be entitled to a number of benefits, including a lump sum and pension.

The immunity was originally enacted because members of the armed forces were called upon to perform hazardous tasks which go beyond anything encountered in normal civilian employment. In 1947, the Attorney General, Sir Hartley Shawcross, stated:

"It is necessary in the course of service training, in order to secure the efficiency of the Forces, to exercise them in the use of live ammunition, in flying in close formation and, in the Navy, in battle conditions with, perhaps, destroyers dashing about with lights out, and so on. These operations are highly dangerous and, if done by private citizens, would no doubt be extremely blameworthy".⁵³

In 1987 the Crown Proceedings (Armed Forces) Act repealed Crown Immunity for a number of reasons. In part there was a desire to give Service personnel the same rights as their civilian counterparts. It was stated that in the 40 years since the Act the UK had been at peace except for Korea and so-called small scale operations. Furthermore, compensation paid by the MOD was thought to be inadequate.

Above all, the claims on behalf of ex-Service personnel involved in the nuclear testing of the 1950s were beginning to emerge; so too were claims on behalf of those involved with experiments at the Defence Chemical, Biological, Radiological and Nuclear Centre at Winterbourne Gunner near Porton Down.⁵⁴ Although there were calls for the legislation to be retrospective, this was not granted. Nonetheless, claimants have achieved out of court settlements for claims arising prior to 1987.⁵⁵

pa/cm200607/cmhsnsrd/cm070607/wmstext/70607m0001.htm#07060782000012 The Coroners and Justice Act 2009 permitted the transfer of inquests from one location to another. The law before 2009 permitted the transfer, but the coroner in whose area the body was located had to conduct the inquest himself unless the Secretary of State gave exemption or permission for the transfer

48 James Kirkup, Military inquests: Chief Coroner created in Coalition climb-down, 22 November 2011. www.telegraph.co.uk/news/uknews/defence/8907969/Military-inquests-Ken-Clarke-creates-Chief-Coroner-role-in-Coalition-climb-down.html

49 Catherine Fairbairn, The Office of the Chief Coroner – Commons Library Standard Note, 25 November 2011. www.parliament.uk/briefing-papers/SN05721

50 Dominic Casciani, "Chief coroner considers specialist military inquests", BBC News, 21 September 2012. www.bbc.co.uk/news/uk-19677657

51 Coroners were empowered and enabled to make narrative verdicts and to make comments under Rule 43 of the Coroners' Rules 1984. The extension of the scope of their coronial jurisdiction by the judicial findings concerning the ECHR in *Middleton, R* (on the application of) *v Coroner for the Western District of Somerset* [2004] UKHL 10 now oblige coroners to consider 'how and in what circumstances the death occurred'. Coroners, therefore, are now able to investigate not only how a Serviceman's death occurred but also the broader circumstances in which the death occurred

52 Alan Clark, *The Donkeys*. Morrow, 1961

53 The Attorney-General, Sir Hartley Shawcross, Crown Proceedings Bill, House of Lords, 4 July 1947; millbanksystems.com/commons/1947/jul/04/crown-proceedings-bill-lords

54 Rob Evans, "The past Porton Down can't hide", *The Guardian*, 6 May 2004. www.theguardian.com/science/2004/may/06/science.research

55 Derek Twigg, then Parliamentary Under-Secretary of State for Defence, Porton Down Veterans, House of Commons, 31 January 2008, Column 26WS. www.publications.parliament.uk/pa/cm200708/cmhsnsrd/cm080131/wmstext/80131m0001.htm

These comments certainly ruffled the feathers of the MOD, leading the then Defence Secretary Des Browne to try (as the media alleged) to ‘gag’ the coroners. If so, this attempt was unsuccessful.⁵⁶ The Government’s attempt to control the pronouncements of coroners was designed to help prevent an onslaught of litigation. Before 1987, this would have been unnecessary as Crown Immunity still applied. Until then, the Government was exempt from civil suits by military personnel or those with whom they came into contact, even if a coroner were to have made remarks or come to decisions which were critical of the MOD. After Crown Immunity was removed, Service personnel were for the first time permitted to sue the Crown, as their employer, for negligence.

Since then – the inquiry process as reflected in coroners’ inquests and public inquiries has challenged the MOD as to its duties in the conduct of operations. They thus have the potential to undermine the flexibility to act and the ability to train properly. This constant spotlight of scrutiny has far reaching implications for the structural lattice of the military.

Military service works through a network of relationships. The majority are not based on the giving or receiving of orders, but rather on shared responsibilities and self-regulated high standards of professionalism within a team. This links the frontline to the rear headquarters; the commander to the commanded. By reducing this bond into one based often on ‘rights’, including the Right to Life, the inquiries are playing their part in unpicking the web of interlocking obligations that hold the military together – thus undermining British Defence Doctrine itself.⁵⁷

The very act of investigating, in public, the actions of officers and officials at different points in the command and supply chain has caused some to focus less on operations and more on their perceived liability – and consequently how to limit their exposure to legal and reputational risk.

As Lieutenant General Sir Paul Newton has observed: “The gradual, cumulative, insidious changes in attitudes to and tolerance of error and risk in recent years is already altering the armed forces’ DNA. By early 2010 it was becoming clear to senior officers, right up to and including the Army Board, that our more junior commanders were becoming increasingly risk-averse and that they thought they were taking their lead from us. Evidence was gathered in a systematic process of de-briefing those, of all ranks from private soldier to brigadier, who had just returned from operations; and it was a recurrent theme in discussions held with experienced mid-ranking Army students at the Staff College. What the most senior leadership said and wrote about the British military ethos was parting company from reality”.⁵⁸ The rot had begun to set in.

The effect is not just on morale and the change in ethos at the front. The need to respond to inquiries has diverted time and resources from the pressures of the day to defending actions of the past. As long as casualties are relatively small in number, it is possible to satisfy the demands of coroners. But should numbers ever rise to the levels seen in the past, the process would rapidly swamp the capacity of both the courts and the MOD. This has increased costs of defence and reduced the Government’s ability to respond to emergencies, perhaps most obviously in the change in ‘Theatre Entry Standard’ which dictates the level and type of equipment and training (for more on Theatre Entry Standard, see page 25).

In March 2003 Sergeant Steven Roberts of the Second Royal Tank Regiment was shot dead by a comrade in a friendly fire incident in Iraq. Sergeant Roberts had been

⁵⁶ Thomas Harding and Aislinn Simpson, “Des Browne attempts to gag coroners”, *The Telegraph*, 18 March 2008. www.telegraph.co.uk/news/uknews/1581997/Des-Browne-attempts-to-gag-coroners.html

⁵⁷ British Defence Doctrine underpins the way the British armed forces fight. This includes the tenet of ‘Mission Command’: “The fundamental guiding principle is the absolute responsibility to act or, in certain circumstances, to decide not to act, within the framework of a superior commander’s intent. This approach requires a style of command that promotes decentralised command, freedom of action and initiative, but which is responsive to superior direction when a subordinate overreaches himself”. Ministry of Defence (2011) *Joint Doctrine Publication 0–01, British Defence Doctrine (Fourth Edition), Development, Concepts and Doctrine Centre*, p 5–4. www.gov.uk/government/uploads/system/uploads/attachment_data/file/33697/20111130jdp001_bdd_Ed4.pdf

⁵⁸ Lieutenant General Sir Paul Newton KBE, Commander of Force Development and Training, *British Army*, 2010–12, in an interview for this paper, 9 September 2013

issued with Enhanced Combat Body Armour. However, as there was insufficient supply for everyone, he was ordered to give his body armour to someone thought to be in greater danger. At the time, mounted armoured soldiers such as Sergeant Roberts were considered to be at relatively low risk. Despite this tragedy, that assessment was correct at the time as it was not foreseen that Sergeant Roberts and his fellow soldiers would ever be operating dismounted check points. It was the claimant's contention in *Samantha Roberts v the Ministry of Defence* [2006] that by failing to purchase sufficient protective body armour before going to war and announcing deployment, the MOD had breached its duty of care to Sergeant Roberts.⁵⁹

Theatre Entry Standard

Theatre Entry Standard defines the level of equipment and training required before an individual or unit is ready to enter a theatre of operations. This includes pre-deployment training and equipment, such as body armour. Training and equipment would include preparation for Force Protection, such as countering improvised explosive devices (IEDs). Theatre Entry Standards have consistently risen to mitigate already-known risks, so that today the baseline is now assumed to be the complexity of threats faced in Afghanistan, no matter what the local conditions may actually dictate. Any move away from the highest standard will see a commander's judgment questioned. Should casualties occur, it will be harder for justifications such as urgency to be used as mitigating factors – even if they are the reason for operational success.

According to Air Chief Marshal Lord Stirrup – then the Deputy Chief of the Defence Staff for Equipment Capability – the Government could have bought enough body armour to ensure that each Serviceman and woman had the equipment required. But there was an unwillingness to do so, since it would have signalled an assumption that combat was likely, thus undermining the diplomatic efforts to avoid war. This prevented the MOD from using the Urgent Operational Requirements system to speed the procurement process. Indeed, in his evidence to the Chilcot Inquiry in 2010, Air Chief Marshal Stirrup stated that had he been able to place orders six months before operations began, rather than four months, it would have made a “significant difference” – but that the Government was not yet prepared to publicly commit to action.⁶⁰ This led to significant criticism of the Government, not least by the armed forces themselves. For example, Lord Dannatt, when Chief of the General Staff, was vocal in his condemnation of poor equipment.⁶¹

But the equipment question is more complex than an initial impression might suggest. Britain's forces have a reputation for agility because they have traditionally accepted risk. Being willing to deploy with what they have – both in terms of equipment and training – and then adjust according to requirement on arrival has given the UK a speed of reaction that few others can match. Many nations require greater logistical support or preparation and choose not to act until they are fully ready. Some in civilian society may see value in such caution. But in the military, it is often vital to seize opportunities early. What may have been a rapid victory with an only small, partially prepared group acting quickly, could become a slow defeat with a well-prepared, larger formation acting later.

59 In December 2006 Andrew Walker, Assistant Deputy Coroner for Oxfordshire, concluded that the death of Sergeant Roberts was the result of “a delay and serious failures in the acquisition and support chain”. He added that to send soldiers into a combat zone without appropriate basic equipment amounted to a breach in trust between the soldiers and the Government. “Kit delays led to soldier's death”, BBC News, 18 December 2006, news.bbc.co.uk/1/hi/england/bradford/6190337.stm

60 Air Chief Marshal Stirrup: evidence to the Iraq Inquiry chaired by Sir John Chilcot, 1 February 2010. www.iraqinquiry.org.uk/transcripts/oralevidence-bydate/100201.aspx

61 Andy McSmith and Kim Sengupta, “Dannatt takes vow of silence as army equipment row rages”, *The Independent*, 20 July 2009. www.independent.co.uk/news/uk/home-news/dannatt-takes-vow-of-silence-as-army-equipment-row-rages-1753009.html

62 Lieutenant General Sir Paul Newton KBE, Commander of Force Development and Training, British Army, 2010–12, in an interview for this paper, 9 September 2013

63 Brigadier Robert Aitken, An Investigation into Cases of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004, Ministry of Defence, 25 January 2008. webarchive.nationalarchives.gov.uk/20121026065214/www.mod.uk/NR/rdonlyres/7AC894D3-1430-4AD1-911F-8210C3342CC5/0/aitken_rep.pdf

64 “It is argued that the use of a high number of soldiers, heavy weapons, many and well protected vehicles, and visible body armour could frighten or agitate the population, making them turn against the military forces”. Kersti Larsdotter, “Exploring the utility of armed force in peace operations: German and British approaches in northern Afghanistan”, *Small Wars & Insurgencies*, Volume 19, Number 3, pp. 352–373. www.tandfonline.com/doi/pdf/10.1080/09592310802228682

65 House of Lords Select Committee on the Constitution, Inquiry into the Constitutional Arrangements for the use of Armed Force, 26 June 2013, QQ 44–58. www.parliament.uk/documents/lords-committees/constitution/Armed%20Force/Armed-Force-Evidence-Volume-110713.pdf

66 Holly Watt, “MPs’ expenses: armour was so poor that troops couldn’t wear it”, *The Telegraph*, 25 September 2009. www.telegraph.co.uk/news/newsttopics/mps-expenses/6229121/MPs-expenses-armour-was-so-poor-that-troops-couldnt-wear-it.html

67 Sean Rayment, “Britain’s ‘donkey’ soldiers are losing the war in Afghanistan”, *The Daily Telegraph*, 16 April 2011. www.telegraph.co.uk/news/worldnews/asia/afghanistan/8455741/Britains-donkey-soldiers-are-losing-the-war-in-Afghanistan.html; Marco Giannangeli, “British soldiers suffer injuries from too-heavy weights”, 25 July 2010. www.express.co.uk/news/uk/188986/British-soldiers-suffer-injuries-from-too-heavy-weights quoting *Jane’s Defence*

One example was the deployment of the Task Force to the South Atlantic in 1982. It would be hard to fit in all the pre-deployment and mission-specific training required today into the month between the Argentine invasion and the arrival of the British forces in the Falkland Islands. Taking risks, even on availability of equipment, is one element of strategic command. In an emergency, a Government must be able to deploy less well-equipped forces when the mission requires speed.⁶²

Iraq was no different. As Brigadier Robert Aitken put it in his 2008 Report into ‘Cases of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004’: “The business of equipping soldiers with the skills they require to meet the demands which the nation demands of them is expensive in time, effort and money. To make best use of those limited resources, the Army provides generic training for all its people to prepare them for war ... and it supplements that training with theatre-specific, pre-deployment training to those units and individuals destined for particular operations ... the bulk of the training provided for the first three waves of troops deployed into theatre ... was targeted at war-fighting skills ... The training packages, plus the doctrine that underpinned them, were (correctly) founded on the Law of Armed Conflict, but based largely on a conventional war scenario.”⁶³

Preparation for deployment is itself fraught with difficulty – and unforeseen consequences. One such example is the wearing of body armour. Body armour and helmets can have a significant impact on operations at the tactical level. Although defensive in intention, there is a paradox. Their use can be seen by the local population as aggressive and intimidating.⁶⁴ In a counter-insurgency campaign, this can alienate the very people whom the armed forces are aiming to reassure and to win over. Furthermore, its weight and bulk can hinder mobility and increase the enemy’s opportunity to target those wearing it. Both situations make troops less, rather than more, safe. As the then Armed Forces Minister Andrew Robathan MP put it when addressing the House of Lords Select Committee on the Constitution in June 2013: “[C]urrently we give people some excellent body armour, but the decision about whether to wear it is made by the commander on the ground. It very much reduces the manoeuvrability and agility of a soldier on the ground, because it weighs, not quite a tonne but not far off it. Therefore, a commander could take the view that his soldiers should not wear body armour on some occasions.”⁶⁵

It has been reported that Royal Marines in Afghanistan have complained that the rear of their helmets hit the top of the body armour that covers their backs and comes up to their necks, preventing them from lying down and looking up to see and aim properly. Indeed, a number of soldiers have said that when they were caught in a firefight, they preferred to remove the armour and take their chances, valuing greater manoeuvrability over greater ‘protection’.⁶⁶ Furthermore, the emphasis on force protection and body armour led to an increased weight of equipment carried by soldiers, leading to parallel concerns about the injuries such heavy weights are likely to cause. By 2009, it was claimed that British soldiers were routinely carrying more than twice the load carried by the Royal Marines and the Parachute Regiment on their march across the Falklands in 1982; observing this, the Taliban nicknamed them ‘donkeys’.⁶⁷

The same concerns apply to the employment of vehicles. In responding to criticism of the Snatch Land Rover, a protected patrol vehicle used in Afghanistan

and Iraq, then Secretary of State for Defence Lord Hutton said: “[O]ur tasks in Iraq and Afghanistan are largely ones of counter-insurgency. To do this, we need to win the support and confidence of local people. This can only be done by face-to-face interaction, demonstrating to the local people that we are working in their interests. Our experience in Iraq and Afghanistan has proven that better armoured vehicles, which tend by definition to be larger and heavier, are viewed by the local population as aggressive and intimidating. Their size and weight mean too that they can cause serious damage to roads, buildings, irrigation channels and drainage systems. All these factors can inflame local opinion against UK troops – working in favour of our enemy and actually increasing the threat levels to our people.”⁶⁸

These two examples show how requirements must be adapted to suit the circumstances on the ground. But growing legal oversight, and the consequent reluctance of commanders to expose themselves to judicial inquisition, is leading to an inability to adapt overall policy in the face of local context.

The issue is demonstrated clearly in the wearing of body armour. Following the death of Sergeant Roberts, body armour became politically charged to the point that the decision on whether or not to wear it was set by directives written by the staff in Permanent Joint Headquarters in Northwood, and not by commanders in theatre.⁶⁹

When this policy was brought to the attention of the Army Board in 2010, some responsibility for body armour was delegated back to commanders in theatre. However, this policy illustrates that decisions which might seem to make sense when taken in isolation can and have had the cumulative and unintended impact of driving risk aversion in the armed forces.⁷⁰

68 The Rt Hon John Hutton, Secretary of State for Defence, Hansard (House of Commons), Written Ministerial Statement, Snatch Land Rover, 16 December 2008, Column 103WS. www.publications.parliament.uk/pa/cm200809/cmhansrd/cm081216/wmstext/81216m0001.htm

69 Lieutenant General Sir Paul Newton KBE, Commander of Force Development and Training, British Army, 2010–12, in an interview for this paper, 9 September 2013

70 Lieutenant General Sir Paul Newton KBE, Commander of Force Development and Training, British Army, 2010–12, in an interview for this paper, 9 September 2013

2

Smith and Others v the Ministry of Defence: the apogee of judicial encroachment

The *Roberts* case was not, however, the highwater mark for the legal intrusion into decisions made in a time of war. In June 2013 the Supreme Court ruled in the *Smith* case that Service personnel are protected by the Human Rights Act 1998 even when in theatre;⁷¹ and that the MOD's duty of care may extend as far as procurement decisions. In effect, it extends a civilian understanding of duty of care and rights guaranteed by the ECHR to Servicemen and women in combat.

This is novel. Combat Immunity would once have acted as the blanket protection for decisions taken in the confusion of battle. Now, as a result of the *Smith* judgment, this means judicial oversight now allows inquiry into soldiers', sailors' and airmen's decisions taken in combat – unless they can prove that they should be permitted to claim Combat Immunity. Contrary to all intentions, the process of claiming immunity has itself become a trial. Formerly, it would merely have required knowledge of the combat status of the parties concerned. In the specific example of the application of duty of care to the wearing of body armour, this, in reality, removes the flexibility commanders require.

The *Smith* [2013] judgement is the conclusion of almost a decade of inquests, based on three incidents in Iraq. The claimants split into two groups. The first, known as the Snatch Land Rover claimants, sought redress for one event that took place on 15 July 2005. The second, from an incident which occurred in the following year. In 2005, Private Phillip Hewett of 1st Battalion, The Staffordshire Regiment was assigned to a mobile unit which was sent that evening to patrol around Al Amarah. The unit consisted of three Snatch Land Rovers with armour designed to provide limited protection against ballistic threats, such as those from small arms fire. It provided no significant protection against improvised explosive devices (IEDs). Private Hewett was in the lead Snatch Land Rover as was its driver with Second Lieutenant Richard Shearer, also of The Staffordshire Regiment. It had no electronic counter measures (ECMs) to protect it against the threat of IEDs. As the Snatch Land Rovers were driving down the single road, an IED detonated level with the lead vehicle. Private Hewett, Second Lieutenant Shearer and another soldier died in the explosion, and two other occupants of the vehicle were seriously injured.

Seven months later, on 28 February 2006, while serving with the 2nd Battalion, the Parachute Regiment, Private Lee Ellis was driving a Snatch Land

71 *Smith and Others v The Ministry of Defence* [2013] UKSC 41

Rover in a patrol of three Warriors and two Snatch Land Rovers making a journey from the military camp to the Iraqi police headquarters in Al Amarah. Captain Richard Holmes, of the same battalion, and another soldier were in the same vehicle. On the return journey from the police headquarters an IED was detonated level with the lead Snatch Land Rover driven by Private Ellis. He and Captain Holmes were killed by the explosion and another soldier in the vehicle was injured. The vehicle had been fitted with an ECM, but a new part of that equipment known as Element A was not inserted at that time. Within a few days of the incident, Element A was inserted into the other Snatch Land Rovers used in the camp.

The second group are referred to as the Challenger II claimants: on 25 March 2003, Corporal Stephen Allbutt, Lance Corporal Daniel Twiddy and Trooper Andrew Julien, all serving

with the Queen's Royal Lancers as part of the Royal Regiment of Fusiliers battle group, were in a Challenger II tank during the fourth day of the offensive by British troops to take Basra. Just after midnight, a Challenger II tank of the Second Royal Tank Regiment which had been assigned to the Black Watch battle group, and was commanded by Lieutenant David Pinkstone, crossed over to the enemy side of a canal to take up a position some distance to the south east of the dam. At about 0050 hours, Lieutenant Pinkstone identified two hot spots through his thermal imaging sights which he thought might be personnel moving in and out of a bunker. Having sought and been given permission to fire, Lieutenant Pinkstone's tank fired a first round of high explosive shell at about 0120 hours and a second round shortly afterwards. The hot spots that he had observed were in fact men on top of Corporal Allbutt's Challenger II tank at the dam. The first shell landed short of the tank, but the explosion blew off the men who were on top of it, including Lance Corporal Twiddy. The second shell entered the tank and killed Corporal Allbutt, injured Trooper Julien and caused further injury to Lance Corporal Twiddy. It also killed Trooper David Clarke.⁷² Lieutenant Pinkstone did not know of the presence at the dam of the Royal Regiment of Fusiliers battle group. He had not realised that he was firing back across the canal, as he was disorientated and believed that he was firing in a different direction.

The Snatch Land Rover claimants accused the MOD of failure to provide suitable equipment instead of Snatch Land Rovers; they also accused the MOD of re-introducing Snatch Land Rovers to the battlefield, despite having withdrawn them from use following the death of soldiers seven months previously. The Challenger II claimants asserted that the MOD negligently failed to provide available technology to protect against the risk of friendly fire and failed to provide adequate vehicle recognition training.

Contrary to its approach in the earlier *Roberts* case, in the *Smith* [2013] case the MOD did not admit liability and settle.⁷³ The *Smith* claimants asserted that the MOD breached the Right to Life of those killed – as guaranteed by Article 2 of the ECHR – and was also negligent in respect of its duty of care. Given that all the incidents addressed in *Smith* [2013] occurred when troops were in combat, the MOD argued that its duty of care did not apply. Relying on Combat Immunity

“Contrary to all intentions, the process of claiming immunity has itself become a trial”

72 Lord Hope, para 3: *Smith and Others v The Ministry of Defence* [2013] UKSC 41, citing *Gentle, R and Another v The Prime Minister and Another* [2008] UKHL 20

73 Jon Robins, *Army widows battle MOD on 'immunity'*, *The Guardian*, 24 September 2006. www.theguardian.com/money/2006/sep/24/observercashsection.theobserver6

as articulated in both *Mulcahy v the Ministry of Defence* [1996] and *Multiple Claimants v the Ministry of Defence* [2003], military personnel could not expect the MOD to provide duty of care on the battlefield. This led to years of legal argument on the application of duty of care and Combat Immunity to Servicemen and women on the battlefield.

Building on the precedent established by the *Roberts* case, the High Court and Appeal Court in 2011 and 2012 respectively, unanimously accepted the rights of the claimants to sue the MOD for duty of care breaches – but rejected their assertion that there was a breach of Article 2 (Right to Life) of the ECHR rights on the grounds that the ECHR did not apply extra-territorially to Servicemen and women when away from their military bases.

The Court of Appeal recognised that the MOD owed the same duty of care to soldiers as any employer,⁷⁴ particularly as the Secretary of State for Defence had chosen not to invoke the exemption provided under Section 2 of the Crown Proceedings (Armed Forces) Act 1987.⁷⁵ Nonetheless, the Rt Hon Lord Justice Moses did not equate civilian and military applications of the rights. He argued in his judgment that just because the ECHR should apply to the detainees of an army abroad (as was the finding of the ECHR in *Al-Skeini*), it did not follow that those same rights applied to the soldiers of that same army.

“The armed forces of a state are under its authority and control, but not in the sense described by the Grand Chamber [when referring to detainees in the *Al-Skeini* case].⁷⁶ The civilians killed came within the United Kingdom’s Convention jurisdiction by analogy with the situation of those detained in custody. It is not possible to extend that analogy to the armed forces who killed them.”⁷⁷

But in June 2013 in *Smith*, the Supreme Court reversed the October 2012 judgment of the Court of Appeal by a majority of four votes to three. The Court held that the ECHR did, in fact, extend to Service members outside military bases, in theatre. In supporting the applications of the Snatch Land Rover and Challenger II claimants, it in effect extended, for the first time, the protections of the ECHR to Service personnel engaged in combat activities on the battlefield. This was a marked departure from the earlier case of *Catherine Smith* [2011] in which the majority held that “the contracting states, in concluding the provisions of the Convention, would not have intended it to apply to their armed forces when operating outside their territories”.⁷⁸ However, the Supreme Court was divided and the opinion of Lord Mance – with the agreement of Lord Wilson and, in part, Lord Carnwath – showed a stark divergence of views.

For the majority in *Smith* [2013], Lord Hope argued that: “The extra-territorial obligation of the contracting state is to ensure the observance of the rights and freedoms that are relevant to the individual who is under its agents’ authority and control, and it does not need to be more than that”.⁷⁹ This determination followed the decision of the ECtHR in *Al-Skeini* [2011] where the Grand Chamber ruled that the rights guaranteed in the ECHR can be tailored. Previously, rights were considered ‘all or nothing’ and were not thought to be eligible in part if the whole did not apply. Given that these military operations were outside ECHR signatory states, and the civilians in question not eligible for many of the rights set out in the ECHR, the British Government argued that the rights therefore did not apply at all.⁸⁰ However, the ECtHR disagreed. In essence, they held that ECHR

74 “The fact that policy considerations and the scarcity of resources will arise in relation to allegations of negligence against the Ministry of Defence provides no basis for distinguishing the MOD from any other public body in relation to the duty it owes to its employees. That no such distinction is to be drawn is further underlined by the absence of any statutory prohibition against making claims for negligence.” *Allbutt, Ellis, Smith and Others v Ministry of Defence*, [2012] EWCA Civ 1365, para 52

75 *Allbutt, Ellis, Smith and Others v Ministry of Defence* [2012] EWCA Civ 1365, para 54

76 The *Al-Skeini* case, which was followed by the *Baha Mousa Inquiry*, will be addressed later in this report

77 *Allbutt, Ellis, Smith and Others v Ministry of Defence* [2012] EWCA Civ 1365, para 27. www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/allbutt-ellis-smith-v-mod.pdf

78 *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)* [2010] UKSC 29, [2011] 1 AC 1

79 Lord Hope, para 38: *Smith and Others v The Ministry of Defence* [2013] UKSC 41

80 Both *Al-Skeini* [2011] and *Smith and Others v The Ministry of Defence* [2013] UKSC 41, para 37 cited *Bankovic and Others v Belgium and Others* [2001] ECHR 890: “It is clear that, whenever the state through its agents exercises control and authority over an individual, and thus jurisdiction, the state is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be ‘divided and tailored.’”

rights apply, even overseas wherever the state exercises ‘effective control’, and even through its agents.⁸¹ Furthermore, ‘rights’ can be made to apply according to the circumstances, and do not need to be either granted or removed as a block.⁸²

In his judgment in Smith [2013], Lord Hope further argues that if those under the control of the state’s agents are to be within the jurisdiction of the ECHR (i.e. civilians on the battlefield) then, under the same principle, so too must the state’s agents themselves.⁸³ In the same judgment, Lord Hope also refers to a statement from the 2006 Parliamentary Assembly of the Council of Europe, that “members of the armed forces cannot be expected to respect humanitarian law and human rights in their operations unless respect for human rights is guaranteed within the army ranks”.⁸⁴ He argued, therefore, that the ECHR must have jurisdiction over the armed forces. This leads to the conclusion that it is not only impossible to surrender ECHR rights, even voluntarily, but that do to so would affect the ability of the armed forces to uphold the rights of others.

The lawyers representing the Smith [2013] claimants also expressed this opinion clearly: “It is essential that we recognise the human rights and dignity of our own soldiers. Apart from the fact that they are entitled as human beings to rights that we recognise as ‘universal’, how else can we expect them to uphold the fundamental human rights of those they come across in conflict if they themselves are not protected?”⁸⁵ But rights that apply to all can be, and often are, set aside in order to achieve an effect. Whether this is free speech for those in sensitive positions, or the Right to Life, as in the case of the armed forces when going into battle, it is clear that rights can be temporarily suspended. Even Lord Hope surrendered his right to vote in General Elections when he was elevated to the House of Lords. But one assumes that he still respected the democracy over which he sat in judgment. It is surely wrong and demeaning to assert that Service personnel who voluntarily sacrifice some of their rights, albeit temporarily, are incapable of upholding the rights of others as a result.

What is Combat Immunity?

Combat Immunity is a defence or exemption from legal liability that applies to members of the armed forces or the Government, within the context of actual or imminent armed conflict. In general, it provides that while the armed forces are in the course of actually operating against the enemy, they are under no ‘actionable’ duty of care as defined by common law to avoid causing loss or damage to their fellow soldiers, or indeed to anyone who may be affected by what they do. The basis of Combat Immunity in the UK came from the judgments in *Mulcahy v Ministry of Defence* [1996], building on the principle articulated in the Australian case of *Shaw Savill and Albion Company Ltd v The Commonwealth* [1940] HCA 40.

This immunity is not limited to the presence of the enemy or when in contact with the enemy – but applies to all operations against the enemy where the armed forces are exposed to attack or the threat of attack, including planning and preparation for combat. Combat Immunity also applies to peacekeeping or policing operations in which Service personnel are exposed to attack or the threat of attack. It demarcates the parameters in which a duty of care does not arise in cases of damage to property, including personal injury or death of fellow soldiers or civilians.⁸⁶

81 Lord Hope, para 46 – 49: Smith and Others v The Ministry of Defence [2013] UKSC 41, in particular: “The Grand Chamber has now taken matters a step further. The concept of dividing and tailoring goes hand in hand with the principle that extra-territorial jurisdiction can exist whenever a state through its agents exercises authority and control over an individual. The court need not now concern itself with the question whether the state is in a position to guarantee Convention rights to that individual other than those it is said to have breached.”

82 Para 85: Al-Skeini and Others v The United Kingdom – 55721/07 [2011] ECHR 1093

83 Lord Hope, para 53, 54: Smith and Others v The Ministry of Defence [2013] UKSC 41

84 Lord Hope, para 53, 54: Smith and Others v The Ministry of Defence [2013] UKSC 41

85 Jocelyn Cockburn, partner at London firm Hodge Jones & Allen, which represented all four claimants quoted in: John Hyde, “HRA applies to soldiers on duty, Supreme Court confirms”, *The Law Gazette*, 17 June 2013. www.lawgazette.co.uk/71405.article

86 *Mulcahy v Ministry of Defence* [1996] EWCA Civ 1323; *Multiple Claimants v the Ministry of Defence* [2003] EWHC 1134 QB

The intrusion of judicial oversight and the consequent curtailing of senior commanders' willingness to trust subordinates has promoted a centralised, defensive attitude towards risk. This is indicative of the spread of civilian concepts that a civilian judiciary can impose on the armed forces. It has also undermined senior commanders' willingness to trust those junior to them. This was not just to protect the senior officers, but also their subordinates. With a much-reduced doctrine of Combat Immunity, it seems callous to allow junior commanders – often only corporals – to carry the burden of responsibility when their actions may lead to litigation.

This is why the assertion of rights in the Smith [2013] judgment undermines the very ability of the British armed forces to operate as a professional body; one that is reliant upon mutual trust and respect to operate in extreme conditions. The British military is a mature and professional organisation precisely because its approach requires the considerable investment in education and training and equipment and subsequent trust in all levels of command. It is this professionalism upon which the Government is reliant to offset what would otherwise be the need for greater mass in men and materiel.

The longer-term implications of the Smith [2013] judgment and its narrowing of the application of Combat Immunity are potentially even more damaging. As Lord Mance points out in his dissenting opinion, “a soldier might, even during the war, complain that his or her equipment or training was inadequate and that it would be a breach of the state's common law duty of care and/or duties under the Human Rights Convention even to order him or her to go into combat with it. If domestic legislation compelled this, then the soldier could seek relief in the Strasbourg court – maybe even interim relief prohibiting the further use or giving of orders to use the allegedly defective equipment.”⁸⁷

The insertion of the judiciary into operational matters undermines the fundamental strength of the British armed forces: agility. Why? Because, as Professor Sir Michael Howard observed in another context, “[I]t is impossible to anticipate precisely the character of future conflict. The key is to not be so far off the mark that it becomes impossible to adjust once that character is revealed”.⁸⁸ Putting judges, in effect, into the command chain will boost the rights culture and make leaders focus on duty of care rather than adaptability and mission success.

Lord Mance clearly articulated how this could happen and highlighted possible future questions that the courts may have to resolve. After all, who else but the judiciary can oversee a soldier's, as they now extend to include his or her training or equipping for war, so that an operation will not breach his or her human rights? The Supreme Court's decision will put judges at the very heart of the tactical battle – just where the majority in Smith [2013] say that they should not be.⁸⁹

Lord Hope says in his decision that litigation is unlikely to be successful, and sought to dissuade suits by making clear to the claimants that their chance of success was small, adding, “it is far from clear that they will be able to show that the implied positive obligation under Article 2(1) of the Convention to take preventative operational measures was breached in either case”. But so long as families want answers and turn to the courts to find them, it seems unlikely that they will be dissuaded from doing so. It also overlooks another threat. By exposing the British armed forces to the prospect of inquiries for actions carried out in circumstances few will experience and fewer still will understand, it hangs

87 Lord Mance, para 131: *Smith and Others v The Ministry of Defence* [2013] UKSC 41

88 Ministry of Defence, Development, Concepts and Doctrine Centre, *Future Character of Conflict*. London: Ministry of Defence, 2010. www.gov.uk/government/uploads/system/uploads/attachment_data/file/33685/FCOCReadactedFinalWeb.pdf

89 Lord Hope, para 100: *Smith and Others v The Ministry of Defence* [2013] UKSC 41, “[I]t is of paramount importance that the work that the armed services do in the national interest should not be impeded by having to prepare for or conduct active operations against the enemy under the threat of litigation if things should go wrong.”

a Sword of Damocles over the heads of commanders. That is why the judgment represents a fundamental departure from the long-standing presumption: that actions taken on the battlefield are not open to civil litigation.

Rather than promoting the ethos that wins wars, the armed forces will, in effect, be forced to focus efforts on preserving evidence. This represents a defensive footing to the detriment of the mission.⁹⁰ While it may be possible for civilian, commercial and public sector organisations and industry to operate in this way, it is not true of the military. This burden of record keeping places increasing demands, and stresses, on those serving in difficult, chaotic and dangerous circumstances overseas. Furthermore, unlike industry, enduring operations have a turnover of personnel every six months.

A recent speech by the Vice Chief of the Defence Staff, Air Chief Marshal Sir Stuart Peach, at this year's Air Power Conference reflects growing concern over such legalistic, post-operational questioning. Air Chief Marshal Peach

“Rather than promoting the ethos that wins wars, the armed forces will, in effect, be forced to focus efforts on preserving evidence”

states that Service personnel must now dedicate themselves to preserving the documents and other information necessary to 'prove' that actions taken on operations, and the decisions that led to them, were legal and authorised.⁹¹ Thus, legal considerations have seeped into the daily operational thinking of the UK's military leadership. This has produced a belief and perception that may be more onerous than the law requires today – which is potentially detrimental to the mission. Trying to imitate civilian procedures of record keeping would place an unmanageable strain on the logistics of all but the smallest operations. It is not possible simply to increase manpower to generate the record-keeping capacity required to satisfy British courts without having a major impact on many other parts of an operation, not least logistics. It is therefore important to make the distinction between the current historical archiving for future lessons and the extra requirement to reach the standard of a legal defence. Conflation of these two concepts has the potential to undermine morale and further to drive a risk-averse approach.

The MOD's response prior to *Smith* [2013] has been to show that the risks have been reduced to 'as low as reasonably practicable' (ALARP). This involves weighing the risk against the trouble, time and money needed to control it. Though this was always a judgment call, *Smith* [2013] has undermined it further – making the need to justify actions even more stringent. By extending both the ECHR and the concept of duty of care, the court's role in striking the balance is now clear; and, in ruling that the Challenger II claimants' allegation of negligence against the MOD of failing to provide appropriate equipment and adequate vehicle recognition training, the Supreme Court has made it very difficult for the Government to defend itself effectively against allegations that it could have done more. Government decisions about equipment and training will now fall outside the doctrine of Combat Immunity.

Again, Lord Mance highlights this point in his dissenting judgment in *Smith* [2013].⁹² *Smith* also extended the ECHR's mandate to include purchasing decisions by allowing the argument that failure to buy new vehicles affected the soldier's Article 2 Right to Life. That decision stretches liability back to the

90 During investigations into the Battle of Danny Boy in 2009 – now the subject of the Al-Sweady Public Inquiry – the armed forces faced heavy criticism for a failure to secure and preserve evidence: "Police expose flaws in army's torture inquiry", *The Observer*, 26 July 2009. www.theguardian.com/uk/2009/jul/26/iraq-conflict-army-torture-inquiry

91 Air Chief Marshal Sir Stuart Peach, Vice Chief of the Defence Staff, speaking at the Chief of the Air Staff's Air Power Conference, 17–18 July 2013

92 *Smith and others v The Ministry of Defence* [2013] UKSC 41: Lord Mance says that although claimants attempted to frame their case so as to avoid naming and shaming the individuals involved in these cases, this will not preclude these facts from being asserted at trial. Such cases cannot go forward without dragging the names of all involved into the public record, further punishing these individuals for taking risks and therefore deterring others

Government and to those who took decisions about which equipment to buy, as well as forward to the combat zone about which equipment to use. This in itself causes further potential concerns, as “There must be risks that the threat of exhaustive civil litigation following any active military operation would affect decision-making and lead to a defensive approach, both at the general procurement and strategic stages and at the tactical and combat stages when equipment was being deployed.”⁹³

“The old saying that ‘generals always fight the last war’, would not only be metaphorically true, but also legally enforced”

In consequence, the old saying that ‘generals always fight the last war’, would not only be metaphorically true, but also legally enforced. Under legal pressure, the MOD would have been

made to stockpile unnecessary equipment that was perceived as lacking in the last round of action – so limiting the scope to think ahead and adapt for the future. Lord Mance critiques the majority decision for opening up this possibility by wondering how many families of the dead in 1918 could have sued the War Office for its failure to buy the tank in 1912.⁹⁴

Lord Mance’s argument also points to the potential liability that the judgment places on the heads of Servicemen and women themselves: “[T]he approach taken by the majority will in my view make extensive litigation almost inevitable”. He asked: “What is the logical distinction between deployment of equipment and of troops? The inter-twining of issues of procurement and training with issues relating to the causation of injury or death on the battlefield seems highly likely to lead to a court undertaking the trial of ‘unimaginable’ issues as to whether a soldier on the field of battle or a sailor on his ship might reasonably have been more careful.”⁹⁵ Though the claimants and their lawyers in *Smith* [2013] sought to avoid making personal criticisms, these combat judgments are, of course, made by people in very dangerous circumstances under high stress. As Lord Mance implies, it seems harsh to judge Lieutenant Pinkstone’s actions in the calm of a courtroom when his decisions were taken at night, with limited information and while in great personal danger.

Preventing this ‘legal mission creep’ was one purpose of Combat Immunity. Without it, the Government and individuals involved in combat will be constantly exposed to the question: “what would have happened if?” Though a useful exercise for Staff College, it is a question that could increasingly paralyse decision making in the field.

Indeed, one of the inquiries already started in the wake of the *Smith* [2013] judgment may begin that process. The families of six members of the Royal Military Police killed in Iraq in June 2003 have announced their intention to bring a claim against the MOD for negligence under the Human Rights Act 1998 – in an attempt, as described by a lawyer acting on their behalf, to force a public inquiry.⁹⁶

Even then, there is an argument that the MOD should be subject to judicial oversight and claims of breaching its duty of care (or failing in its obligation to take reasonable steps to safeguard life) if these requests come from bereaved families understandably seeking answers. But the families are not alone in turning to the judges. Some, whose hostile intent towards the UK has been demonstrated through violent action, have found ways to obtain recourse in the British courts.

93 Para 131: *Smith and Others v The Ministry of Defence* [2013] UKSC 41

94 Lord Mance, para 133: *Smith and Others v The Ministry of Defence* [2013] UKSC 41: “[W]ould many disastrous casualties of the First World War have been avoided if the War Office had recognised the significance of the proposal for a tank put to it in 1912, 1914 and 1916 by the Australian engineer Lancelot de Mole – of whom a post-war Commission on Awards to Inventors said in 1919: ‘We consider that he is entitled to the greatest credit for having made and reduced to practical shape as far back as the year 1912 a very brilliant invention which anticipated and in some respects surpassed that actually put into use in the year 1916. It was this claimant’s misfortune and not his fault that his invention was in advance of his time, and failed to be appreciated and was put aside because the occasion for its use had not then arisen.’”

95 Lord Mance, para 150; 148: *Smith and Others v The Ministry of Defence* [2013] UKSC 41

96 “Red Caps’ families take legal action for public inquiry”, *BBC News*, 5 September 2013. www.bbc.co.uk/news/uk-england-23979806

In 2005, Ahmed Al-Fartoosi, the leader of radical Shia cleric Moqtada Al-Sadr's militia, the Mahdi Army, was arrested in Basra. He was released late in 2007 after the UK agreed to an Iraqi-sponsored deal with Ahmed Al-Fartoosi in an attempt to secure greater security in Basra.⁹⁷ The deal involved the release of Mahdi Army prisoners and the withdrawal of British troops from the city centre. Ahmed Al-Fartoosi later alleged abuse during his captivity and is now suing the MOD for compensation, claiming he was denied his rights under the ECHR.⁹⁸

This complaint will likely result in a hugely expensive taxpayer-funded court case and possible future inquiries. The Baha Mousa inquiry,⁹⁹ for example, cost £25 million. The MOD expects that by 2014, it will have spent some £57 million on inquiries, including the as-yet unfinished Al-Sweady Inquiry. The Iraq Historic Abuses Team¹⁰⁰ is projected to add a further £36 million to the total by the time it finishes in 2016. In many such cases, the financial risk to the claimant may be little to none.¹⁰¹

Indeed, the number of cases now possible, as well as the threat of litigation, may require the MOD either to hire more lawyers – or to obtain more money to settle with complainants. In 2012, data released under the Freedom of Information Act revealed that the MOD employs around 310 lawyers and hires legal consultants at a cost of £36 million each year.¹⁰² The MOD Annual Report and Accounts also reveals that the provision for legal claims has been increased annually, standing currently at £130 million, almost double the provision of only five years ago.¹⁰³ Beyond that, it is impossible to measure the cost of action designed to avoid prosecution.

This legal assault on the armed forces, which some have termed 'lawfare', could lead to prosecutions conducted with the sole purpose of declaring certain military actions illegal. As Dai Havard MP, a Labour member of the House of Commons Defence Select Committee, asserted following the Smith [2013] judgment: "There is the potential for lawfare, when people might seek to use domestic legislation as a weapons system, all the way through to the development of universal jurisdiction".¹⁰⁴ As well as judicially tying the hands of politicians in the arena in which they must have the most freedom to act – foreign policy – the extension of law risks seriously weakening UK armed forces. Sun Tzu's dictum that "to subdue the enemy without fighting is the acme of skill", has much to recommend it. Sadly, some judicial decisions go quite a way to ensuring that this is easier than ever. It may not be long before either a foreign power or sub-state forces might begin to sponsor legal actions as a way of paralysing the armed forces through legal process.

As Lord Mance argues, the ground is ripe with the opportunity for disastrous litigation in a field which would involve, in the context of claims for civil compensation, "extensive and highly sensitive review with the benefit of hindsight the United Kingdom's policies, strategy and tactics relating to the deployment and use of its armed forces in combat", even if not a penny was ever paid in compensation.¹⁰⁵

However, the heavy burden placed by such litigation on the MOD is already too apparent. The costs of litigation have now risen out of all proportion, with the number of claims brought against the MOD totalling 5,827 in 2012–2013.¹⁰⁶ The MOD frequently settles cases and in 2012 made payments totalling £8.3 million to 162 Iraqis.¹⁰⁷ The average payment made to the 205 people who

97 Public Interest Lawyers, British Forces in Iraq: The Emerging Picture of Human Rights Violations and the Role of Judicial Review, 30 June 2009, p. 22–24, www.justice.org.uk/data/files/events/13/PIL-Iraq-Report.pdf

98 Public Interest Lawyers, The Other Side of the "Al-Mahdi Deal" www.publicinterestlawyers.co.uk/news_details.php?id=115 and The MOD said in a statement: "Mr Al-Fartoosi, who was a senior commander in the Jaish Al-Mahdi militia in Basra, was interned for the protection of UK forces and Iraqi nationals. We are not aware of any allegations of abuse being made by him during his internment. Claims are now being investigated by the Special Investigation Branch of the Royal Military Police." Richard Norton-Taylor, "Iraq abuse claims: British troops 'made Muslim commander hear porn videos'", *The Guardian*, 2 August 2008. www.theguardian.com/uk/2008/aug/02/military.iraq

99 Ali Zaki Mousa and Others v the Secretary of State for Defence [2013] EWHC 1412. See also: Sean Rayment and David Barrett, £57m and rising: the cost of inquiries into British 'war crimes', 25 August 2012. www.telegraph.co.uk/news/uknews/defence/9499330/57m-and-rising-the-cost-of-inquiries-into-British-war-crimes.html

100 Ministry of Defence, "Announcement: Iraq Historic Allegations Team starts work", 1 November 2010. www.gov.uk/government/news/iraq-historic-allegations-team-starts-work

101 "Main changes: Conditional fee agreements", Ministry of Justice, 1 August 2013, www.justice.gov.uk/civil-justice-reforms/main-changes; Changes to Conditional Fee Agreements mean that from April 2013 the winning party's success fee is no longer payable by the losing side. If one side is charged it will be paid by the winning party, typically out of damages recovered, but this does not create significant financial risk or a clear disincentive for such suits

102 Defence Management, "MOD bill for legal staff tops £36m", Staffordshire: *Public Service*, 9 July 2012. [www.defencemanagement.com/news_story.asp%3Fid%3D20254-&cd=1&hl=en&ct=clnk&gl=uk&client=firefox-a](http://webcache.googleusercontent.com/search?q=cache:-Yrc9YrcH40l:www.defencemanagement.com/news_story.asp%3Fid%3D20254-&cd=1&hl=en&ct=clnk&gl=uk&client=firefox-a)

103 Ministry of Defence, Annual Report and Accounts 2012–2013, London: The Stationery Office. www.gov.uk/government/uploads/system/uploads/attachment_data/file/222874/MOD_AR13_clean.pdf

104 Hansard (House of Commons), Defence Reform Bill, 16 July 2013, Column 980. www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130716/debtext/130716-0003.htm

105 *Smith and others v The Ministry of Defence* [2013] UKSC 41, para 146; 133: Lord Mance also commented, “Would the disaster of Isandlwana have been avoided had the army command equipped Lord Chelmsford’s forces with the heliograph? Or was the cause the failure to form a laager? Or the deployment of troops over too wide a perimeter? Or the lack of screwdrivers to open the ammunition boxes quickly enough?”

106 Ministry of Defence: Claims Report 2012/2013, London: Ministry of Defence, 2013, p. 2

107 Ben Quinn, “MOD compensation log illustrates human cost of Afghan war”, *The Guardian*, 1 January 2013 (Link in Guardian article contains statistics in a log released by the MOD). www.theguardian.com/world/2013/jan/01/mod-compensation-log-afghan-war

108 Ben Quinn, “MOD compensation log illustrates human cost of Afghan war”, *The Guardian*, 1 January 2013 (Link in Guardian article contains statistics in a log released by the MOD). www.theguardian.com/world/2013/jan/01/mod-compensation-log-afghan-war

109 Public Interest Lawyers, People: Phil Shiner, accessed 26 September 2013. www.publicinterestlawyers.co.uk/people.php

110 Communication from the Ministry of Defence, August 2013

have made successful claims has been almost £70,000 including costs. The MOD stated in December 2012 that it was negotiating payments concerning another 196 individuals.¹⁰⁸

This looks set to increase further. As the Public Interest Lawyers website puts it: “Phil and his team of lawyers are currently acting for over 130 former detainees who allege that they or their family members were unlawfully detained, ill-treated, or killed by UK forces in Iraq”.¹⁰⁹ The MOD state that they have recently been threatened by one firm alone with 614 personal injury claims from Iraq.¹¹⁰ The MOD will have to call on the Treasury Reserve to fight legal as well as military action, or risk having procurement and other commitments compromised.

3

The importance of detention in war

The extension of the ECHR to include an extra-territorial mandate means that those individuals detained by British forces overseas now also enjoy its protection. This poses additional novel legal difficulties for detention operations and greatly complicates the effective prosecution of operations. Indeed, without derogation, Article 5 of the ECHR does not allow for preventative security detention in the absence of judicial oversight.¹¹¹ Under the ECHR, prisoners can only be taken as part of a judicial process; they must then be processed towards trial, or released.

For the armed forces, detention is a tool. It is one option amongst many. At times it may be the least bad choice in order to protect the British armed forces – not to mention their allies, the local authorities and the civilian population. Detention can also provide a vital source of information or intelligence which can be used to penetrate enemy networks, identify new targets and keep both troops and civilians safe. Furthermore, treating prisoners well helps convince others to surrender – reducing conflict and enabling quicker operational successes. For all these reasons, the practice of detention is, and will remain, a necessary option for the successful outcome of military operations. For example, effective detention operations aimed at Al-Qaeda in Iraq made an essential contribution to a massive reduction in civilian casualties in Baghdad, which fell from around 90 per day in February 2007 to 10 per day in November that year.¹¹²

In failed and fragile states where many future conflicts are likely to occur, host nations are unlikely to offer detention facilities that would meet the requirements of the ECHR. Some may have a history of prisoner abuse. Many will require considerable support in improving their ability to hold detainees and then collect and process evidence for prosecution in domestic courts. Developing this capacity may well be a core element of the mission for which the UK's armed forces are deployed.

Traditionally, the LOAC has provided the legal framework to regulate such activity, thus allowing the British armed forces to detain while improving the capacity of the host nation. The LOAC allows the detention in humane conditions of those deemed security risks until the end of hostilities. The Fourth Geneva Convention (as well as Additional Protocols) of 1949,¹¹³ establishes rules for administrative detention in international armed conflict for the parties to those treaties. Various Articles in the Fourth Geneva Convention establish the standards for detaining and releasing an individual, and a requirement for review of appeal from the initial detention decision as well as a mandated periodic reconsideration of the state's decision to detain.

111 One international law academic, Marco Sassoli, observes, however: "The ECtHR accepted in the past that certain violations of the right to a judicial remedy, provided for in Article 5(4) ECHR, were covered by the right to derogation under Article 15, ECHR", (*citing Ireland v. United Kingdom*, 25 ECHR (ser. A) paras. 202–24 (1978).) "It is however submitted that the Court would not necessarily decide so today, as international practice... has since developed toward recognizing the non-derogable nature of habeas corpus." Thus Sassoli suggests that a derogation would no longer on its own serve to allow for detention without judicial oversight and that states that do derogate will need to provide for some form of judicial remedy. Marco Sassoli, *The International Legal Framework for Stability Operations: When May International Forces Attack or Detain Someone in Afghanistan?* *International Law Studies*, Vol. 85: *The War in Afghanistan: A Legal Analysis*, 2008, p 449

112 Figures from: www.iraqbodycount.org/analysis/numbers/baghdad-surge/

113 The Fourth Geneva Convention, *Relative to the Protection of Civilian Persons in Time of War* (12 August 1949) and the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed conflicts (Protocol I)

114 See Art 42 and 43 of the Fourth Convention (governing detention in the territory of a party to the conflict, and Art 78 (for those detained in occupied territory). Art 75 of the Additional Protocol I addresses the advice to detained individuals about the reasons for detention

115 International Court of Justice, *Legality or Threat of Nuclear Weapons*, Advisory Opinion 8 July 1996, *The Legal Consequences of the Construction of a Wall in the*

Occupied Palestinian Territories, Advisory Opinion 9 July 2004

116 This reflects the legal principle of *lex specialis derogat legi generali*, meaning the specific law that should prevail over certain other general rules

117 Ministry of Defence, The Joint Service Manual of the Law of Armed Conflict, 23 October 2004. www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf

118 Edwin Williamson and Hays Parks, “Where is the Law of War Manual?”, The Weekly Standard, 22 July 2013. www.weeklystandard.com/articles/where-law-war-manual_739267.html?nopager=1

119 This decision was made on the basis that “if a contracting state has effective control of part of the territory of another contracting state, it has jurisdiction within that territory within the meaning of Article 1 of the ECHR, which provides that ‘the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention’ – as outlined in Article 1 of the European Convention on Human Rights

120 The UK Courts found that Baha Mousa was within the UK’s jurisdiction as he was detained and killed on the UK facility. They ruled, however, that the other five claimants were not, as the UK could not be held to “exercise effective control” over Basra City for the purposes of ECHR jurisprudence at that time. *Al-Skeini and Others v the Ministry of Defence* [2007] UKHL 26. The House of Lords ruling was later overruled by the ECtHR in 2011 as discussed earlier

121 *Al-Skeini & Ors, R (on the application of) v Secretary of State for Defence* [2005] EWCA Civ 1609 (21 December 2005) and *Al-Skeini & Others v the Ministry of Defence* [2007] UKHL 26 (13 June 2007)

122 “Mr Christopher Greenwood QC, who appears as leading counsel for the Secretary of State, now accepts on behalf of his client – although he argued unsuccessfully to contrary effect in the court below – that when a citizen of Iraq was in the actual custody of British soldiers in a military detention centre in Iraq during the period of military occupation he was within the jurisdiction of the UK within the meaning of Article 1 of the

Slightly different rules appear elsewhere and govern detention in the territory of a party to the conflict and detention in occupied territory. Further Articles add a requirement that the state advise the detained individual of the reasons for his detention.¹¹⁴

International Humanitarian Law v International Human Rights Law – The Battle for Supremacy

The relationship between International Humanitarian Law (IHL) and International Human Rights Law (IHRL) is the subject of much academic, political and legal debate. The European Court of Human Rights, as it is required to do, determines rights in accordance with the European Convention on Human Rights – and rarely acknowledges or even mentions IHL. But the International Court of Justice has held that, whilst IHRL is applicable in armed conflict and that the two bodies of law do indeed co-exist,¹¹⁵ in the event of conflict it is the IHL which is the *lex specialis* – the specialist law that should prevail over certain other general rules.¹¹⁶

The distinction between the two bodies of laws is illustrated by the principles of Right to Life and detention. Under IHL, enemy combatants who have neither surrendered nor are *hors de combat* can be killed without warning: combatants do not have a Right to Life. Under IHRL, the policing model for restraint and use of force as a last resort prevails. Furthermore, detention and internment are permitted for reasons of security, whereas under IHRL detention without due process is not permitted.

The International Committee of the Red Cross recognises that IHRL and IHL are two distinct but complementary bodies of law. It does not advocate one body of law over the other but does recognise the ‘interpretative approach’ where the applicable law will depend upon an analysis of the situation. This approach, together with the ‘tailored’ approach adopted by the ECtHR, does little to make the lives of soldiers and commanders easier. In fact it confuses, adding greater uncertainty to the achievement of the military mission.

A further example of the complexities of IHL and the relationship with IHRL can be found by an analysis of the length of time it has taken to produce Service Operational Armed Forces Manuals. The British Army’s LOAC Manual (2004) was almost 25 years in the making, although there were other LOAC guides in existence.¹¹⁷ Part of the delay was in the ratification of Additional Protocol I to the Geneva Conventions. As the title suggests, it is a LOAC manual and makes few references to IHRL. It is presently under revision and it will be interesting to see if, and how, the impact of IHRL is addressed. Similarly, in 1996 the USA decided to publish a single joint Law of War Manual which was eventually produced in draft 13 years later. One of the proposed changes was the deletion of a paragraph that recognised the LOAC as the specialist law. The US Law of War Manual has not yet been officially issued.¹¹⁸

While IHRL proponents may not agree, in this area of detention or internment on security grounds, the LOAC would seem to have much to commend itself as the specialist body of law in armed conflict.

In 2004 in the case of *Al-Skeini and Others v The Ministry of Defence*, the High Court ruled that British detention facilities and bases fall within the scope of the

ECHR and therefore, in addition to the LOAC, the ECHR should be applied to all detainees in UK-run facilities.

The *Al-Skeini* case began as a civil suit against the MOD brought by six Iraqis who claimed that the British had failed to conduct an adequate investigation into the deaths of their family members. Of six Iraqi civilians who died in Basra in 2003 and were cited by the appellants, five of them, including Hazim Al-Skeini, were shot dead by British military patrols. The sixth, and now most well-known, was Baha Mousa. Mousa had been arrested and died while in the custody of British troops in a military base.

The High Court ruled in *Al-Skeini* that because UK-run detention facilities in Iraq fell within the jurisdiction of the ECHR and the UK's Human Rights Act 1998,¹¹⁹ the British Government was obliged to conduct an independent, thorough and impartial investigation into the circumstances of the deaths of detainees who were held and allegedly abused or killed at a UK detention facility (in *Al-Skeini*, specifically concerning the death of Baha Mousa).¹²⁰ This decision was subsequently upheld by the Court of Appeal and the House of Lords.¹²¹

In *Al-Skeini* [2005] the MOD accepted that, with respect to detainees, the ECHR applies in the tightly defined circumstances of UK-run detention facilities in Iraq.¹²² However, the implications of this liability affect operations in Afghanistan where cases relying on ECHR rights have challenged the legality and implementation of HM Government's detainee transfer policies.

Two further rulings have built on the principle of extra-territorial jurisdiction: the *Maya Evans*¹²³ and *Serdar Mohammed*¹²⁴ cases. In 2010, Leigh Day & Co, on behalf of Maya Evans, a peace activist, sought permission to bring Judicial Review proceedings to prevent detainees being handed over to Afghan authorities – who were likely to ignore the rights of the individuals for whom the British once had responsibility.¹²⁵ All prisoner transfers were stopped after allegations that Afghan authorities had tortured Serdar Mohammed, a Helmandi whom the British had detained before handing him over to the Afghan National Directorate of Security (NDS).¹²⁶

Both the *Maya Evans* and *Serdar Mohammed* Judicial Reviews held that the ECHR applied to those whom the British held, and that the MOD could not therefore transfer prisoners to the Afghan authorities who were likely to use torture and ignore detainees' rights. In effect, this meant that on being taken into custody by UK forces – rather than by other ISAF nations or, particularly, by Afghan forces – a prisoner would enjoy rights otherwise enjoyed in the UK. This accident of jurisdiction not only annoyed the Afghan Government, but also led to competing legal judgments.

Both judgments sought to push the UK towards enforcing the principle of non-refoulement, meaning that Britain cannot transfer individuals where there is a risk the individual will be subjected to torture.¹²⁷ The MOD had tried to forestall future such judgments by limiting the danger of abuse in the Afghan judicial system through a Memorandum of Understanding between the British and Afghan Governments – allowing for the monitoring of any detainees whom the UK transferred.¹²⁸ While the High Court cautiously accepted that oversight was sufficient in 2010, two years later the alleged treatment of Serdar Mohammed by the Afghan NDS led to an injunction against any further transfers.¹²⁹

ECHR". *Al-Skeini and Others v The Secretary of State for Defence* [2005] EWCA Civ 1609

123 In *Maya Evans v The Secretary of State for Defence* [2010] it was held that there was a "real risk" that detainees transferred to the Afghan National Directorate of Security detention facility at Kabul would be subject to torture or mistreatment, therefore rendering any transfers of detainees unlawful. However, the High Court held that as long as specific conditions were met, transfers could continue to other facilities such as Lashkar Gah and Kandahar

124 Serdar Mohammed's transfer occurred just one month after the conclusion of the *Maya Evans* Judicial Review. He was detained by British forces in Afghanistan and subsequently handed over to the Afghan authorities in 2010. Serdar Mohammed claimed that after his transfer to the Afghan authorities, he was beaten and severely tortured before signing a confession and being sentenced to 16 years in prison, following a trial that lasted 15 minutes in a language he did not understand

125 *Maya Evans v Secretary of State for Defence* [2010] EWHC 1445

126 "High Court blocks UK detainee transfers in Afghanistan", BBC News, 2 November 2012. www.bbc.co.uk/news/uk-20185001

127 The principle of non-refoulement obliges states not to transfer a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture. Furthermore, if a person is to be transferred or sent to the custody or control of an individual or institution known to have engaged in torture or ill treatment, or has not implemented adequate safeguards, the state is responsible, and its official subject to punishment for ordering, permitting or participating in this transfer contrary to the state's obligation to take effective measures to prevent torture

128 *Maya Evans v The Secretary of State for Defence* [2010], paras 91–104. In April 2006, the Afghan and UK ministers of defence signed an MoU designed to ensure that the Afghans agreed to "observe the basic principles of international human rights law such as the Right to Life and the prohibition on

torture and cruel, inhumane and degrading treatment pertaining to the treatment and transfer of persons by the UK [armed forces] to Afghan authorities and their treatment”

129 *Serdar Mohammed v The Secretary of State for Defence* [2012] EWHC 3454 (Admin)

130 United Nations Security Council, United Nations Security Council Resolution 2069, 9 October 2012. [www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2069\(2012\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2069(2012))

131 Although this has now been reversed and prisoner transfers are occurring following six months of the MOD working with the Afghan National Directorate of Security to identify a safe and effective route to transfer those captured by UK forces on the battlefield into the Afghan judicial system, the question still remains as it could recur in another jurisdiction. “Transfer of detainees to Afghan custody to resume”, *Ministry of Defence*, 6 June 2013. www.gov.uk/government/news/transfer-of-detainees-to-afghan-custody-to-resume

132 Ian Cobain, “British military under pressure over Afghan prisoners”, *The Guardian*, 9 May 2012. www.theguardian.com/world/2012/may/09/british-military-pressure-afghan-prisoners

133 Ben Farmer, “Karzai demands Britain hand over Afghan prisoners”, *The Daily Telegraph*, 3 December 2012. www.telegraph.co.uk/news/worldnews/asia/afghanistan/9719660/Karzai-demands-Britain-hand-over-Afghan-prisoners.html

134 Sari Kouvo, “Transfers and Torture: The British Army halts transfers of detainees to the NDS”, *Afghanistan Analysts Network*, 11 December 2012. www.afghanistan-analysts.org/transfers-and-torture-the-british-army-halts-transfers-of-detainees-to-the-nds

135 *Al-Jedda v the United Kingdom* [2011] (Application No. 27021/08)

136 Al-Jedda was detained under the authority to conduct preventative detention as granted to coalition forces by UN Security Council Resolution 1546. He claimed that his detention was unlawful under Article 5 of the ECHR, which, absent a derogation, does not allow for preventative security detention without judicial oversight. The UK argued that Article 103 of the UN Charter

This halt to detainee transfers was more serious than it may initially appear. The role of the UK armed forces in Afghanistan, as stated in UN Security Council Resolution 2069 (2012), is to support the Afghan Government in the exercise of its sovereign rights, recognising that “the responsibility for providing security and law and order throughout the country resides with the Afghan Authorities”.¹³⁰ The injunction, imposed by British courts applying ECHR judicial standards – thus preventing the transfer of Afghans detained inside Afghanistan to detention facilities in Afghanistan under the jurisdiction of the Afghan Government – effectively represented a violation of Afghan sovereignty. It was certainly perceived as such by the Afghan Government.¹³¹

Rather than simply leading to a slew of releases, the freeze on transfers resulted in a backlog of detainees being held in the UK temporary holding facility in Helmand.¹³² Meanwhile, Afghan authorities called for the transfers to resume, alleging that the UK had no authority under Afghan law to detain Afghan individuals in Afghanistan captured for offences committed by troops whose mandate was based on the support of the Afghan Government.¹³³ This was further complicated because no attempt could be made to bring them to trial for crimes under British law. Following the moratorium on transfers of detainees, President Karzai asserted that “no foreigners have the right to run prisons and detain Afghan nationals in Afghanistan”. Indeed, he went further, stating that the presence on Afghan soil of any foreign run prisons or foreign-held detainees is a “violation of national sovereignty”.¹³⁴

The use of detention also gave rise to cases in Iraq. In September 2004, Hilal Abdul-Razzaq Ali Al-Jedda travelled from London to Iraq where he was arrested by US forces, accompanied by Iraqi national guards and British soldiers, on suspicion of being a member of a terrorist group involved in weapons smuggling and explosive attacks in Iraq (a charge which Al-Jedda himself always disputed). He was taken to a British-run detention centre in Basra.¹³⁵ MOD lawyers were required to review the case regularly and at every point it was concluded that he remained a threat, until he was released in February 2008 when British forces finally left Iraq – ending their ability to detain.

In June 2005, Al-Jedda brought a Judicial Review claim before the courts, challenging the lawfulness of his continued detention and the refusal to return him to the UK.¹³⁶ In their judgment of December 2007, the House of Lords upheld the decision of the lower courts that United Nations Security Council Resolution 1546 and successive resolutions authorised British forces within the Multi-National Force to use internment “where necessary for imperative reasons of security in Iraq”, and that such a binding Security Council decision superseded all other treaty commitments, including Article 5 (Right to Liberty and Security) of the ECHR in relation to the detention of Al-Jedda.¹³⁷ The House of Lords found that there was a conflict between the UNSCR and Article 5 of the ECHR. However, they ruled that Article 5 of the ECHR could be displaced, only to the absolute minimum necessary, so that a “detainee’s rights under Article 5 are not infringed to any greater extent than is inherent in such detention”.¹³⁸ This decision was based on Article 103 of the United Nations Charter which holds that: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail”.¹³⁹

The ECtHR in Strasbourg unanimously disagreed with the House of Lords judgment, finding that, since the UK was merely ‘authorised’ rather than ‘obligated’ to use internment under the UNSCR, Article 103 of the UN Charter was not engaged and therefore, the ECHR did apply: this placed the UK in violation of Article 5 (Right to Liberty and Security). The detention of Al-Jedda was therefore unlawful.¹⁴⁰ Following the subsequent case of *Nada v Switzerland*,¹⁴¹ there are concerns whether ‘explicit’ drafting of UNSCRs would be sufficient for Article 103 of the UN Charter to prevail over a state’s obligations under the ECHR.¹⁴²

The *Al-Jedda* [2011] case has opened the door to significant legal challenge by detainees, again usually financed by legal aid – even when detention is authorised by UNSCRs. The MOD is currently dealing with 375 claims of abuse by Iraqi nationals, many of which are for compensation for unlawful detention. In such cases, compensation has ranged from £1,500 to £115,000.¹⁴³ This creates uncertainty for the UK and other state parties to the ECHR. With uncertainty comes the potential for unsustainable levels of liability – so much so that in future, detention, which is key to operational success, may be discounted as an option to forestall financial and reputational liability (as is already the case with many of the ISAF partners who have been deployed in Afghanistan).¹⁴⁴

The judgment in *Al-Jedda* has also raised significant implications for the drafting of future Security Council Resolutions, and risks putting pressure on the Security Council to ensure explicit reference in future resolutions to prevent the application of the ECHR. However, as Judge Mihai Poalelungi of Moldova observed in his partial dissent to the ECHR judgment in *Al-Jedda* [2011]: “[I]t is unrealistic to expect the Security Council to spell out in advance, in detail, every measure which a military force might be required to use to contribute to peace and security under its mandate”.¹⁴⁵ In the event that the Security Council refuses to be so explicit, the result may be reluctance on the part of states to participate in military operations where resolutions are ambiguous, or at the very least a restriction on the use of detention during operations.¹⁴⁶ This concern was raised by the Netherlands Government following the recent court battles over Dutch liability for the death of three Bosnian Muslim men killed in the 1995 Srebrenica massacre.¹⁴⁷

Furthermore, the Geneva Conventions and Additional Protocols already regulate internment. There may therefore be contradiction and duplication if the United Nations Security Council were to begin drafting resolutions which explicitly regulate detention operations. As Jelena Pejic, the legal adviser to the International Committee of the Red Cross, points out: “It is not clear why the Security Council, composed of 15 member states, should be better placed to regulate detention in armed conflict than the 194 state parties to the Geneva Conventions, each of which have already agreed to be bound by the provisions regulating internment”.¹⁴⁸

Together, the judgments of these various courts pose a difficulty for British forces on operations. Without the ability to detain, information gathering will be hindered, potentially putting the lives of non-combatants and combatants alike in danger. But if the British can neither trust the host nation to process detainees appropriately and without torture; nor to hold them; nor to release them without trial, then the forces are left with no alternative but to conduct the detention

granted detention authority in UNSCR 1546 – prevailing over the contrary prohibition in Article 5 of the ECHR

137 *Al-Jedda v Secretary of State for Defence* [2007] UKHL 58

138 *Al-Jedda v Secretary of State for Defence* [2007] UKHL 58

139 *Al-Jedda v Secretary of State for Defence* [2007] UKHL 58

140 In October 2013, Al-Jedda won an appeal against the Home Secretary which allows him to return to the UK. The Court of Appeal previously held that the Home Office decision in 2007 to strip him of his citizenship was illegal under the British Nationality Act 1981. The Supreme Court upheld that ruling. The Home Secretary may now have to approve a new passport for him as it is believed that he wishes to return to the UK. Frances Gibb, Terror suspect wins appeal to return to UK, 10 October 2013. www.thetimes.co.uk/tto/news/uk/article3891036.ece

141 In *Nada v Switzerland* 10593/08 – HEJUD [2012] ECHR 1691, the ECtHR again failed to address whether a UNSCR could prevail over the ECHR if the language was explicit. In the case of *Nada v Switzerland*, under UNSCRs 1267, 1333 and 1390, the Swiss Federal Council adopted measures to target individuals whose names were on a list maintained by the Security Council’s Sanctions Committee. The measures froze the assets of listed persons and restricted their travel. Nada’s name was added to the list in November 2001. Nada requested that his name be removed from the list; however, this request and subsequent appeals were denied. He was successful in having it delisted in September 2009 having always contested his inclusion on the List. He claimed before the ECtHR that he had been deprived of several rights under the ECHR. Of relevance here are the claims Nada made under Article 8 of the ECHR, which were in conflict with Switzerland’s obligations under the UNSCRs. The court distinguished the case from *Al-Jedda*, as UNSCR 1390 expressly required Switzerland to infringe on the freedoms under Article 8. Due to the explicit language, imposing an obligation to take measures capable of infringing human rights, the court found that the *Al-Jedda* principle had been rebutted. However, the court did not then address whether the authority of

the resolution prevailed under UN Charter Article 103. Instead, the court ruled that Switzerland could have done more to harmonise the divergent obligations, minimising the intrusions on Nada's human rights further

142 *Nada v Switzerland* [2012] ECHR

143 Ministry of Defence: Claims Report 2012/2013, London: Ministry of Defence, 2013

144 John B Bellinger III, State Department Legal Adviser, said that "Many European countries go to great lengths to avoid detaining anybody because their soldiers carry on their backs with them the International Covenant on Civil and Political Rights or the European Convention on Human Rights – it means that it imports an entire new body of law for them to deal with that they are not used to dealing with in these places. In many cases the European forces will simply avoid any detention at all" quoted in Michael Wood (2008), "Detention During International Military Operations: Article 103 of the UN Charter and the Al-Jedda case", *Military Law and the Law of War Review*, Vol. 47, No. 1–2, p 143

145 *Al-Jedda v the United Kingdom* [2011]

146 This is especially true as in the recent case of *Nada v Switzerland* [see Appendix C]

147 "Dutch state liable for three Srebrenica deaths – court", BBC News, 6 September 2013. www.bbc.co.uk/news/world-europe-23986063

148 Jelena Pejic, "The European Court of Human Rights' Al Jedda judgment: the oversight of international humanitarian law", *International Review of the Red Cross*, Vol. 93, No. 883, 2011

149 Lieutenant General Sir Paul Newton KBE, Commander of Force Development and Training, British Army, 2010–12, in an interview for this paper, 9 September 2013

150 Lieutenant General Sir Paul Newton KBE, Commander of Force Development and Training, British Army, 2010–12, in an interview for this paper, 9 September 2013

themselves. If that is not permitted, detainees must then be released, thus continuing to pose a threat to the UK armed forces as well as to local civilians.

A small number of incidents where individuals detained by the UK's armed forces have been subjected to appalling treatment have tarnished the idea of detention – which is now closely associated in the minds of elements of the public and, apparently of some of the judiciary, with cruel and inhumane practices. But to take such a view is to ignore the countless innocent lives that have been saved through detention when it has been conducted properly (as it is in the vast majority of cases).¹⁴⁹ It is also to detract from the bravery of those who have carried out the detention in the first place. It is considerably harder to detain an enemy combatant than to kill him. This is because the safest way of removing a legitimate military target is to inflict a lethal strike with a standoff weapon, such as a sniper or a manned, or even un-manned, aircraft. By contrast, an arrest requires proximity which increases the likelihood of both military and civilian casualties. British forces are prepared to put their lives on the line because of the recognised value that can be gained from detention operations both in terms of the information received and the threat removed, albeit temporarily, from the fight.

This offers a further reason why international support for the development of robust and effective legal institutions is so important. It underpins security and justice within fragile or conflict-ridden states. Where the ability of international forces to detain is circumscribed or absent, or where a host nation is unable to elicit evidence as to the standards necessary to prosecute, this can lead to a 'catch and release' policy.

Without the authority to hold prisoners, or when the policy means that almost immediate release negates the value in taking them, the operational commander would therefore be forced to question whether the danger to his or her men and any collateral risk to civilians was worth the attempt to detain. This could lead to the presumably unintended consequence – that, in order to avoid infringing a detainee's human rights through captivity, an enemy combatant deemed a sufficient threat and a legitimate military target should be killed.¹⁵⁰

It should be made clear that killing a lawful target in this instance is neither an assassination nor 'extrajudicial killing'. It is the lawful use of force in accordance with the LOAC, where one belligerent may lawfully kill another. There is no difference in law in killing a uniformed soldier in, for example Normandy 1944 and a non-uniformed combatant in Afghanistan today. Both are combatants killing combatants. There is no obligation on British forces to try to arrest a combatant, unlike police forces would have to do. However, the legal position does not make it any easier to see that the choice to kill rather than capture an enemy combatant improves the human rights of either party.

4

Risk taking, military judgment and decision making: the case of the Military Aviation Authority

The spread of inquiries and civilian rights culture has also begun to influence the ethos of deployed forces and thus affects commanders' ability to act. In 2008 the armed forces were subjected to regulation focused on imposing external or quasi external oversight mechanisms on activities previously governed by the traditional chain of command. One example of this was the Military Aviation Authority (MAA).

How did all this come about? The chain of events was as follows: on 2 September 2006, during a routine mission over Helmand Province in Afghanistan, an RAF Nimrod XV230 suffered a catastrophic mid-air fire, leading to the total loss of the aircraft and the death of all 14 Servicemen on board. The aircraft is believed to have suffered a leak during mid-air refuelling while it was monitoring a NATO offensive against Taliban insurgents west of Kandahar. The fuel appears to have leaked into the bomb bay where it caught fire, either as a result of an electrical fault or hot air leaking from a heating pipe.¹⁵¹

The incident occurred despite a four-year investigation into the aircraft conducted by BAE Systems and the MOD Nimrod Integrated Project Team, completed in 2005. This investigation had represented the best opportunity to identify serious design flaws in the Nimrod which had lain dormant for years. But they were missed.¹⁵²

Charles Haddon-Cave QC was appointed by the Rt Hon Des Browne MP, then Secretary of State for Defence, to look into military aviation. He asserted that if the investigation into the Nimrod had been drawn up with proper skill, care and attention, the catastrophic fire risks would have been identified and dealt with and the loss of the Nimrod in September 2006 avoided.¹⁵³

The outcome of Haddon-Cave's review was the MAA, created in April 2010 with full oversight of all defence aviation activity for the three Services.¹⁵⁴ The MAA is charged with acting as a regulator to oversee the airworthiness of all three Services' aircraft and their safe operation; and whilst the intention behind its formation is good, the MAA illustrates the cumulative and unintended effects of such institutional innovations. In 2011, the creation of the Defence Safety and Environment Agency (DSEA) extended this principle to other areas of defence activity beyond aviation.¹⁵⁵

The Haddon-Cave reforms built on the existing Authorising Officer concept and strengthened it. The new Operational Duty Holder (ODH) in each Service

151 Charles Haddon-Cave QC, *The Nimrod Review: An independent review into the broader issues surrounding the loss of the RAF Nimrod MR2 Aircraft XV230 in Afghanistan in 2006*, London: p. 6

152 Charles Haddon-Cave QC, *The Nimrod Review: An independent review into the broader issues surrounding the loss of the RAF Nimrod MR2 Aircraft XV230 in Afghanistan in 2006*, London: The Stationery Office, 2009. www.official-documents.gov.uk/document/hc0809/hc10/1025/1025.pdf p 10

153 Charles Haddon-Cave QC, *The Nimrod Review: An independent review into the broader issues surrounding the loss of the RAF Nimrod MR2 Aircraft XV230 in Afghanistan in 2006*, London: The Stationery Office, 2009. p. 10

154 Military Aviation Authority, 'About us': www.maa.mod.uk/about/index.htm

155 The DSEA brought other aspects, including nuclear and maritime safety, together under one command. The DSEA regulates safety and environmental protection in accordance with the Secretary of State's Policy Statement on Safety, Health and Environmental Protection for all areas outside of aviation. DSEA applies to all areas of Defence, outside aviation, where exemptions, disapplications and derogations from legislation apply. The Secretary of State's Policy Statement requires that MOD comply with the law where there are exemptions and derogations. The MOD should introduce internal regulations that produce outcomes that are, so far as reasonably practicable, at least as good as those required by legislation. The DSEA breaks down into five areas: Corporate Policy and Assurance; Defence Nuclear Safety Regulator; Defence Land Safety Regulator; Defence Ordnance Safety Regulator; and the Defence Maritime Regulator, Ministry of Defence, DIN 2012DIN06-013, Launch of the Defence Safety and Environment Authority, 2012

is personally responsible for the airworthiness of each aircraft type.¹⁵⁶ Unless this ODH deploys in an operational capacity – which has rarely been the case – a separation of authority now exists between the commander at the home base responsible for airworthiness and safe operating practices, and the in-theatre air commander on the battlefield who tasks the aircraft to meet the demands of the mission. While the in-theatre air commander can go beyond the limits imposed by the ODH when tasking aircraft, the very fact that the in-theatre air commander would then be going against an official safety regime could put him in a legally vulnerable position. Should anything go wrong, the in-theatre air commander would not just have to explain his decisions to superior officers in a chain of command but might also have to defend his judgment in civilian courts.

The change to authority has led to a subtle but palpable change of culture. Before the creation of the MAA, investigations were carried out by those whose main purpose was the discharge of the military mission at hand. Their purpose was to identify improvements and prevent a recurrence of errors. It was neither an interrogation nor a board, but more an opportunity to learn lessons. Though only subtle, the change is important. The MAA sits outside the traditional chain of command. By moving from a collaborative process – where the intent is not questioned, but only the execution – towards one which seeks to ensure compliance with a policy set by a new agency, the MOD is encouraging commanders to work to the new rules.

The introduction of ODHs partially centralises command back to the UK. In doing so, it risks slowing the speed of action and discouraging initiative, aggravating a situation that already undermines commanders' discretion. Even before Haddon-Cave's reforms, there were problems. In 2008, the commander in Kandahar had to override the UK Authorising Officer for the C130 Force in order to be able to use the assets at his disposal to achieve an urgent resupply mission.¹⁵⁷ At that time in Helmand, British forces and allies were spread out in so-called Forward Operating Bases (FOBs) across the province. One particular FOB was isolated and surrounded by Taliban fighters. Any departure from the base was a fighting patrol.

Due to the operational urgency, the preferred option of the in-theatre air commander when seeking to resupply the base was to parachute provisions from a C130 so that those vulnerable soldiers were not exposed to more risk when simply collecting their ammunition, food or fuel. However, as with many military operations, this constituted a transference of risk. Flying low and parachuting supplies accurately onto the area near the base avoided the need for a foot patrol from the base to collect the supplies. But it introduced risks not ordinarily taken by C130 crews. The Authorising Officer from the C130 Force at the home station in the UK stated in writing that if asked to authorise the mission, he would not underwrite such risks. The in-theatre air commander overruled him – judging the risk better balanced when placed against the aircraft than the soldiers on the ground. The mission was flown successfully.¹⁵⁸

But that might not have been the end of the story. It is easy to foresee a situation in which the same decisions were taken and the C130 was damaged, or worse. Could the board of inquiry (made up of air officers who were tasked with investigating the air aspect of the operation) fully account for the overall military importance of the mission – and the conflicting options for placing risk?

¹⁵⁶ See also earlier discussion of Operational Duty Holders

¹⁵⁷ Interview with Air Commodore Edward Stringer, previous operational commander in Afghanistan and Libya, 4 September 2012

¹⁵⁸ Interview with Air Commodore Edward Stringer, previous operational commander in Afghanistan and Libya, 4 September 2012

Were that to happen, it is possible that the in-theatre air commander's decision in overruling the established, home-based authority would be seen as reckless, not least because he had willingly made himself liable for any incident.¹⁵⁹ Though it is possible, and even probable, that a court would have agreed that the in-theatre air commander had the right to make the decision and should not be held responsible for taking calculated risk in war, it was nonetheless a risk that would still have to be weighed. Indeed, it is noticeable that the UK-based Authorising Officer's distance from the urgency of the situation provoked a stark divergence of perspective on the actual operational necessity – and caused unnecessary confusion and delay in the chain of command, as well as the necessary resupply for the men on the ground.

The MAA appears to be an indicator of the direction of travel for the military.¹⁶⁰ All three Services now have Operational Duty Holders for each aircraft type,¹⁶¹ and it seems likely that all military vehicles will have designated responsible officers in due course. After all, many more people have been killed in avoidable vehicle accidents than in aircraft crashes; so the rules may turn out to be even more stringent for ground transport.

Other public services also take such risks at times – particularly the police when a 'Gold Commander' is required to exercise overall control of his or her organisation's resources at an incident.¹⁶² If the commander finds it necessary to go against established practice, he or she is required to put in writing why they did so in order to satisfy a future board of inquiry or court. In the police, the need to go against established policy is infrequent. In the military, it is very frequent when forces are deployed overseas – and the commander taking the decision will often be living in harsh conditions with little sleep and without the luxury of the control room to formulate measured prose.

This new kind of conflict between decision makers at home and away first became visible during Operation TELIC (the Iraq War) in 2003, and was raised in an MOD after-action report as an emerging concern.¹⁶³ Now, more than a decade has passed and conflict still arises. What Operational Duty Holders are unable to evaluate from that distance are the competing risks that the operational commanders must balance: the urgency of the mission; the vulnerability of the aircraft types; and the greater, or lesser, danger inherent in other options for completing the task. The decision taken in the UK, based purely on risk to life of the crew, is not sufficient basis for a judgment about events in theatre. Like any other military personnel, their lives may be put at risk to prevent a greater harm or seize a greater opportunity. That is the unique nature of military service. Part of the range of risks which an operational commander must balance will sometimes include the acceptance of possible casualties for operational gains. In such cases there are rarely any simple 'right versus wrong' decisions. The least bad option is often the best that is available.

Like earlier examples, the real danger to the armed forces is the challenge to the authority of the chain of command. Clarity is vital and, Lieutenant General Sir Paul Newton observes: "We taught – and continue to teach – our fighting men and women that there is a distinctive 'British way of warfare' which embodies

“All three Services now have Operational Duty Holders for all aircraft types, and it seems likely that all military vehicles will have designated responsible officers in due course”

159 Ibid.

160 Ibid.

161 Operational Duty Holders are those operators of aircraft who, by reason of their legal duty, are responsible for the management and mitigation of risks and hazards arising from the operation of the platform. Interview with Air Commodore Edward Stringer, previous operational commander in Afghanistan and Libya, 4 September 2012

162 The Gold Commander will not be on site, but at a control room, Gold Command, where he or she will formulate the strategy for dealing with the incident. National Policing Improvement Agency, Guidance on Command and Control, 2009. www.acpo.police.uk/documents/crime/2009/200907CRICCG01.pdf

163 Interview with Air Commodore Edward Stringer, previous operational commander in Afghanistan and Libya, 4 September 2012

164 Lieutenant General Sir Paul Newton KBE, Commander of Force Development and Training, British Army, 2010–12, in an interview for this paper, 9 September 2013

the ideals and duties of military service in this country. This is presented to them as a seamless compact of trust up and down the entire chain of command – from private to Chief of Defence Staff, and, indeed, to the Secretary of State. These unify all under one clear set of beliefs about service and leadership.”¹⁶⁴

When this relationship between the chain of command and those serving is undermined or clouded by conflicting priorities – including the confusion created by potentially risk-averse frontline commanders who find it necessary to look to the rear for authority to act – it threatens the ethos of the armed forces.

5

'Train as you fight' and the impact of legislation on readiness

Training is another area where legislation has had a mixed impact on the safety of British forces. In seeking to apply civilian concepts of duty of care combined with health and safety legislation to training for war, soldiers' lives are being put at greater long term risk. As a former SAS soldier who writes under the pseudonym Andy McNab put it: "Train hard, fight easy. Train easy, fight hard and die".¹⁶⁵ As the Ministry of Defence concluded following the National Security Strategy and Strategic Defence and Security Review: "we should assume an adaptable strategic posture, reflecting our expectation that the geopolitical context will continue to evolve rapidly and in ways that are hard to predict, and that this will create both opportunities and risks to which we will need to respond".¹⁶⁶ That requires training for the hardest operations, not hoping for the easiest.

But the incidents arising from failures to train and failures in training have caused two different pressures: first, the requirement to train people better for the tough challenges they will face; second, the requirement to make training less perilous. The first is well exposed by the following incident which was part of the Smith [2013] case.

The families of the Challenger II claimants in the Smith case – Allbutt, Julien and Twiddy, who were killed as a result of friendly fire while they were in a Challenger II tank – alleged negligence on the part of the MOD. They decried both the MOD's failure to provide adequate equipment and technology to protect against the risk of friendly fire; and also to provide adequate vehicle recognition training before deployment and in the theatre of operations.

The second pressure is reflected by the tragic deaths of three soldiers attempting selection to the Special Forces in South Wales this summer.¹⁶⁷ Though the inquiries are yet to conclude, it is possible that the deaths (perhaps from heat exhaustion) may yield lessons for the future. Even so, former members of the Special Forces have rejected criticisms that the training was too hard and the Brecon Beacons too extreme an environment.¹⁶⁸

Dan Jarvis, Labour MP for Barnsley Central and a former Parachute Regiment officer who commanded in Helmand Province, has also trained in the Brecon Beacons in hot and cold weather. He said: "I robustly defend the right of the army to conduct the most rigorous training. We have got to have people who are used to facing adversity."¹⁶⁹ For elite units such as the SAS, the imperative to conduct realistic training in preparation for the reality of the battlefield is clearly a vital part of the duty of any commander in preparing his forces – and so attempts to

165 Andy McNab, "It's deadly, yes, but SAS selection saves soldiers' lives", *The Sunday Times*, 21 July 2013. www.thesundaytimes.co.uk/sto/newsreview/article1289971.ece. See also: Bruce W Menning, *Train Hard, Fight easy: The Legacy of A.V. Suvorov and His "Art of Victory"*, Soviet Army Studies Office, US Army Combined Arms Centre: Fort Leavenworth, Kansas, 1986

166 House of Commons Defence Select Committee, *Written Evidence from the Ministry of Defence*, 1 February 2013. www.publications.parliament.uk/pa/cm201213/cmselect/cmdfence/9/9we03.htm#footnote_1

167 Another training incident that resulted in the death of a Service member occurred in January 2013. Captain Rob Carnegie of the Royal Signals died whilst on a march in freezing conditions in the Brecon Beacons as part of the SAS selection process. His death also prompted debate about training: Steven Morris, Alexandra Topping and Richard Norton-Taylor, "Military asked to review hot-weather training after Brecon Beacons deaths", *The Guardian*, 15 July 2013. www.theguardian.com/uk-news/2013/jul/15/hot-weather-brecon-beacons-territorial-army-deaths

168 Andy McNab, "It's deadly, yes, but SAS selection saves soldiers' lives", *The Sunday Times*, 21 July 2013. www.thesundaytimes.co.uk/sto/newsreview/article1289971.ece. Tim Collins, "Tested to destruction", *The Daily Mail*, 16 July 2013. www.dailymail.co.uk/debate/article-2364723/ Tested-destruction-Ex-SAS-officer-reveals-terrifying-selection-process-special-forces.html. Major Chris Hunter (former British Army officer, Royal Logistical Corps), *Fatalities on Brecon Beacons* – BBC Radio 4, 15 July 2013. GP Alan Porter wrote in the *Lancet Medical Journal* that training exercises that led to heat illness were "not only irrelevant but also foolhardy and irresponsible". Alan Porter, "The death of a British officer-cadet from heat illness", *Lancet Medical Journal*, Vol. 355, No. 9203, 2000, pp. 569–571. Steven Morris, Alexandra Topping and Richard Norton-Taylor, "Military asked to review hot-weather training after Brecon Beacons deaths", *The Guardian*, 15 July 2013. www.theguardian.com/uk-news/2013/jul/15/hot-weather-breconbeacons-territorial-army-deaths

dilute selection criteria for elite units will be resisted. Whilst training for the SAS could be considered the most arduous in the armed forces, its conceptual basis remains sound: to prepare soldiers, sailors and airmen and to find out if they have the “mental and physical stamina that would be needed on SAS operations”.¹⁷⁰

Nevertheless, since the deaths of the three soldiers on the Brecon Beacons in July 2013, no fewer than four official inquiries or investigations have been called to examine the deaths and the underlying circumstances: the Health and Safety Executive (HSE) investigation; a coroner’s inquest; a Service Inquiry; and a police investigation.¹⁷¹ All of that is, of course, capped by the media coverage.

Together, these may lead to a perception of equivalence between military training and any other form of adventurous training. However, there is a fundamental difference: military training is not an end in itself, nor an attempt to build a corporate team. Rather, it is to prepare individuals and units for the rigours of combat and to prepare them to be capable of fighting in the harshest environments so that they can achieve their missions without becoming a burden to their comrades.

Given current legal trends, it seems entirely possible that judicial oversight or a coroner’s verdict will seek to limit the military’s freedom to conduct arduous training. Sections of the media are already questioning the necessity for such training.¹⁷² But as former British Army Officer and bomb disposal specialist Major Chris Hunter of the Royal Logistical Corps noted, “there is always this trade off ... If you’ve got to prepare troops for combat, and especially when you’re talking about specialist units, who do by virtue of their job have to work both independently and in small teams, carrying large amounts of equipment in very austere conditions, then you can’t always make a trade-off when it comes to the training and preparation for those operations”.¹⁷³

Moreover, it is not always easy to distinguish training from operations. In the Services, all activity sits on a spectrum and can move from one end to the other very quickly. For example, the Royal Navy has established itself over the years as a training partner of choice for many of the world’s navies. Hundreds of ships and crews have been through the ‘Thursday War’ in Plymouth under the eye of the Flag Officer Sea Training (FOST). But FOST would be the first to recognise that the training conducted in Plymouth does not mean that a ship can leave home waters ready with all training complete. On the contrary, training will be on-going and may indeed be part of the mission.

An example of this are the Royal Navy vessels operating out of the British base in Bahrain, which patrol throughout the Persian Gulf. They train themselves and allied nations to conduct everything from mine hunting to counter-terrorism and counter-piracy operations, and deploy from there to the Horn of Africa as part of Operation Atalanta, the operation to protect shipping from the threat of Somali piracy. The training conducted in these waters is not therefore what many civilian organisations might understand as such. It is not a day away from the office, but is an attempt to hone the skills of a ship’s crew to act nimbly and effectively. To the extent that these exercises are hazardous and potentially deadly, they are necessary – to prepare the armed forces for combat.

In the Persian Gulf, British training missions continue to exercise their rights to enter parts of international waters claimed by Iran. Furthermore, by training well within visibility of the Iranian military, Royal Navy ships act as a deterrent to

169 Steven Morris, Alexandra Topping and Richard Norton-Taylor, “Military asked to review hot-weather training after Brecon Beacons deaths”, 15 Jul 2013. www.theguardian.com/uk-news/2013/jul/15/hot-weather-brecon-beacons-territorial-army-deaths

170 Andy McNab, “It’s deadly, yes, but SAS selection saves soldiers’ lives”, *The Sunday Times*, 21 July 2013. www.thesundaytimes.co.uk/sto/newsreview/article1289971.ece

171 Tim Owen, “Inquests opened after soldiers die on Brecon Beacons”, *The Brecon and Radnor Express*, 24 July 2013. www.brecon-radnor-today.co.uk/News.cfm?id=25219&headline=Inquests%20opened%20after%20soldiers%20die%20on%20Brecon%20Beacons

172 Gerry Holt, “Soldier deaths: How dangerous is military training allowed to be?” *BBC News*, 15 July 2013. www.bbc.co.uk/news/magazine-23311575

173 Major Chris Hunter (former British Army officer, Royal Logistical Corps), *Fatalities on Brecon Beacons*, BBC Radio 4, 15 July 2013

any military action from Tehran. At the same time, they demonstrate resolve and commitment to regional allies.

The same is true for the Army. Many so-called training operations have a wider, geo-strategic intent. For example, though Kenya offers excellent training facilities to prepare for the desert conditions of Afghanistan or Iraq, our commitment to the Kenyan people because of historic links and its key location in East Africa means that each Kenyan soldier or officer trained (and every village that is aided by the Royal Engineers) helps to reinforce Britain's influence in the region.

This process is repeated around the world and many armed services ask for British training teams to improve their own militaries. But it is also done to cement relationships with the UK and dissuade enemies from seeking to use military force against them.

However, two Acts of Parliament risk depriving the training regimes of the armed forces of the necessary robustness, and undermining the effect of training for British forces and in influencing others: the Health and Safety at Work Act 1974 (HSWA) and the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA).

The HSWA applies to the MOD, its agencies and the armed forces within Great Britain. Upon its introduction in 1974, the HSWA was not thought to apply as widely to the armed forces as it does today. At the time the HSWA was introduced, the Crown Proceedings Act 1947 still provided civil immunity for the Ministry of Defence under Section 10, whereby the armed forces could not be subject to liability in tort.

Over time, however, the concepts of health and safety have evolved, creating greater acceptance and a broader expectation of the application of such legislation than may have existed originally. In 1987 the Crown Proceedings (Armed Forces) Act repealed this immunity (see earlier discussion of Crown Immunity). Since that date, the MOD could now face claims for breach of statutory duty for failure to comply with regulations made under the HSWA as well as claims in negligence.

The MOD does retain a measure of immunity through 'Crown Privilege', meaning that the MOD as an organisation cannot be subject to criminal prosecution. Instead of the criminal enforcement action that would be faced by a civilian, commercial or public sector organisation, a system of Crown Censure and Crown Notices is used – publicising the findings of a Health and Safety Executive inspector.¹⁷⁴ Crown Censures are used in circumstances where the HSE concludes that, but for the immunity from criminal prosecution, there would have been sufficient evidence to provide a realistic prospect of conviction in the courts.¹⁷⁵

Whilst the HSE cannot bring criminal charges against the MOD collectively, they can bring criminal charges against individual Service personnel for breaches of the HSWA.¹⁷⁶ However, despite HSE investigation into potential breaches of the HSWA by an individual Service member, it is often the armed forces themselves which take such actions forward – and pursue criminal charges against the individual for negligence under the Service Discipline Acts rather than under the HSWA.¹⁷⁷

In *Multiple Claimants v the Ministry of Defence* [2003],¹⁷⁸ the MOD accepted that in peacetime it owes a duty of care to its employees, including premises, equipment, systems of work, supervision, and where appropriate, medical supervision, care and support. Although the HSWA is a criminal statute – based upon the protection

174 "HSE Crown Censure of MOD over death of cadet, 14", *Health and Safety Executive*, 25 January 2013. www.hse.gov.uk/press/2013/rnn-scot-mod-crown-censure.htm

175 "Enforcement against Crown bodies", Health and Safety Executive. www.hse.gov.uk/enforce/enforcementguide/investigation/approving-enforcement.htm

176 "Major George McCallum fined £5,000 over Kaylee McIntosh death", BBC, 19 November 2012. www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-20392971 Kaylee McIntosh, 14, drowned after becoming trapped under a boat during a training exercise in Loch Carnan in 2007. In addition to a number of other failings, she had been wearing the wrong type of life jacket which resulted in her being pinned beneath the boat. The death was subject to a fatal accident inquiry and the successful prosecution of Major McCallum for a breach of his Health and Safety responsibilities

177 Two examples of incidents that resulted in such censures are: a) on 22 May 2003, Corporal Thomas Eirian Rees, 32, died as a result of injuries when he was crushed between two armoured personnel carriers being unloaded from a low loader at Teesport, Middlesbrough, Cleveland; and b) on 1 May 2004, Lance-Bombardier Robert Wilson, 29, was crushed between a Multiple Launch Rocket System vehicle and a large lift truck at Albemarle Barracks, Northumberland, and died from his injuries. Both soldiers were on duty at the time of these incidents and the activities were subject to the full application of the HSWA as they took place in Great Britain

178 The claimants of *Multiple Claimants v the Ministry of Defence* [2003] were former members of the armed forces who claimed to have sustained psychiatric injury as a consequence of exposure to the stress and trauma of combat. They contended that the MOD was negligent in taking adequate steps to prevent the development of psychiatric illness and secondly in failing to detect, diagnose or treat such an illness. The MOD was not held in the past to be in systematic breach when the risk of chronic or delayed Post Traumatic Stress Disorder (PTSD) was thought to be low. However four of the claimants established

a liability for breaches in their case after combat and in these cases the MOD was held to be in breach of duty in failing to provide safe systems of work, by, inter alia, monitoring the health of Service personnel so as to prevent psychiatric injury and to secure the diagnosis and treatment of psychiatric illness

179 Although most regulations made under the HSWA provide for the Secretary of State for Defence to claim exemption on behalf of the armed forces in the interests of national security, in practice this is rarely exercised. Examples of this provision in the regulations include: a. Lifting Operations and Lifting Equipment Regulations 1998 – Reg 12; b. Work at Height Regulations 2005 – Reg 16; c. Provision and Use of Work Equipment Regulations 1998 – Reg 36. Furthermore, the MOD is specifically exempted from the application of certain regulations: a. The Carriage of Dangerous Goods etc Regulations 2007, Regs 3 & 4 – exempted are military activities, activities carried on in preparation for, or directly in support of, such operations, or training of a hazardous nature; b. Health and Safety (Consultation with Employees) Regulations 1996, Reg 11 – appointment of safety representatives, not election. NB Reg 12 – disappplied to sea-going ships (military or otherwise); c. Working Time Regulations 1998, Regs 25 & 38 – disappplied from workers, including young workers serving as members of the armed forces

180 Why is this the case? Probably because the Regulations do not apply outside Great Britain, so the only time that it would have been likely that the Secretary of State would have wanted to disapply them was in Northern Ireland. In England and Wales it was unlikely that there was a ‘national security’ justification for disapplying the Regulations: the Secretary of State can also revive Section 10 of the Crown Proceedings Act 1947 and could have done so, for instance in relation to Iraq and/or Afghanistan so as to block claims in negligence. Again, successive Secretaries of State did not do so

181 Ms Sandra Caldwell and Ms Elizabeth Gyngell, Parliamentary Select Committee on Defence, Evidence, 7 July 2004. www.publications.parliament.uk/pa/cm200304/cmselect/cmdfence/uc620-iv/uc62002.htm

of employees – breaches of health and safety regulations made under the HSWA may be relied upon by soldiers in civil actions against the MOD as their employer. But the right to bring a claim for damages based upon breach of such regulations will be removed by s69 of the Enterprise and Regulatory Reform Act 2013 for breaches occurring from 1 October 2013 onwards. The right to sue the MOD in negligence is unaffected by the Enterprise Act.

The Secretary of State for Defence can claim an exemption on behalf of the armed forces from some HSWA requirements in the interests of national security – and can do so under most regulations of the HSWA, (for example Regulation 36 of the Provision and use of Work Equipment Regulations 1998).¹⁷⁹ However, in practice this right is rarely exercised.¹⁸⁰ Such exemptions might apply to military activity for which there is no civilian counterpart – for example, night time driving without lights, using night-vision goggles. While this may involve a breach of Health and Safety Regulations for a civilian driver, the skill is necessary for the military and so must be practised.

The military has met the challenges presented by the HSWA by applying the rationale that risk should be ‘as low as reasonably practicable’ – the so-called ‘ALARP’ rule. This means that safety measures need to be implemented, unless the cost of doing so is ‘grossly disproportionate’ to the benefit of doing so.

Perhaps most telling of all is the tacit acceptance of defeat: the armed forces and MOD comply with many of the requirements of the HSWA, despite their own immunity from prosecution in the criminal courts for violations of the Act. Indeed, in an attempt to comply with these new legal regimes, the armed forces may actually overcompensate. The Director for Field Operations at the Health and Safety Executive indicated in her testimony to the Duty of Care Inquiry by the House of Commons Defence Select Committee in 2004 that the armed forces “are doing things they do not actually have to do and they are complying with things even though they have immunity”.¹⁸¹

The Corporate Manslaughter and Corporate Homicide Act 2007, is a criminal statute. The armed forces do not enjoy comprehensive immunity from prosecution under the CMCHA and may be held liable for activities beyond battlefield operations, such as accidents, which are occasioned by gross negligence.¹⁸² The CMCHA does, however, provide specific exemptions to the MOD when engaging in operations defined as ‘military activities’ (see below for more detail). This legislation, therefore, recognises the unique nature of military operations and the necessity of hazardous training – and properly excludes criminal liability in these cases. It seems all the more remarkable, therefore, that the Supreme Court in the Smith [2013] case is extending the duty of care to the battlefield.

The military activities exemption in CMCHA includes “activities carried on by members of the Special Forces”.¹⁸³ Presumably, this includes all Special Forces training whether inherently hazardous or not. The reputation and success of the UK Special Forces is attributed in part to the ‘train hard’ regime described earlier. This raises the obvious question: should not all military training be afforded the same protection, to ensure that all Service personnel receive the best training designed to equip them for the rigours and demands of the contemporary operating environment?

During the debate in the House of Lords in 2007 on the Corporate Manslaughter and Corporate Homicide Bill, the then Advocate General for Scotland, Lord

Davidson of Glen Clova, made clear the potential risk of applying such legislation to the armed forces, saying: "If criminal liability were potentially to attach to decisions made during the lead-up to combat operations, commanders may become risk-averse at a time when military imperatives require them to focus completely on the military task in hand".¹⁸⁴ The debate followed the tragic death of Sergeant Steven Roberts in Iraq (see page 24–25).¹⁸⁵ Lord Davidson of Glen Clova articulated his wish to avoid such an outcome, stating that even in the Roberts case "we do not believe that the criminal law can simply be superimposed in these circumstances".¹⁸⁶ Again, his words may now have been overtaken by the Supreme Court's recent Smith judgment.

Corporate Manslaughter and Corporate Homicide Act 2007: application to the Military

The CMCHA provides a number of specific exemptions from the offence of corporate manslaughter, including the duty of care owed by MOD to other persons when engaging in operations or during defined 'military activities' outlined below:

1. Operations, including operations for dealing with terrorism, civil unrest or serious public disorder, in the course of which members of the armed forces come under attack or face the threat of attack or violent resistance.
2. Activities carried on in preparation for, or directly in support of, such operations.
3. Training of a hazardous nature, or training carried out in a hazardous way, which, is considered necessary, in order to improve or maintain the effectiveness of the armed forces with respect to such operations.
4. The activities carried out by members of the Special Forces, the maintenance of whose capabilities is the responsibility of the Director of Special Forces, or which are for the time being subject to the operational command of that Director.

The decision in the Smith [2013] case may have further implications for the CMCHA and the understanding of the duty of care. Despite being identifiable as an organisation having a duty of care as an employer under this Act, there are two potential defences in the military environment. The first is the exemption provided to cover 'public policy' decisions; and the second is the exclusion of a relevant duty of care owed in operations and training of a hazardous nature.¹⁸⁷ This recognition is important, in that it mirrors the established principle of Combat Immunity. That understanding meant that no actionable duty of care existed when engaging in operations or 'military activities' outlined in the Act itself – such that the MOD was exempt from owing a duty of care to other persons in these circumstances and therefore could not be prosecuted under criminal law. However, Smith has effectively broadened the MOD's duty of care, so that it now extends to embrace some activities on the battlefield that were previously understood to be exempt: for example, the duty of care extends to procurement decisions that might be alleged to have led to equipment problems on the battlefield years later. While such an allegation may be defeated by the 'public policy' defence, this change to the duty of care formula has still opened the door to possible criminal culpability for the MOD.

182 Brian Brady and Jonathan Owen, "One-third of deaths in Britain's military caused by accidents", *The Independent*, 22 February 2009. www.independent.co.uk/news/uk/home-news/onethird-of-deaths-in-britain8217s-military-caused-by-accidents-1628935.html

183 Section 4 (4) Corporate Manslaughter and Corporate Homicide Act 2007 www.legislation.gov.uk/ukpga/2007/19/section/4

184 Hansard (House of Lords), Corporate Manslaughter and Corporate Homicide Bill, 17 January 2007, Column GC229. www.publications.parliament.uk/pa/ld200607/ldhansrd/text/70117-gc0001.htm

185 See Section 1, p. 24-25 of this paper for further details

186 Hansard (House of Lords), Corporate Manslaughter and Corporate Homicide Bill, 17 January 2007, Column GC234. www.publications.parliament.uk/pa/ld200607/ldhansrd/text/70117-gc0002.htm

187 Health and Safety Executive, Corporate Manslaughter and Corporate Homicide Act 2007. www.hse.gov.uk/corpmanlaughter/about.htm

Under the CMCHA, however, it has always properly been the case that the military's exemption from prosecution did not extend to activities beyond battlefield operations, such as accidents which were occasioned by gross negligence. The CMCHA's recognition of the imperative of military operations and training – by virtue of the immunities it provided – was an important step in upholding the operational freedoms required for effectiveness.

“Operational frontline commanders must retain the ability to make appropriate operational decisions based on dynamic risk assessment, and it would be unduly onerous to impose liability in these sorts of circumstance”

The changes to the definition and extent of Combat Immunity which arise out of Smith [2013] are also relevant when considering gross negligence manslaughter. All Service deaths in combat are investigated by the Service police. The majority will be tragic, as they are the consequences of warfighting. The investigations are

used to inform next of kin and coroners. Other deaths, notably those occasioned by friendly fire, may be regarded as negligent and may therefore be considered as instances of gross negligence manslaughter. In considering these cases, one of the aspects of the offence is the duty of care owed to the deceased. Combat Immunity as it stood prior to Smith [2013] meant that there was no duty of care in this situation and therefore criminal proceedings were rare. However, if Combat Immunity is diluted in the future, there may be more investigations and prosecutions of Service personnel for manslaughter.

In the 2007 debate, Lord Davidson of Glen Clova seemed to anticipate the conclusions of Lord Mance in Smith [2013], when he asked the House of Lords if it was sensible that the new law would apply “if a commanding officer ordered soldiers to carry out dangerous activities because, in the heat of battle, that was the only recourse available to him, even though they might not have had the ideal equipment or training? There might be similar difficulties with judging whether there had been ‘failure to provide reinforcements’. Might a divisional commander be entitled to refuse to carry out a potentially battle-winning strike unless he is promised an array of reinforcements? Operational frontline commanders must retain the ability to make appropriate operational decisions based on dynamic risk assessment, and it would be unduly onerous to impose liability in these sorts of circumstance.”¹⁸⁸

Lord Davidson's apprehension is not misplaced; it does not just affect the armed forces in combat, but even more so the training estates and barracks in the UK. Given that the exercises conducted around the world, though of operational necessity, are perceived to be further from the frontline than, say, the three corporals in Kosovo in the Bici [2004] case or Lieutenant Pinkstone in Iraq in Smith [2013], it seems unlikely that any troops conducting training would qualify for Combat Immunity today. This changes the way in which the UK can think about training and risk. It promotes risk aversion.

The greater danger, however, is that the unintended consequence of overregulation and the creation of a culture of risk aversion is inactivity: turning a blind eye and ultimately ineffectiveness. For example, in current conflicts, combat leaders may choose, in the face of danger, to do nothing that will draw further risk and, instead, stop the mission and attend to the wounded.¹⁸⁹ Such an

188 Hansard (House of Lords), Corporate Manslaughter and Corporate Homicide Bill, 17 January 2007, Column GC234. www.publications.parliament.uk/pa/ld200607/ldhansrd/text/70117-gc0001.htm

189 Lieutenant General Sir Paul Newton KBE, Commander of Force Development and Training, British Army, 2010–12, in an interview for this paper, 9 September 2013

approach reflects both risk aversion in combat and a transfer of the society's own casualty-averse sensibility to the military itself. As Simon Wessely, Vice Dean of the Institute for Psychiatry, King's College London asserted: "[s]afety for its own sake, in which the only purpose of risk management is to reduce risk ... such measures do not generate greater reassurance but greater anxiety. Safety first is not enough ... people need to know that there is a wider purpose to accepting risk ... the goal of a risk free society, let alone a risk free armed forces is unachievable and probably unpalatable; but at present that seems to be the only purpose of policy, which lacks any vision other than precaution. 'Better safe than sorry' may seem sensible, but the danger is that we will end up no safer, and a lot sorer." ¹⁹⁰

190 Simon Wessely, "Risk, psychiatry and the military", *The British Journal of Psychiatry*, vol. 186, 2005, pp. 459–466

Conclusion: the impact on operational effectiveness

“How many divisions does the Pope have”? asked Stalin famously. Today, the question is: how many divisions does the judiciary have? ‘Judicial mission creep’ embodied most recently and dramatically in Smith [2013] makes it essential that the Government addresses this issue in the next Strategic Defence and Security Review (SDSR). It will be the first since the end of the so-called ‘Blair’s Wars’; and the first SDRS where there will be considerations of a fundamental issue beyond the usual budgetary and force structure debates. Given the constraints that are beginning to be felt, the very utility of the UK’s military instrument is in question.

A corpus of law is being built up which stresses the rights of detainees, duty of care and the Right to Life. These are meant to mitigate against risk and abuses arising from the particular form of contemporary warfare which the Services are currently fighting. These have had unintended effects, distorting procurement, training and combat priorities – leaving the Services configured largely for one kind of campaign.

But imagine if the United Kingdom was faced with a war of national survival – with the courts holding inquires into combat deaths: the military would be hamstrung by process. Even without such a national emergency, Britain’s policy of engagement overseas to forestall larger conflicts or to contain nascent emergencies will be impossible if the law, as it does today, imposes such a duty of care on the forces.

Military justice, as noted earlier, has a combat role. It is designed to enhance cohesion and discipline and to promote martial qualities. Together with the LOAC, it is also designed to limit violence to those who are legitimate combatants and those with an interest in the fight. This report is quite clear that law in war is necessary. But which law? That intended for use in peacetime, or in war? The LOAC applies for war in general, while the ECHR has only been used as the basis for judicial interpretation over the past decade. Parliament, a body which can change the law judges must apply, has not acted with sufficient clarity to guide their decisions. The damage is done when legal norms such as the ECHR – created for the relatively predictable governance mechanisms of post war Europe – are imposed in chaotic and inherently uncertain conflict zones.

As this introductory report has argued, law in war must suit the generic, not the particular – and, in this context, the LOAC is better suited for an uncertain future. As Hays Parks, former Senior Associate Deputy General Counsel in the United States Department of Defense observes, not recognising the LOAC as the primary body of law governing armed conflict “would place our fighters on a footing comparable to a police officer in the United States in a peacetime

environment and at an extreme and unprecedented risk of being killed by the enemy and of facing ‘war crimes’ allegations by human rights activists”.¹⁹¹

The need for clarity and simplicity in legislation is important not just to avoid causing greater difficulties, but to ensure justice. As Air Chief Marshal Lord Stirrup said in his evidence to the House of Lords Select Committee on the Constitution Inquiry into the constitutional arrangements for the use of armed force: “If the law is seen to be becoming so difficult for people in the field that they are constantly concerned about their own legal position, frankly, it undermines respect for the whole institution of the legal underpinning”.¹⁹² Taken with his warning that, “one of the potential consequences of [concern about their personal legal positions on operations] is not that you have fewer casualties; it is actually that you have more”,¹⁹³ the topic is one that requires addressing.

It is clear from the analysis in this introductory paper that there is room for exceptions, derogations and reservations to meet the demands of military operations. The exemptions provided in the CMCHA for operations and training were a recognition of this fact under domestic legislation. The UK must look for further exemptions to the laws that are being applied – and repel the mission creep of civilian judicial oversight. The Government must consider the legislative scrutiny under which it places the armed forces and the consequences for the country.

The fact remains that for a nation to be free and to live in peace, it must employ men and women who are prepared to commit violent acts on its behalf. Since the Second World War, and in all probability for many decades before that, 1968 was the only year in which a British Serviceman was not killed in action. Though it is possible to wish away the need for armed forces and to question the decisions which Governments make on deployment, we are living in a dangerous world. The existence of the military is vital to the freedom of the country.

So the question remaining is: will the judicial constraints currently encircling the armed forces mean that although the military will always be there, it will be increasingly impotent? As a nation, it is in Britain’s vital interest to retain the legal equivalent of the “sea-room” Nelson so valued – and to adjust the law so that the troops can face new threats as they evolve. In the words of Cole Porter, “don’t fence me in”.¹⁹⁴

191 Edwin Williamson and Hays Parks, “Where is the Law of War Manual?”, *The Weekly Standard*, 22 July 2013. www.weeklystandard.com/articles/where-law-war-manual_739267.html?nopager=1

192 Air Chief Marshal the Lord Stirrup, Oral Evidence to the House of Lords Select Committee on the Constitution: Inquiry into the Constitutional Arrangements for the Use of Armed Force, 5 June 2013, p 26. www.parliament.uk/documents/lords-committees/constitution/Armed%20Force/COMPLETE%20armed%20force%20evidence%20volume.pdf

193 Air Chief Marshal the Lord Stirrup, Oral Evidence to the House of Lords Select Committee on the Constitution: Inquiry into the Constitutional Arrangements for the Use of Armed Force, 5 June 2013, p 22 www.parliament.uk/documents/lords-committees/constitution/Armed%20Force/COMPLETE%20armed%20force%20evidence%20volume.pdf

194 Robert Fletcher and Cole Porter, *Don’t Fence Me In*, 1934

Options

Option 1

Parliament should legislate to define Combat Immunity

Smith [2013] demonstrated that the principle of Combat Immunity has been significantly affected. Although the individual claims still, possibly, have a long way to run (and the Supreme Court has expressed caution as to the overall chances of success), they are now where they should not be – in court. The principle of Combat Immunity is no longer a bar to proceedings, but a potential defence that needs to be determined after an analysis of the evidence by the courts. Furthermore, liability has now been stretched both ways. It extends both forwards to the frontline but also rearwards, making supply depots, training establishments and supporting commands liable for failures to deliver parts, training or guidance. The reach of the MOD's obligation to protect the Right to Life of those in combat, combined with the stretch of the MOD's duty of care responsibilities has, in consequence, extended the chain of command. The Smith [2013] ruling may not have been written with the intention of moulding procurement (or other) decisions to meet what Government officials perceive will be the demands of a UK civilian court – but this may well be an inevitable reaction from serving officials to avoid future legal censure.

As the then Minister of State for the Armed Forces commented in 2012, “Combat Immunity is an important legal principle that the MOD is committed to defend ... a soldier involved in combat or under an immediate threat should be able to focus on the task of fighting. Constant assessment of personal liability on the battlefield could lead to paralysis...and result in military failure... However there is a recognised mechanism to compensate for injury or death...”¹⁹⁵

To begin to reverse this development, Parliament should legislate to define Combat Immunity to include: the conduct of military operations; the materiel and physical preparation for military operations; and those persons affected by the military on operations. At the very least, the UK should define Combat Immunity as applying when off-base on deployed operations. This cannot be deemed an unreasonable position for the Government to take; it is, after all, not incompatible with the dissenting opinion written by three Supreme Court justices: Lords Mance, Wilson and Carnwath in the case of Smith [2013].¹⁹⁶

This would change the thought process of those who felt themselves liable to lawsuits. For example, the MAA and other responsible authorities would still have oversight for the employment of equipment as a matter of course. But operational commanders would feel more confident that their externally set constraints would not leave them liable to prosecution. They would therefore retain their clear command prerogative. By removing the potential for lawsuits

¹⁹⁵ Andrew Robathan, Minister for the Armed Forces, Hansard (House of Commons), Oral Answers, Defence: Combat Immunity, 26 November 2012, Column 11. www.publications.parliament.uk/pa/cm201213/cmhansrd/cm121126/debtext/121126-0001.htm#12112614000569

¹⁹⁶ Smith and others v The Ministry of Defence [2013] UKSC 41

against civil servants and others for failure to purchase equipment, this would also allow more flexibility in the procurement chain and prevent stockpiling of unnecessary equipment.

Combat Immunity legislation should be enshrined in law so as to limit the extent of an actionable duty of care and extended to include the following:

- Incidents that occur during active operations. This would include all incidents that occur on the battlefield, including accidents. Individuals and claimants excluded from filing claims would include not only Service personnel but all persons affected by the military in such incidents. To ensure that this applied equally, this would require legislation to ensure that the Armed Forces Compensation Scheme also covered those who deployed alongside British armed forces (such as MOD civilians and diplomats) for this period.
- Incidents that occur during military training exercises and training for combat generally, for rigorous preparation is vital to the effective deployment of forces. Indeed, the distinction between operations and training is often far from clear, for these are part of a continuum. For example, the very act of training can be a deterrent to less prepared enemies – especially in the Persian Gulf where Royal Navy training deters Iran and reassures British regional allies.

Option 2

The MOD should revive Crown Immunity (Section 10 of the Crown Proceedings Act 1947) in times of national emergency or warlike operations

Closely connected with the principle of Combat Immunity is the narrower issue of Crown Immunity under the Crown Proceedings Act 1947. Crown Immunity was repealed by the Crown Proceedings (Armed Forces) Act 1987, removing the bar on the right of Service personnel to pursue actions in tort against the Crown. However, Crown Immunity (Section 10 of the Crown Proceedings Act 1947) can be revived by order of the Secretary of State for Defence¹⁹⁷ in a number of circumstances:

- Imminent national danger or of any great emergency that has arisen
- For the purposes of any warlike operations in any part of the world outside the United Kingdom or of any other operations which are to be carried out in connection with the warlike activity of any persons in any such part of the world.

The failure to revive Crown Immunity was clearly a factor of the Court of Appeal decision in the Smith [2013] case. In *Allbutt, Ellis, Smith and Others v Ministry of Defence* [2012], the Rt Hon Lord Justice Moses said: "... Parliament cannot have thought that the imposition of liability in negligence was detrimental to the troops, and 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 law 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."¹⁹⁸

¹⁹⁷ In practice this would be the Secretary of State for Defence, but under the Interpretation Act 1978 any Secretary of State could sign the order

¹⁹⁸ *Allbutt, Ellis and Smith v the Ministry of Defence* [2012] EWCA Civ 1365 para 54

Option 3

Parliament should legislate to exempt fully the MOD from the Corporate Manslaughter and Corporate Homicide Act 2007

The principle of Combat Immunity is reflected in the Corporate Manslaughter and Corporate Homicide Act of 2007 (CMCHA) and was expressly raised during the debate on the Bill's passage through Parliament. Though the Act created the offence of corporate manslaughter committed by organisations that cause a person's death through gross negligence, it incorporates the common law concept of Combat Immunity and negligence to determine which military activities are exempt from the offence. It further exempts the MOD from owing an actionable duty of care when engaging in operations; but the MOD's exemption from the CMCHA does not extend to its duties as an employer on the home front. Thus, the MOD may no longer be immune to prosecution for its actions on the battlefield that are in violation of the CMCHA.¹⁹⁹

The CMCHA was introduced to ensure that civilian, commercial and public sector organisations (as opposed to individuals within those organisations) which operate in a manner that is grossly negligent can be prosecuted. Since the CMCHA came into law, out of a total of 141 cases which have been referred to the Crown Prosecution Service, there have been three successful prosecutions. There are 56 cases currently being investigated.²⁰⁰ Whilst the law was not intended to apply on the battlefield, the recent *Smith* case narrowing the breadth and understanding of Combat Immunity and what constitutes activities or conduct on the battlefield may now draw individuals in the MOD and armed forces into reach of the offence. The Act should be amended to recognise the unique nature of the armed forces, thus affording them a greater measure of exemption.

Option 4

The UK should derogate from the European Convention on Human Rights during deployed operations

In the 60 years of the ECHR, there has been significant 'legal mission creep' – and even more so since its introduction into UK domestic law through the Human Rights Act 1998. A string of cases has catapulted the ECHR into the conduct of combat operations – leading to perverse outcomes. The extra-territorial reach of the ECHR was never contemplated, and it is clear that the only way now of limiting the growth of the 'living instrument' that the ECHR is, is by derogation.

According to Article 15, the state can, in time of "war or other public emergency threatening the life of the nation",²⁰¹ derogate from the application of the ECHR – with the exception of Article 3 (Prohibition of Torture), Article 4 (Prohibition of slavery and forced labour), and Article 7 (No punishment without law).²⁰² In the case of *Al-Jedda* [2007], Lord Bingham asserted that "it is hard to think that these conditions could ever be met when a state had chosen to conduct an overseas peacekeeping operation, however dangerous the conditions from which it could withdraw".²⁰³

However, the novel interpretation both by the Grand Chamber of the ECtHR and the Supreme Court in Westminster – that the ECHR applies overseas – makes it reasonable to extend the principle of derogation in time of 'war or other emergency' to operations abroad. As the International Law expert Marco Sassoli

199 At present the CMCHA has no extra-territorial jurisdiction

200 Jan Cruise, Corporate Manslaughter Charges On the Rise, 6 June 2013. www.wolflaw.co.uk/general/corporate-manslaughter-charges-on-the-rise/

201 Article 15 allows for derogation in time of "war or other public emergency threatening the life of the nation". For that emergency to be valid, it must be: actual or imminent, although states do not have to wait for disasters to strike before taking preventive measures (*A v United Kingdom* [2009] ECHR 301 para. 177); involve the whole nation, although a threat confined to a particular region may be treated as "threatening the life of the nation" in that particular region (*Aksoy v. Turkey* (1997) 23 EHRR 553 para 70); threaten the continuance of the organised life of the community; or, exceptional, such that measures and restrictions permitted by the Convention would be "plainly inadequate" to deal with the emergency (*Greek case* (1969) 12 YB 1 at 71–72, paras. 152–154)

202 Article 15, European Convention on Human Rights

203 *Al-Jedda v Secretary of State for Defence* [2007] UKHL 58

suggests, "... 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. An emergency on the territory where the State has a certain limited control must be sufficient".²⁰⁴

Moreover, ten countries, including France and Spain have made reservations to the ECHR in respect of their armed forces, in effect opting-out of certain aspects of the Convention.²⁰⁵ These reservations are limited to military justice, but they nonetheless recognise a need for the military to be treated differently. The UK was not one of those states to make a reservation with respect to its armed forces on these partial grounds; however, in 1966 it did enter a reservation to the International Covenant on Civil and Political Rights (ICCPR) in respect of military justice. This is a multilateral treaty adopted by the United Nations as part of the International Bill of Human Rights.

Without being inconsistent with its other obligations under international law, the UK could derogate from the ECHR and articulate its intent to apply the LOAC as *lex specialis* – the specialist law that should prevail at a time of conflict overseas. This would be more in keeping with the spirit of those who drafted the ECHR in the immediate post-War period. As legal academic authority Andrea Gioia asserts, "most commentators agree that ignoring the International Humanitarian Law, [the Law of Armed Conflict] rules governing international armed conflict would be a mistake and lead to legal confusion; those rules are in fact well developed and very detailed, and could not be ignored without openly disregarding the express intention of states."²⁰⁶ Their intention was clearly not to limit the armed forces in the manner of today's courts, because its authors were expecting the Services to defend Europe against the Soviet Union.

The UK should, by default, invoke this derogation from the application of the ECHR on operations overseas and define the LOAC as the relevant body of law to govern operations – to which may be added, as required by the nature of the conflict, detailed measures to address any gaps in coverage provided by the LOAC. The ECHR requires derogation to be consistent with other obligations under international law, so derogation should also be sought from the International Covenant on Civil and Political Rights (ICCPR). Application of the LOAC would ensure that the armed forces continue to operate under lawful control with appropriate operational freedoms and permissions during operations.

While continuing to exercise its authority to derogate from the ECHR for military operations overseas, the UK should also consider drafting a new protocol to exclude application of the ECHR during military operations overseas. The UK should discuss this with the other 41 signatories.

Option 5

The UK should seek explicit language in United Nations Security Council Resolutions to provide a legal basis acceptable to the ECtHR
In parallel to derogation, and to secure and preserve its operational freedoms when

“Given the novel interpretation causing extra-territorial reach to the convention, it seems logical that the interpretation of what permits derogation should be similarly broadened”

204 Marco Sassoli, "The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts", *International Humanitarian Law and International Human Rights Law*, 34, 2010, pp. 69–78

205 Armenia, Azerbaijan, Czech Republic, France, Spain, Slovakia, Moldova, Portugal, Russia and the Ukraine have all made reservations to articles of the ECHR, Council of Europe (2013): List of declarations with respect to treaty No. 005: Convention for the Protection of Human Rights and Fundamental Freedoms. conventions.coe.int/treaty/Commun/ListeDeclarations.asp?CL=ENG&NT=005&VL=1

206 Andrea Gioia (2011), "The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict", in Orna Ben-Naftali (2011), *International Humanitarian Law and International Human Rights Law*, Oxford: Oxford University Press, p 217

conducting military operations overseas, the Government should seek to ensure that explicit language allowing detention or internment is incorporated into future Chapter VII UNSCRs. This is in order to provide a legal basis acceptable to the ECtHR.

In *Al-Jedda*, the ECtHR determined that the UNSCR governing the operation did not oblige the UK to detain, and that the ECHR rights therefore applied. Neither Resolution 1546 regarding Iraq (nor any other UNSCR) explicitly or implicitly required the UK to place an individual whom its authorities considered to constitute a risk to the security of Iraq into indefinite detention without charge. Given that this hindered the British Government's detention policy, a sufficiently explicit UNSCR may serve as the basis for future detention activity. That said, Judge Poalelungi of Moldova's dissenting opinion in the *Al-Jedda* case recognised the difficulty of getting explicit language into a UNSCR.

It is possible the UNSC may not be able to provide the necessary clarity – fearing that to do so would trigger objection or even a veto. Failure to do so would have other consequences, according to Sir Michael Wood, a member of the International Law Commission and former principal legal adviser to the Foreign and Commonwealth Office. “If the Security Council were to refuse to be so explicit, the result may be ‘a chilling effect on the willingness of states to participate in international military operations, and on what they are prepared to allow their armed forces to do when they do participate’.”²⁰⁷

Option 6

The Attorney General should draft an ‘operational effectiveness impact statement’ for the Ministry of Defence when new legislation is being drafted stating what, if any, are the implications for the armed forces

Most legislation would result in a ‘nil’ return. However, given the spread of employment protection and health and safety legislation – entailing a presumption of responsibility and other such orders designed for the civilian world – the Attorney General should be required to inform the MOD when any legislation changes the balance of responsibility which may limit a commander's freedom of action. This would force lawmakers to consider the implications for the military of any legislation prompting either a change, or else derogation from the Act concerned.

This would be similar to the requirement for drugs to be tested for side effects. Doctors must constantly weigh the unintended consequences of medicines against their benefits. Political leaders would have to do the same. Any such operational effectiveness impact statement would also give courts the ability to understand the original intent of legislation – and shape future judgments accordingly. Likewise, it would provide a public and transparent accounting for the cumulative impacts of new law and legislation and would provide a useful tool for post-legislative scrutiny of any relevant amendments to the Act.

Option 7

Legal Aid should be removed from lawsuits brought by non-UK persons against HM Government in line with the Ministry of Justice's current proposals for reform. The Ministry of Justice is currently undertaking the consultation process for reforming legal aid. One key proposed reform is the introduction of a residence

²⁰⁷ Michael Wood, “Detention During International Military Operations: Article 103 of the UN Charter and the *Al-Jedda* case”, *Military Law and the Law of War Review*, Vol. 47, No. 1–2, 2008, p 143

test to ensure that only those with a ‘strong connection’ to the United Kingdom are eligible for legal aid.²⁰⁸ This is not an extraordinary measure since other, more important areas of legal aid are also being cut: in April 2013, legal aid was restricted for divorce, clinical negligence, child custody, welfare, employment, immigration, housing, debt, benefits and education.²⁰⁹

The application of the Service Discipline Act and the LOAC provides guarantees to the rights of individuals in UK custody or who have dealings with the UK armed forces overseas. Applications for redress can be considered either through established review processes or, should individuals deem it of great merit, by self-funded recourse to the courts. Continuing to allow the use of public funds could potentially provide an incentive to bring actions against the nation in the future which may not be in the public interest.²¹⁰

Currently, foreign nationals who reside in England or Wales can apply for civil legal aid for cases being conducted in the UK. Foreign nationals who reside outside England or Wales can also apply for civil legal aid if they are bringing or defending proceedings within Britain. Under the new proposals, individuals applying for civil legal aid would have to satisfy a residency test in order for such aid to be available. Upon application, the individual would have to be a lawful resident in the UK, Crown Dependencies or British Overseas Territories and would have had to stay in the UK for a continuous period of 12 months. Legal aid would continue to be available to those individuals who do not meet this criteria through ‘exceptional funding’ arrangements under Section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 – in order to comply with the UK’s obligations under EU or international law.²¹¹

The residency test is a common sense means of ensuring that legal aid funds are targeted at those with a ‘strong connection’ to the UK, whereas the wider availability of legal aid may ‘encourage people to bring disputes before UK courts’.²¹²

Given the potential for vexatious claims by interested parties qualifying under the residency criteria, this is not sufficient. It would be better if the Director of Legal Casework at the Legal Aid Agency were able to decide whether a case had the merit to continue to court – or simply be dropped.

Honour

That is a good note on which to end. The armed forces express much that is best about Britain. They also keep us safe. They bring honour on us. The least that we can do is reciprocate.

That is a moral duty. But it also has practical benefits. In recent years, the forces have been cut and cut again. Yet they continue to display a remarkable ability to make do and mend: to do more with less. This is only possible because they have been able to preserve their culture and perpetuate their ethos. If that were ever imperilled, the consequences could be disastrous.

If there were a grave international crisis with the threat of a major war, it would be possible to expand the armed forces rapidly, as happened in 1914 and 1939 – on one condition: that the culture and the ethos survive. You can buy kit. You can recruit men. But once the military ethos is lost – that subtle yet powerful reinforcement of service and discipline and duty – everything may be lost.

208 Ministry of Justice, Transforming Legal Aid: delivering a more credible and efficient system, London: The Stationery Office, 2013, p 27–28

209 Legal Aid was restricted with the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012

210 Ministry of Justice, Transforming Legal Aid: delivering a more credible and efficient system, London: The Stationery Office, 2013, p 27–28

211 Ministry of Justice, Transforming Legal Aid: delivering a more credible and efficient system, London: The Stationery Office, 2013, p 27–28

212 Ministry of Justice, Transforming Legal Aid: delivering a more credible and efficient system, London: The Stationery Office, 2013, p 27–28

As noted above, generals have sometimes been guilty of fighting the last war. Today's 'judicial mission creep' may make it hard for them to do anything else. The rule of law is crucial, and under the Law of Armed Conflict and military law, it exists on the battlefield. However, laws which weaken the Forces who guarantee the public's safety do not advance the rule of law. They undermine it.

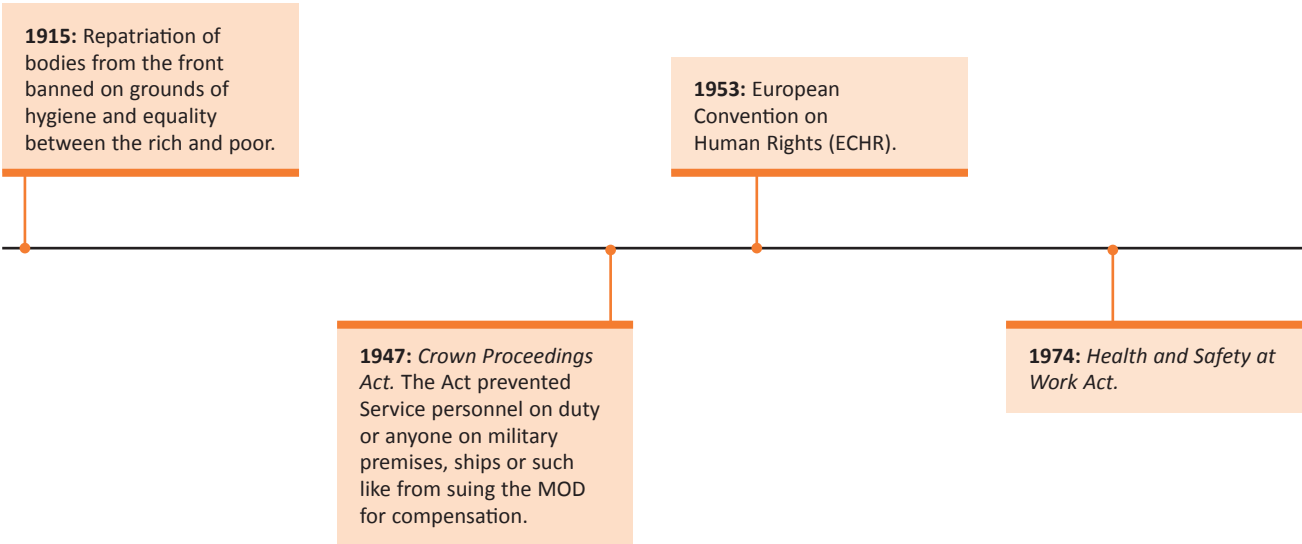
Appendix A

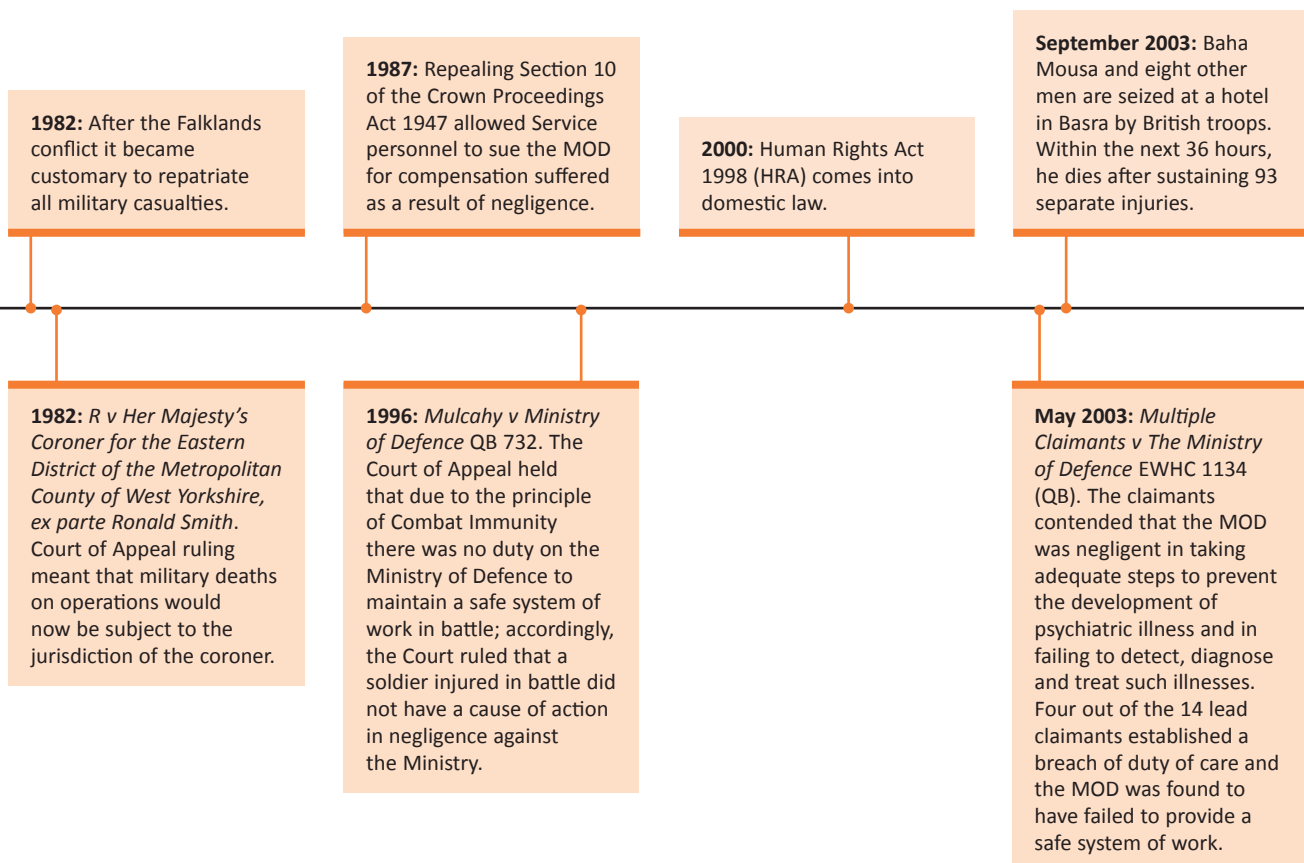
Glossary of Terms

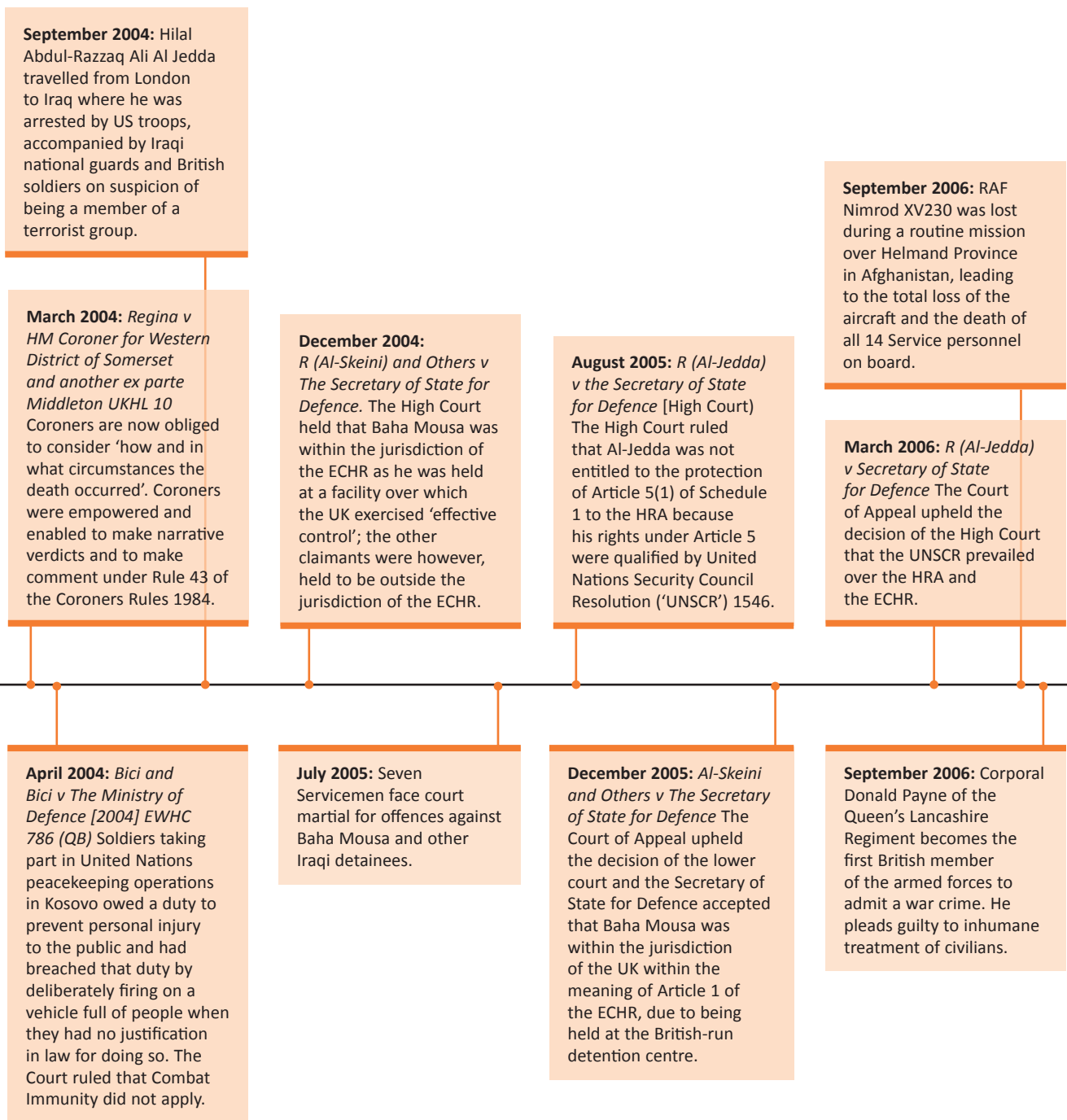
ALARP:	‘as low as reasonably practicable’
CMCHA:	Corporate Manslaughter and Corporate Homicide Act 2007
CND:	Campaign for Nuclear Disarmament
DSEA:	Defence Safety and Environment Agency
ECHR:	European Convention on Human Rights
ECMs:	electronic counter measures
ECtHR:	European Court of Human Rights
FOB:	Forward Operating Base
FOST:	Flag Officer Sea Training
FP:	Force Protection
HRA:	Human Rights Act 1998
HSE:	Health and Safety Executive
HSWA:	Health and Safety at Work Act 1974
ICCPR:	International Covenant on Civil and Political Rights
IEDs:	improvised explosive devices
IHL:	International Humanitarian Law
IHRL:	International Human Rights Law
KFOR:	(NATO-led) Kosovo Force
LOAC:	Law of Armed Conflict
MAA:	Military Aviation Authority
MOD:	Ministry of Defence
NDS:	(Afghan) National Directorate of Security
ODH:	Operational Duty Holder
PTSD:	Post-traumatic Stress Disorder
RAF:	Royal Air Force
SDSR:	Strategic Defence and Security Review
UNSCR:	United Nations Security Council Resolution

Appendix B

Timeline







June 2007: *Al-Skeini v Secretary of State for Defence*. The House of Lords followed the decision of both the High Court and Court of Appeal, holding that Baha Mousa was under the jurisdiction of the ECHR as he was held and died in the British-run detention centre. However, the other claimants, who died during operations in Basra, were outside the centre and therefore not under the jurisdiction of the ECHR.

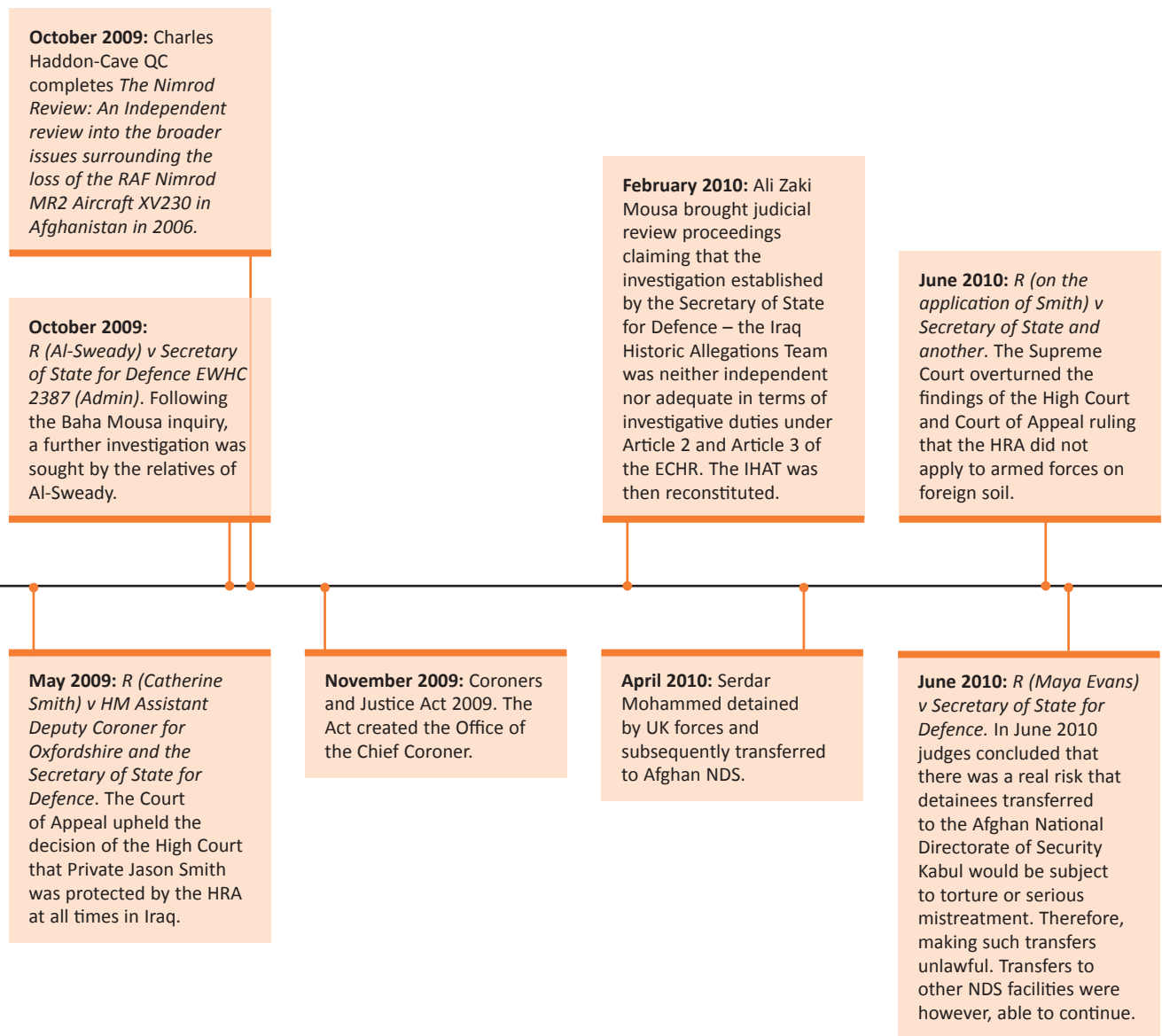
May 2008: The Government announces a public inquiry into Baha Mousa's death led by the Rt Hon Sir William Gage.

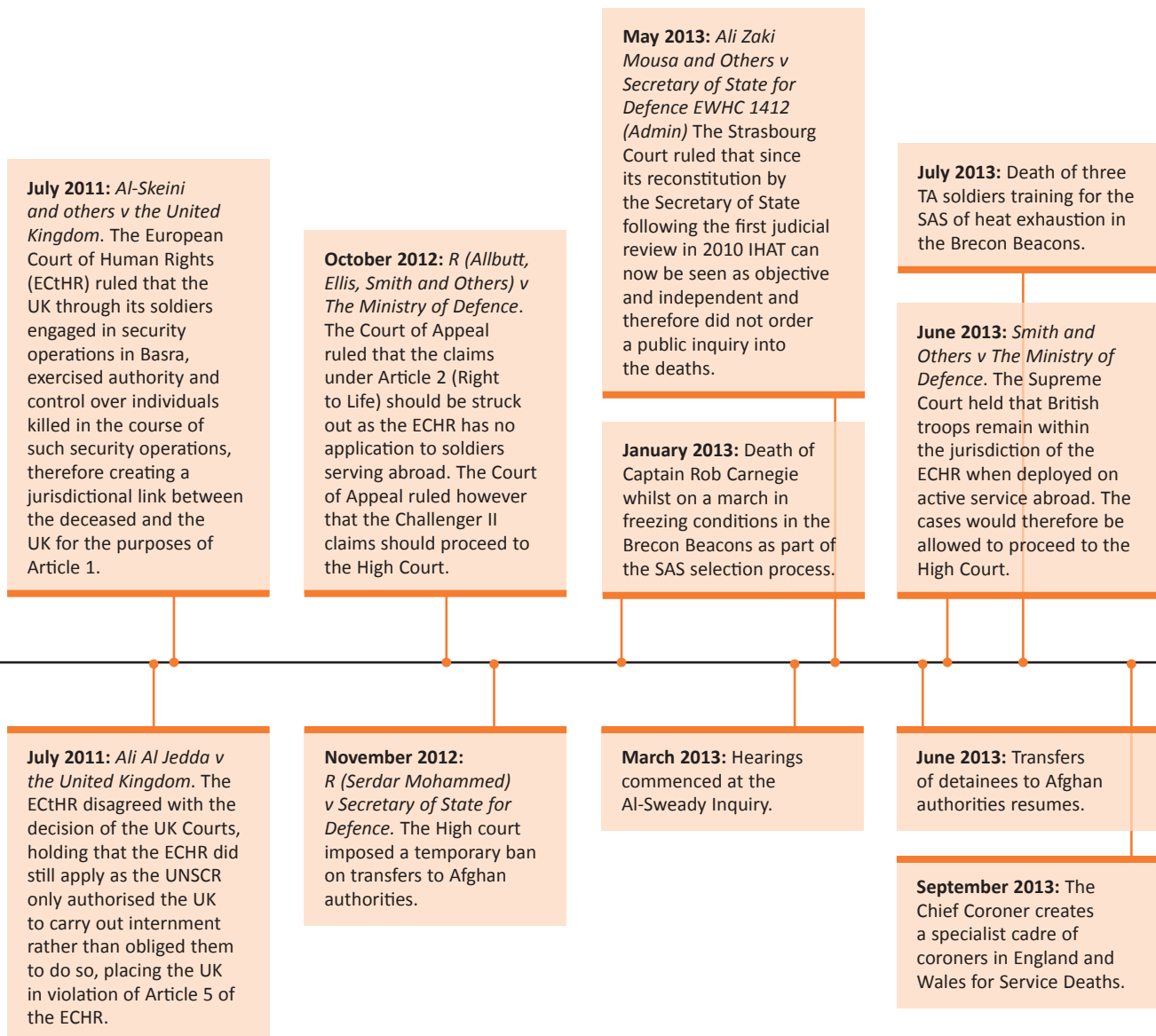
April 2008: *Corporate Manslaughter and Corporate Homicide Act*. The Act allows a corporate body to be prosecuted where serious management failures result in a fatality.

December 2007: *R (Al-Jedda) v The Secretary of State for Defence*. The House of Lords upheld the decision of the lower court ruling that "the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must ensure that the detainee's rights...are not infringed to any greater extent than is inherent in such detention".

April 2008: *R (Catherine Smith) v Assistant Deputy Coroner for Oxfordshire and Secretary of State for Defence* Catherine Smith, the mother of Private Jason Smith, who died of heat exhaustion, argued that the UK had owed her son a duty to respect his right to life which was protected by Article 2 of the ECHR and that the inquest had to satisfy the procedural requirements of an investigation into an alleged breach of that right. The High Court held that Private Smith had been protected by the HRA at all times in Iraq (both on and off base) and therefore ordered a fresh inquest.

July 2008: The Ministry of Defence agrees to pay approximately £3 million to the family of Baha Mousa.





Appendix C

Table of cases

Case	Background	Judgment
<i>Shaw Savill and Albion Company Ltd v The Commonwealth [1940] HCA 40</i>	The plaintiff owned a ship, 'The Coptic', which was in a collision with HMAS 'Adelaide'. The plaintiff alleged that the collision resulted from the negligence of the defendant's officers, saying the Adelaide was sailing too fast, that it failed to keep a proper lookout for the Coptic and that it was not navigated in a proper and seaman-like manner. The defence was that, at the relevant time, the Adelaide was part of the naval forces of Australia and was engaged in active naval operations against the enemy and therefore, owed no duty of care.	<p>The Court accepted that in principle the defence was open to the state as it could hardly be maintained that during an actual engagement with the enemy a navigating officer was under a common-law duty of care to avoid harm to such non-combatant ships as might appear in the theatre of operations.</p> <p>To not do so "would mean that the Courts could be called upon to say whether the soldier on the field of battle or the sailor fighting on his ship might reasonably have been more careful to avoid causing civil loss or damage. No one can imagine a court undertaking the trial of such an issue, either during or after a war. To concede that any civil liability can rest upon a member of the armed forces for supposedly negligent acts or omissions in the course of an actual engagement with the enemy is opposed alike to reason and to policy".</p> <p>The Court further held that such a defence could not be limited to the presence of the enemy. "Warfare perhaps never did admit of such a distinction, but now it would be quite absurd... The principle must extend to all active operations against the enemy. It must cover attack and resistance, advance and retreat, pursuit and avoidance, reconnaissance and engagement."</p>
<i>R v Her Majesty's Coroner for the Eastern District of the Metropolitan County of West Yorkshire, ex parte Ronald Smith [1982]</i>	Helen Smith was employed as a nurse at a hospital in Jeddah, Saudi Arabia. She died on 20 May 1979. It is said that she fell to her death from one of the balconies in a block of flats in the city. However, the circumstances of her fall and death were by no means clear and her father (Ronald Smith) wished to have them formally examined in order to determine, if possible, the cause of his daughter's fall and subsequent death.	<p>Mr Phillip Gill, Coroner for the Eastern District of the Metropolitan County of West Yorkshire, refused to hold an inquest on the grounds that the death occurred outside the jurisdiction of the English Courts.</p> <p>On 30 July 1982 the Court of Appeal, which had allowed an appeal of the Coroner's decision, quashed the decision and on 16 August 1982 the Coroner formally opened the inquest into the death of Helen Smith.</p>
<i>Mulcahy v Ministry of Defence [1996] EWCA Civ 1323</i>	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. He was standing in front of the gun and alleged that it was fired by the gun commander. The Ministry of Defence sought to have the application struck out as presenting no cause of action; however, the judge held that there should be a trial.	The court struck out the claim by application of Combat Immunity principles, stating that the claimant did not have a cause of action in negligence against the defendant. No duty of care can be owed by one soldier to another on the battlefield, nor can a safe system of work be required from any employer under such circumstances.

Case	Background	Judgment
<i>Matthews v Ministry of Defence</i> [2003] UKHL 4	<p>Matthews claimed that he had sustained personal injury caused by exposure to asbestos while he was serving in the Royal Navy between 1955–1968. Until 1987 the MOD had Crown Immunity from liability in tort for things done by members of the armed forces and for the nature or condition of land, premises, ships, aircraft or vehicles used for their purposes. Repeal of Crown Immunity in 1987 only made tort claims possible for subsequent events as it did not apply retroactively.</p> <p>Matthews argued that this immunity was incompatible with Article 6 of the ECHR as it deprived him of the right to have his civil rights determined by an independent and impartial tribunal.</p>	<p>The House of Lords decided that the claimant did not have any relevant right to claim damages from the Ministry of Defence under the substantive law of England, because the true effect of Crown Immunity (under section 10 of the Crown Proceedings Act) was that it preserved part of the ancient substantive law that “the King can do no wrong”. Consequently Article 6 was not relevant.</p>
<i>Multiple Claimants v The Ministry of Defence</i> [2003] EWHC 1134 QB	<p>The claimants were former members of the armed forces who claimed to have sustained psychiatric injury as a consequence of exposure to the stress and trauma of combat. They contended that the MOD was negligent in taking adequate steps to prevent the development of psychiatric illness and secondly in failing to detect, diagnose or treat such an illness.</p>	<p>The MOD was not held in the past to be in systematic breach when the risk of chronic/delayed Post Traumatic Stress Disorder was thought to be low. However four of the 14 lead claimants established a liability for breaches in their case after combat and in these cases the MOD was held to be in breach of duty in failing to provide safe systems of work, by, <i>inter alia</i>, monitoring the health of Service personnel so as to prevent psychiatric injury and to secure the diagnosis and treatment of psychiatric illness.</p> <p>Combat Immunity was defined as:</p> <ol style="list-style-type: none"> Not limited to the presence of the enemy or the occasions when contact with the enemy has been established. It extends to all active operations against the enemy in which Service personnel are exposed to attack or the threat of attack. It covers attack and resistance, advance and retreat, pursuit and avoidance, reconnaissance and engagement. Extending to the planning of and preparation for operations in which the armed forces may come under attack or meet armed resistance. Applying to peace-keeping/policing operations in which Service personnel are exposed to the threat of attack.
<i>Middleton, R (on the application of) v Coroner for the Western District of Somerset</i> [2004] UKHL 10	<p><i>Middleton</i> involved a suicide in a prison in circumstances where questions were raised as to whether appropriate precautions should have been taken to prevent the deceased taking his own life. During the summing up, the coroner informed the jury that, if they wished to do so, they could give him a note regarding specific areas of the evidence. In response, the jury handed in a note communicating its opinion that the Prison Service had failed in its duty to the deceased.</p>	<p>After <i>Middleton</i>, coroners were empowered and enabled to make narrative verdicts and to make comment under Rule 43 of the Coroners’ Rules 1984. The extension of the scope of their coronial jurisdiction by the judicial findings in <i>Middleton</i> obliged coroners to consider ‘how and in what circumstances the death occurred’.</p> <p>Coroners, thereafter, were able to investigate not only how a Serviceman’s death occurred but also the broader circumstances in which the death occurred.</p>

Case	Background	Judgment
<i>Bici and Another v Ministry of Defence</i> [2004] EWHC 786 QB	<p>On 2 July 1999 in Pristina, Kosovo, shortly after the liberation of the province by NATO troops, a car with eight people on board was driving around celebrating the allied victory and their independence day. Skender Bici was a rear passenger and Mohamet Bici was on the roof with a cousin, Fahri Bici, who was holding an AK47 and occasionally firing into the air. Fahri Bici also fired a pistol. He was a member of the Kosovo Liberation Army and, under an agreement with the allies, was not supposed to carry arms within two kilometres of the capital.</p> <p>As they drove through the town, they came across a British patrol. Three corporals from 1st Battalion, the Parachute Regiment then shot Fahri Bici claiming they were acting in self-defence. One said he shouted at Fahri Bici to put down his gun and gesticulated to him in order to show him what to do but Fahri Bici ignored him and continued shooting. All three soldiers claimed that although Fahri Bici had his back to them, he turned and brought his rifle down so that it was aimed at them. They then fired a total of 15 shots between them at him, believing that they were in danger. Fahri Bici was shot in the back and died. Avni Dudi, who was in the back seat with Skender Bici, also died. Mohamet Bici and another passenger were wounded.</p>	<p>Mr Justice Elias rejected that the soldiers were acting in self-defence and therefore found that the defence of Combat Immunity was not applicable.</p> <p>Elias J noted that Combat Immunity was exceptionally a defence to the Government and to individuals who take action in the course of actual or imminent armed conflict and cause damage to property or death or injury to fellow soldiers or civilians.</p> <p>Elias J held that any threat must be imminent and serious and that the principle of Combat Immunity should be narrowly construed.</p>
<i>R v Kevin Williams</i> [2005] ²¹²	<p>On 2 August 2003 Trooper Williams was on patrol with other soldiers near Ad Dayr in South East Iraq. The patrol discovered six Iraqis moving a cart containing heavy machine gun ammunition. The patrol managed to detain three of the men, but one, Mr Said, ran off. Trooper Williams and another soldier, Corporal Blair, gave chase and followed him into the courtyard of a private dwelling. Despite attempts to restrain him, Mr Said refused to be handcuffed. During the attempts to restrain him, Trooper Williams shot Mr Said. Mr Said was unarmed and he died the following day in hospital.</p> <p>The case was passed to the Attorney General, Lord Goldsmith, QC who decided that a prosecution should be brought in civilian courts rather than under military law.</p>	<p>The CPS charged Trooper Kevin Williams with murder on 7 September 2004. However, in April 2005 he was formally cleared after the CPS accepted that there was no longer a realistic prospect of conviction.</p> <p>Mrs Justice Hallett asserted in the build-up to the trial that “many people genuinely believe that this prosecution of Trooper Williams is a betrayal of soldiers who risk their lives for their country and who are expected to make difficult decisions in split seconds”.</p>
<i>Samantha Roberts v Ministry of Defence</i> [2006]	<p>In March 2003, tank commander Sergeant Steven Roberts, was shot dead by a comrade in a friendly fire incident – becoming the first casualty of the Iraq War.</p> <p>It was the argument of Samantha Roberts in <i>Samantha Roberts vs. MOD</i> that a real and effective breach of the duty of care was the result of the MOD’s decision not to purchase protective body armour in peacetime before declaring war and announcing the deployment.</p> <p>In December 2006 the Assistant Deputy Coroner for Oxfordshire concluded that the death of Sergeant Roberts was the result of an “unforgivable and inexcusable delay in issuing personal body armour to troops in Iraq”.²¹³ He concluded that to send soldiers into a combat zone without the appropriate basic equipment represents a breach of trust that the soldiers have in those in Government.</p> <p>The coroner further asserted, “Sergeant Roberts’ death was as a result of delay and serious failures in the acquisition and support chain that resulted in a significant shortage within his fighting unit of Enhanced Combat Body Armour, none being available to him”.²¹⁴</p>	<p>The case was settled before going to trial.</p>

Case	Background	Judgment
<i>Behrami and Behrami v France, and Saramati v France, Germany and Norway – 71412/01; 78166/01 [2007] ECHR</i>	Mr Saramati was detained by international forces in Kosovo (KFOR) on preventative grounds, on the basis of purported detention authority in Security Council Resolution 1244 – which was argued to prevail over ECHR.	Rather than debating the issue of Article 103, and detention provision, the ECtHR held that the actions of KFOR troops were not attributable to individual troop contributing states, but to the UN. As by authorising the mission in Kosovo, the UNSC supposedly exercised ‘ultimate and effective control’ over it.
<i>Kadi and Al Barakaat International Foundation v Council and Commission [2008] ECR I-6351</i>	The claimant had been designated on a sanctions list maintained by the UN Security Council and therefore had his assets frozen.	The central argument of the ECtHR was that the very foundation of the UN is the protection of fundamental rights and therefore all measures must be compatible with fundamental rights. As Kadi was not able to seek Judicial Review his rights were in breach. The Court ruled that a UNSCR would not have primacy over EU Law as EU Law constitutes an independent legal order that international law could only penetrate on the EU’s terms.
<i>Al-Saadoon and Another, R (on the application of) v Secretary of State for Defence [2009] EWCA Civ 7</i>	<p>The claimants were accused of involvement in the murder of two British soldiers shortly after the invasion of Iraq in 2003, and complained that their transfer into Iraqi custody put them at real risk of execution by hanging.</p> <p>The Basra Criminal Court decided that the allegations constituted war crimes and therefore fell within the jurisdiction of the Iraqi High Tribunal.</p> <p>The UK argued that since Iraq was a sovereign state, it would be a breach of Iraqi sovereignty not to transfer the men and transferred them.</p>	The ECtHR rejected the UK Government’s decision on the grounds that the decision to transfer the men to Iraqi custody was made after December 2005 and the reintroduction of the death penalty. The British sought no assurance that they would not be subjected to the death penalty, and the UK failed to establish that there were other means available by which to safeguard the fundamental rights of Al-Saadoon and Mufdhi. Secondly the ECtHR ruled that it was not open to the UK to enter into an agreement with another state which conflicted with its Convention obligations.
<i>R (on the application of Smith) (FC) v Secretary of State for Defence and another [2010] UKSC 29</i>	<p>Private Jason Smith was a member of the Territorial Army mobilised for service in Iraq in June 2003. On 9 August he repeatedly reported that he was feeling unwell, complaining of the heat; however, for the next four days he continued to carry out duties off base. On 13 August he collapsed and died of heat stroke.</p> <p>Private Smith’s mother claimed that the UK owed her son a duty to respect his Right to Life which was protected by Article 2 of the ECHR and that an inquest was needed to satisfy procedural requirements of an investigation into an alleged breach of that right. The Secretary of State countered that a soldier on military service abroad was not subject to the protection of the HRA when off base.</p>	<p>Both the High Court and the Court of Appeal ruled that Private Jason Smith was protected by the HRA at all times in Iraq – whether on or off base.</p> <p>In 2010 the Supreme Court overruled these earlier findings, holding that soldiers off base were not covered by the HRA. However, in 2013, the Supreme Court reverted to the earlier decision of the lower courts, finding that its 2010 judgment could no longer be considered “good law” following the ECtHR judgment in <i>Al-Skeini</i>, and found that the ECHR did extend to soldiers off base.</p>
<i>Evans, R (on the application of) v Secretary of State for Defence [2010] EWHC 1445 (Admin)</i>	In June 2009 Maya Evans, a peace activist and human rights campaigner, sought a Judicial Review of the detainee transfer policy applying to Afghans captured by British soldiers, following claims they were subject to torture after being handed to the Afghan authorities such as the National Directorate of Security (NDS).	In June 2010 Evans won a ‘partial victory’, with judges concluding that there was “a real risk that detainees transferred to NDS Kabul would be subjected to torture or serious mistreatment” and transfers would “therefore be in breach of the Secretary of State’s policy and unlawful”; but transfers to other NDS facilities, such as Kandahar and Lashkar Gah could continue as long as specific conditions were met.
<i>MacIntyre v Ministry of Defence [2011] EWHC 1690 QB</i>	The claimant was seriously injured in a climbing accident in the Bavarian Alps in the course of a formal army adventurous training exercise. The claimant argued that he was a novice climber, reliant on the expertise of the leaders; however, he claimed that the leaders were not formally qualified to lead novice climbers over a challenging route. The claimant asserted that had there been a sufficient assessment of the risk by the leaders, a different route would have been taken in the interests of safety.	The High Court held that the lead climbers and instructors owed a duty of care to take all reasonable steps to minimise the dangers of injury of death. However, in this case the court held that the lead climbers were appropriately qualified and were not in breach of their duty of care as the claimant’s injuries arose from a tragic accident rather than out of any negligence.

Case	Background	Judgment
<i>Al-Jedda v the United Kingdom – 27021/08 [2011] ECHR 1092</i>	<p>Hilal Abdul-Razzaq Ali Al-Jedda travelled from London to Iraq in September 2004, where he was arrested by US troops, accompanied by Iraqi national guards and British soldiers, on suspicion of being a member of a terrorist group involved in weapons smuggling and explosive attacks in Iraq (a charge which Al-Jedda himself always disputed).</p> <p>Al-Jedda was detained in a detention centre in Basra run by British forces, his detention was reviewed periodically and at every point it was concluded that he remained a threat until his release in February 2008.</p>	<p>The UK Courts and the House of Lords held that Al-Jedda was not entitled to the protection of Article 5 (Right to Liberty and Security) of the HRA because the UNSCR 1546 authorised internment and “all necessary measures”. The ECtHR however, unanimously disagreed with the decision of the UK courts, finding the UK in violation of Article 5.</p> <p>The ECtHR rejected the assertion that UNSC Resolution 1546 created an obligation to use internment in Iraq, ruling there “<i>must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention</i>”.</p>
<i>Al-Skeini and Others v The United Kingdom – 55721/07 [2011] ECHR 1093</i>	<p>The relatives of six Iraqis brought a suit against the UK, each claiming that the British had failed to conduct an adequate investigation into the deaths of their family members – all of whom were civilians. The first five individuals died in separate incidents involving British troops, the sixth, Baha Mousa, died in a military prison whilst in British custody.</p>	<p>The lower courts and the House of Lords held that while the sixth applicant, Baha Mousa, was within the UK’s jurisdiction with regard to the ECHR, the other five were not as the UK could not be considered to exercise ‘effective control’ over Basra.</p> <p>However, on 7 July 2011 the Grand Chamber of the Strasbourg Court held that the deaths of the other five claimants were within the territorial scope of the Convention and an investigative duty arose.</p> <p>The ECtHR held that the UK, through its soldiers engaged in security operations in Basra, exercised authority and control over individuals killed in the course of such security operations – therefore creating a jurisdictional link between the deceased and the UK for the purposes of Article 1 of the Convention, making the UK liable.</p>
<i>Birch v Ministry of Defence [2012] EWHC 2267 QB</i>	<p>The claimant suffered injuries in an accident in November 2006 when he was serving with the Royal Marines in Afghanistan. The claimant denied liability and claimed contributory negligence by the Ministry of Defence due to the vehicle’s defective steering, its unsuitability for negotiating the track where the accident happened, a lack of appropriate systems for training drivers and ensuring that those required to drive in off road conditions had the appropriate training.</p>	<p>The High Court ruled however, that there was no evidence of contributory negligence by the MOD; the claimant must take responsibility for his own decision to drive, even though he was permitted to do so by an officer. There was a degree of non-enforcement of procedures but it fell well short of establishing a failure to provide a safe system of work or a breach of a duty of care on the part of the MOD.</p>
<i>Noor Khan v Secretary of State for Foreign Affairs and Commonwealth Affairs [2012]</i>	<p>On 17 March 2011 a CIA drone strike killed Malik Daud Khan, a Pakistani tribal elder and others at a tribal council meeting in North Waziristan. On 13 March 2012 Mr Noor Khan applied for a British Judicial Review of UK drone policy.</p> <p>Leigh Day & Co, Noor Khan’s solicitors, issued the legal challenge in relation to the UK’s role in drone strikes, stating that its practice of sharing intelligence may be unlawful as only persons participating in an ‘international armed conflict’ are entitled to immunity from ordinary criminal law as ‘lawful combatants’. The UK is not at war with Pakistan and therefore it was the argument of Leigh Day & Co. that GCHQ, who share intelligence with the CIA for use in drone attacks, are therefore open to prosecution under UK law for murder. Even if GCHQ employees were not guilty of murder, they may be guilty of conduct ancillary to crimes against humanity or war crimes.</p>	<p>Rt Hon Lord Justice Moses and Mr Justice Simon at the High Court rejected the application for judicial review, citing a legal principle whereby the courts will not sit in judgment on the sovereign acts of a foreign state. Rt Hon Lord Justice Moses added that breaking with this principle would “imperil relations between the states”. In order to decide whether GCHQ agents might be open to prosecution if they shared information with the CIA that was used to target drone strikes, a UK court would have to rule on whether the CIA’s campaign in Waziristan could be considered a formal war, as this would allow the agents to claim Combat Immunity.</p>

Case	Background	Judgment
<i>R (Serdar Mohammed) v Secretary of State for Defence</i> [2012] EWHC 3454 (Admin)	Serdar Mohammed is an Afghan citizen who was detained by British forces in Afghanistan and subsequently handed over to the Afghan authorities. In the early morning of 7 April 2010 he was detained by UK forces while he was irrigating his family's fields situated outside their village in Northern Helmand. He sought judicial review of the UK's decision to transfer detainees to the Afghan authorities.	Following the Serdar Mohammed case in November 2012, the High Court imposed a temporary ban on transfers to Afghan authorities. A ban had been in place since April 2012, but the MOD had been planning to resume transfers in October 2012.
<i>Patterson v Ministry of Defence</i> [2012] EWHC 2767 QB	In November 2003 after training at Pirbright and elsewhere, the claimant served for a period in Iraq. In February 2006 he was deployed to Norway. While in Norway he undertook with others a week of cold weather survival training and during this training he experienced a burning pain in his feet and sustained a cold injury known as 'non-freezing cold injury' (NFCI). The claimant alleged that his cold injury was caused by negligence or a breach of statutory duty on the part of the MOD.	In April 2011 the claim was settled by payment of £75,000 in respect of damages. The claimant contended however, that NFCI is a 'disease' – therefore warranting a higher level of compensation. The appeal in this case was rejected.
<i>Nada v Switzerland – 10593/08 – Hejud</i> [2012] ECHR 1691	In the case of <i>Nada v Switzerland</i> , under UNSCRs 1267, 1333 and 1390, the Swiss Federal Council adopted measures against individuals whose names were on a list maintained by the Security Council's Sanctions Committee. The measures froze the assets of listed persons and restricted their travel. Nada's name was added to the list in November 2001. Nada requested that his name be removed from the list; however, this request and subsequent appeals were denied. He was successful in having it delisted in September 2009 having always contested his inclusion on the List. He claimed before the ECtHR that he had been deprived of several rights under the ECHR.	The court distinguished the case from Al-Jedda as UNSCR 1390 expressly required Switzerland to infringe on freedoms under Article 8. Due to the explicit language, imposing an obligation to take measures capable of infringing human rights, the court found that the Al-Jedda principle had been rebutted. However, the court did not then address whether the authority of the resolution prevailed under UN Charter Article 103. Instead, the court ruled that Switzerland could have done more to harmonise the divergent obligations, minimising the intrusions on Nada's human rights further.
<i>Haidar Ali Hussein v The Secretary of State for Defence</i> [2013] EWHC 95 (Admin)	Haidar Ali Hussein is an Iraqi national and had been arrested in April 2007 and questioned. He alleged that he had been ill-treated and that he had been shouted at for substantial periods throughout the course of his questioning.	The claim challenged the lawfulness of an element of the policy of questioning by the armed forces, particularly interrogation and tactical questioning. The policy to which the claim pertained was no longer current policy; although shouting was still permitted. Therefore, the claim was considered on its merits. If (which was doubted) shouting could be regarded as oppressive, it is not sufficiently oppressive so as to amount to inhumane treatment. Shouting is not an assault, and does not amount to coercion or oppression and it is not threatening or abusive. The claimant was unsuccessful.
<i>Ali Zaki Mousa and Others v Secretary of State for Defence</i> [2013] EWHC 1412 (Admin)	The claimants are Iraqi citizens who claim that they were ill-treated by the British armed forces in Iraq or are relatives of those who were killed by the British armed forces. They brought Judicial Review proceedings in February 2010 claiming that the investigation established by the defendant, the Secretary of State for Defence – the Iraq Historic Allegations Team [IHAT] – was neither independent nor in adequate compliance with the investigative duties under Article 2 and Article 3 of the ECHR. The claimants succeeded in establishing that this initial investigation was not sufficiently independent. They then contended that the reconstituted investigation was still not independent and they sought a more far reaching inquiry.	The Strasbourg court ruled in May 2013 that since its reconstitution by the Secretary of State following the first Judicial Review, IHAT can now be objectively seen as independent and did not order an overarching public inquiry into the deaths.

Case	Background	Judgment
<i>Smith and Others v The Ministry of Defence</i> [2012] EWCA Civ 1365	This case arose out of the deaths of soldiers using Snatch Land Rovers and Challenger II tanks in Iraq during Operation TELIC (the operational name for the Iraq War) between January 2003 and July 2009, and asserts claims under the ECHR as well as negligence with respect to duty of care obligations.	The Supreme Court ruled on the case in June 2013 following its progress through the High Court and Court of Appeal, finding that (with respect to the Snatch Land Rover Claims) British troops remain within the UK's jurisdiction when deployed on active service abroad, and so attract the protections of the HRA; and that whether obligations to take preventative measures to protect the soldiers who were required to patrol in Snatch Land Rovers were breached could be heard by the High Court. The court also found that the principle of Combat Immunity did not negate the MOD's duty of care during the military activities in question.
<i>The State of the Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v Hasan Nuhanovic</i> [2013]	The case related to incidents in July 1995 when Bosnian Serb forces overwhelmed a force of fewer than 400 lightly armed Dutch peacekeepers and seized control of the area, killing nearly every man and boy they captured. Hasan Nuhanovic, worked as a United Nations translator. He and his father were told that they were allowed to stay within the walls of the United Nations compound in Srebrenica. However, soldiers ordered his younger brother and mother to leave the compound and his father decided to join them. They were never seen again.	The Supreme Court in the Netherlands held that the Netherlands was responsible for the deaths, as Dutch peacekeepers had wrongfully ordered them to leave the United Nations compound. The court found that although the United Nations was in charge of the peace mission, in the days after the Serbian takeover, the Dutch authorities had "effective control" over the troops and therefore shared responsibility.
<i>Jaloud v The Netherlands</i> 47708/08 ECHR [on-going]	On 21 April 2004 an unknown car passed a vehicle checkpoint 'B-13' on the main supply route to 'Jackson' north of the town of Ar-Rumaytah. The car slowed down and turned. Shots were fired from the car at the personnel guarding the checkpoint, all of them members of the Iraqi Civil Defence Corps (ICDS). The guards returned fire; no one was hit, and the car drove off. An ICDS Sergeant summoned a patrol of six Netherlands soldiers to the scene. Fifteen minutes later a Mercedes car approached the checkpoint at speed. It hit one of the barrels in the middle of the road and continued. Shots were fired into the car by the leader of the patrol and shots may also have been fired by one or more ICDS personnel. The car stopped and the applicant's son was in the front passenger seat of the car. He was hit in several places, including the chest. Jaloud was declared dead one hour after the incident. The x-ray examination of the body could not determine from what weapon the bullets had been fired or by whom.	In 2007 the applicant lodged a request for the prosecution of the Lieutenant he held responsible for the shooting. The Public Prosecutor however argued that there was no violation of Article 2 of the ECHR, since the ECHR did not bind Netherlands troops in Iraq as the Netherlands had not exercised effective authority in the country. This was echoed by the Advocate General who stated that "it was reflected in UNSC 1483 that co-operating states did not have the status of occupying powers". The case is on-going and will apply the precedent of 'effective control' established in the case of <i>Al-Skeini</i> .
<i>Pritchard v The United Kingdom</i> 1573/11 ECHR [on-going]	Dewi Pritchard was fatally shot in Basra in August 2003 when the vehicle he was driving came under fire. His father alleges under Article 2 (Right to Life) and Article 13 (Right to an Effective Remedy) that the UK authorities failed to carry out a full and independent investigation into his son's death.	On-going at the ECtHR.
<i>Khadim Resaan Hassan v The United Kingdom</i> 29750/09 ECHR [on-going]	In April 2003 Tarek Resaan Hassan was detained by UK military personnel in Iraq. He was then taken to Camp Bucca, which at that time was regarded as a 'US facility'. He was released in May 2003, however, his dead body was subsequently found in the countryside, with both hands tied with plastic wire and his body had several bruises and bullet wounds. The Secretary of State held that the UK was only responsible under the ECHR for events within its territorial jurisdiction – of which Camp Bucca was not.	The UK Courts held that the application for Judicial Review must be dismissed. Camp Bucca was not considered to fall within the jurisdiction of the ECHR. However, the claimant submitted that the detention of his brother fell within the exceptional category of jurisdiction as articulated in <i>Al-Skeini</i> – namely the exercise by agents of the UK of effective control and authority over an individual in a foreign territory. The case will be heard by the ECtHR in December 2013.

212 "R v Kevin Williams", Crown Prosecution Service, 7 April 2005. www.cps.gov.uk/news/latest_news/120_05/

213 Claire Taylor, Afghanistan: Equipment Issues – Commons Library Standard Note, 14 July 2009. www.parliament.uk/briefing-papers/SN05128.pdf%E2%80%8E

214 Claire Taylor, Afghanistan: Equipment Issues – Commons Library Standard Note, 14 July 2009. www.parliament.uk/briefing-papers/SN05128.pdf%E2%80%8E

Britain's Armed Forces are under threat from a sustained legal assault which could paralyse the effectiveness of the military with catastrophic consequences for the safety of the nation.

In the past, those serving in the Armed Forces were protected from prosecution under Combat Immunity while the Law of Armed Conflict ensured that the minimum harm was done to all affected by conflict. However, recent legislation and judicial findings have extended the domestic common law claims of negligence and civil claims of duty of care to the combat zone. These constraints have led to confusion among commanders undermining their interaction with allies and affecting the combat capability of the services. In the long run, the report says that the rise of 'legal creep' could pose a "mortal threat to the culture and ethos of the military which cannot be easily reversed."

This report warns that the, "extension of law risks catastrophically weakening the UK". It says that it may not be long before either a foreign power or sub-state forces begin to sponsor legal actions as a way of paralysing the Armed Forces through legal process. If the costs of litigation continue to rise, the MOD will have to ask the Treasury Reserve to fight legal as well as military action, or risk having procurement and vital funds for UK service personnel diverted.

"I welcome this timely contribution to the debate about the appropriate balance between legal protections and freedom of decision-making by commanders in the field. I remain concerned about the challenge to combat immunity arising from recent court judgments. These could make it more difficult for our troops to carry out operations in the future, and they potentially throw open a wide range of military decisions to the uncertainty of litigation. It cannot be right that troops on operations have to put the European Convention on Human Rights ahead of what is operationally vital to protect our national security."

Rt Hon Philip Hammond MP, Secretary of State for Defence