HOUSE OF LORDS

Library Note

Debate on 7 November: The Armed Forces and Legal Challenge

This Library Note provides background reading for the debate to be held on Thursday, 7 November on:

"the case for protecting the armed forces from vulnerability to legal challenge"

In June 2013, the Supreme Court ruled that British servicemen deployed overseas could fall within UK jurisdiction for the purposes of the European Convention on Human Rights (ECHR). In October 2013, the Policy Exchange think tank published a report which argued that such "legal mission creep" could "paralyse the effectiveness of the military". This Note looks at some of the issues raised. It examines both the obligations of UK armed forces deployed overseas to local civilians and the Government's obligations to members of the armed forces, particularly regarding the extraterritorial application of the ECHR. It also considers the prospects for change in the legal frameworks that apply to the military, including the possibility of derogation from the ECHR.

Nicola Newson
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1. Introduction

In recent months, there has been an increasing spotlight on the legal framework that applies to British armed forces personnel and the military operations they carry out. In May 2013, the High Court ordered hundreds of inquest-style public hearings to investigate alleged unlawful killings and mistreatment of civilians by British forces in Iraq—the latest development in nearly a decade of legal proceedings and public inquiries relating to such allegations.[1] In June 2013, the Supreme Court held that two British servicemen killed in Iraq were within the UK's jurisdiction for the purposes of the European Convention on Human Rights (ECHR) at the time of their deaths.[2] This prompted headlines proclaiming that "soldiers have the right to life even in war zones".[3] It reversed an earlier Supreme Court judgment from 2010 that members of the British armed forces deployed abroad were not within the UK's jurisdiction for the purposes of the ECHR, and so were not protected by the Convention rights.[4] The June 2013 judgment has been described as possibly "one of the most important legal judgments in military history".[5]

The House of Commons Defence Committee announced in July 2013 that it would conduct an inquiry into the UK armed forces and the legal framework for future operations. The inquiry is set to cover the legal protections and obligations applying to UK armed forces personnel when deployed; the effects of the developing concepts and doctrines of 'lawfare' and 'universal jurisdiction'; the judicial development of duty of care concepts and of domestic UK law and negligence claims; and what changes might be necessary to the current Ministry of Defence (MoD) legal framework.[6] The inquiry is ongoing and the Committee has not yet published its report or any evidence received.

In October 2013, the Policy Exchange think tank published a report by Thomas Tugendhat (a Lieutenant Colonel in the Territorial Army) and Laura Croft (a lawyer and retired US Army Lieutenant Colonel) entitled *The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power*, which argued that "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".[7] The authors' contention is that "legal mission creep", namely "the application of laws originally designed for domestic civilian cases to military operations overseas" has "changed the way the armed forces can act".[8]

Tugendhat and Croft seek to make clear in their report that "the armed forces neither should be, nor are, above or exempt from the law".[9] Rather, their report questions whether it is

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[1] *R (on the application of Mousa)* v *Secretary of State for Defence* [2013] EWHC 1412 (Admin); Danielle Munroe, '"Mistreatment" under scrutiny', *New Law Journal*, 30 May 2013, Vol 163 Issue 7562,

[2] *Smith and others (Appellants)* v *The Ministry of Defence (Respondent)* [2013] UKSC 41

[3] Terri Judd, 'Supreme Court Ruling that Soldiers Have the Right to Life Even in War Zones Will Have Major Ramifications for MoD', *Independent*, 19 June 2013

[4] *R (on the application of Smith)* v *Secretary of State for Defence* [2010] UKSC 29. NB: Although the two cases both involved parties called Smith, and were both to do with the death of British servicemen in Iraq, they are two distinct cases relating to entirely separate incidents in Iraq. The 2010 case is often referred to in the literature as *Catherine Smith* or *Smith (No 1)*.

[5] Thomas Tugendhat and Laura Croft, *The Fog of War: An Introduction to the Legal Erosion of British Fighting Power*, Policy Exchange, October 2013, p 15

[6] House of Commons Defence Committee, 'New Inquiry: UK Armed Forces and the Legal Framework for Future Operations', 3 July 2013

[7] Policy Exchange, 'The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power—Synopsis', 18 October 2013

[8] Thomas Tugendhat and Laura Croft, op cit, p 10

[9] ibid

appropriate for civilian standards of human rights and duty of care to apply to the military given the unique circumstances under which they operate. Philip Hammond, the Secretary of State for Defence, welcomed the report as a "timely contribution to the debate about the appropriate balance between legal protections and freedom of decision-making by commanders in the field".[10] Martyn Day, a lawyer whose firm has represented some of the claimants against the Government, dismissed the publication as "an entirely biased report, which seems to have been written with the full cooperation of the MoD".[11]

This Note looks at some of the issues raised by these debates. Section 2 very briefly examines the international and domestic legal frameworks that have traditionally applied to the armed forces, and considers some of the reasons why norms in this area have been changing over recent years. Section 3 considers the obligations of UK armed forces to civilians, with particular reference to legal cases dealing with the application of ECHR rights to civilians who have been detained or killed by British troops deployed overseas. Section 4 looks at the Government's obligations to members of the armed forces, in terms of ECHR rights, combat immunity and duty of care whilst on deployment, and the impact of health and safety legislation on military training. The final section considers the prospects for change in the legal frameworks that apply to the military, including the possibility of a derogation from the ECHR.

2. Context

2.1 International and Domestic Legal Frameworks

The application of laws to military personnel and to the conduct of armed conflict is nothing new. Professor Anthony Forster has written that "for over 200 years wars have been governed by the laws of war and national legislation".[12] International humanitarian law—which is also referred to as the 'law of armed conflict', or the 'law of war'—is defined by the International Committee of the Red Cross as:

> […] a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare.[13]

International humanitarian law is based on a large number of treaties, in particular the Geneva Conventions of 1949 and their Additional Protocols, and a series of other conventions and protocols covering specific aspects of the law of armed conflict.[14] Standards of military behaviour have long been regulated by domestic rules and legislation: the Royal Navy introduced the first version of what is now known as the Queen's Regulations in 1731.[15] More recently, the Armed Forces Act 2006 replaced the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957, which set out disciplinary frameworks for each of the services, with a single, harmonised disciplinary system governing all members of the armed forces.[16]

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[10] Policy Exchange, 'The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power—Testimonials', 18 October 2013, p 11
[11] *Guardian*, 'Military at Risk of Paralysis From Human Rights Cases, Think-Tank Argues', 18 October 2013
[12] Anthony Forster, 'British Judicial Engagement and the Juridification of the Armed Forces', *International Affairs*, 2012, 88:2, p 283
[13] International Committee of the Red Cross (ICRC), 'War and International Humanitarian Law', accessed 29 October 2013
[14] ICRC, 'Treaties and Customary Law: Overview', 29 October 2010, accessed 29 October 2013
[15] Thomas Tugendhat and Laura Croft, op cit, p 18
[16] Explanatory Notes to the Armed Forces Act 2006

Forster argues that the international and domestic legal framework governing the armed forces traditionally "depended upon a series of five connected principles that created commanding and uncontested assumptions about relationships and behaviours".[17] Firstly, the government of the day set out the bargain between the armed forces and the state, and then policed it; decisions about the legality of going to war were never contested. Secondly, the unique circumstances in which service personnel found themselves (being asked to risk their own lives or take the lives of others) required special legal treatment.[18] This gave rise to principles such as combat immunity and Crown immunity. The concept of "combat immunity" has been defined as:

> A common law doctrine that operates to exclude civil liability for negligence and deliberate damage to property or person committed by the armed forces during certain combat operations.[19]

Writing on the UK Human Rights blog, Rosalind English explains how this has typically operated in practice:

> The combat immunity rule was established during WWII and extends to all active operations against the enemy. While in the course of actually operating against the enemy, the armed forces are under no duty of care to avoid causing loss or damage to those who may be affected by what they do. And this immunity is 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, including the planning and preparation for the operations in which the armed forces may come under attack or meet armed resistance. The rule was endorsed and enhanced in *Mulcahy* v *MoD* [1996], which established that there is no duty on the defendants in battle conditions to maintain a safe system of work.[20]

Prior to 1987, section 10 of the Crown Proceedings Act 1947 gave Crown immunity to the MoD from actions pursued in tort, meaning that "a serviceman or woman injured while on duty could not sue the Ministry of Defence as his employer for compensation".[21]

A third important principle underpinning the traditional legal framework, according to Forster, was the presumption that "citizens voluntarily joining the armed forces accepted some restrictions on their human rights".[22] Fourthly, there was an acceptance by both the military and the Government that "the distinct obligations and responsibilities of the armed forces necessitated an essentially separate military judicial system".[23] Finally, Forster argues that "there was tacit acquiescence from families and supporters that they had no […] ability to challenge the decisions of the MoD".[24]

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[17] Anthony Forster, op cit, p 284
[18] ibid
[19] *Oxford Dictionary of Law*, 6th Edition, 2006, p 100
[20] Rosalind English, "'Snatch Rover" Case—Inviting Judges into the Theatre of War?', UK Human Rights Blog, 20 June 2013
[21] Thomas Tugendhat and Laura Croft, op cit, p 23
[22] Anthony Forster, op cit, p 285
[23] ibid
[24] ibid

2.2 The Process of 'Juridification'

Tugendhat and Croft argued in their Policy Exchange report that "recent legal developments have undermined the armed forces' ability to operate effectively on the battlefield".[25] Forster concurs that there "appears to be a strong case" that there has been a process of "juridification" of the British armed forces, "defined as the colonisation of the conduct of conflict by legal criteria which have drawn judges into arbitrating on issues previously based on trust".[26] In Tugendhat and Croft's view, "the main weapon used in the legal challenge against the MoD in the UK is the ECHR", as incorporated into domestic law by the Human Rights Act 1998 (HRA).[27] Forster agrees that:

> A particular consequence of the effect of the ECHR as a treaty internationally binding on the Crown, and its subsequent incorporation into domestic law under the HRA, is that courts have become the principal arena for the determination of key aspects of the conduct of war, through important judgments about the extent of the obligations of the state extraterritorially under the ECHR.[28]

He points out that the supranational role of both the European Court of Justice and the International Criminal Court has also contributed to "the creation of legal jurisdiction beyond UK national territory".[29]

As well as these legal developments, Forster also identifies a number of political and social changes that have contributed to reshaping the traditional relationship between the state and the armed forces. He argues that since there is no longer "any sense of an enduring national interest", British governments are now more willing to review previous governments' use of military force (eg the Saville Inquiry into Bloody Sunday and the Chilcot Inquiry into the UK's involvement in Iraq).[30] He points out that "parastatal organisations" are now more willing to contest the authority of the government of the day, so for example the Equality and Human Rights Commission (EHRC) and its predecessors have "played an important role in contesting MoD policies and practices".[31] Similarly, he contends that since 1997, families and service personnel have increasingly "sought to use the legal process to hold the government to account in domestic courts for the conduct of war".[32] In Forster's view, one manifestation of this is the way in which inquests into the deaths of service personnel overseas have become:

> […] an arena independent from the MoD in which families could contest the cause of death of love ones, using the powers of the coroners' courts to demand the MoD release information to families on the circumstances and cause of death.[33]

Forster speculates that this change in social attitude may owe something to the fact that recent military deployments have been "'wars of choice' rather than wars of national survival".[34]

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[25] Thomas Tugendhat and Laura Croft, op cit, p 10
[26] Anthony Forster, op cit, p 295
[27] Thomas Tugendhat and Laura Croft, op cit, p 17
[28] Anthony Forster, op cit, p 288
[29] ibid, pp 286–8
[30] ibid, pp 289–90
[31] ibid, p 290. The EHRC was granted permission to intervene in *Smith* [2013]—see section 4 of this Note.
[32] ibid, p 291
[33] ibid, p 293
[34] ibid, p 292

Forster concludes that "the cumulative effect of juridification is that the certainties of the old order have indeed disappeared", which is "very worrying for those who need to know the legal basis of the actions service personnel are being asked to undertake".[35] He views the outcome as a shift from a system of self-regulation and hierarchy to a rights-based system, and argues that rights-based systems are "inherently unstable, because it is almost impossible to bring all the rights possessed by the all parties involved into alignment".[36] For their part, Tugendhat and Croft emphasise what they see as the undesirable military implications of the new legal regime:

> 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.
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> But imagine if the United Kingdom was faced with a war of national survival—with the courts holding inquiries into combat deaths: the military would be hamstrung by the 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.[37]

3. Obligations of UK Armed Forces to Civilians

3.1 *Al Skeini:* Investigations into Deaths and Allegations of Abuse

Recent legal challenges to the armed forces can broadly be divided into two categories: those which relate to the armed forces' treatment of civilians, and those which relate to the armed forces' treatment of their own personnel (for the latter, see section 4 of this Note). There have been a number of judgments concerning the application of the ECHR to foreign nationals who have been killed or detained by British service personnel deployed on operations outside the UK. Article 1 of the ECHR requires parties to the Convention to "secure within their jurisdiction the rights and freedoms" defined in the ECHR. The extent of parties' jurisdiction and the extent to which the ECHR therefore applies outside the UK (extraterritorial application) are important legal questions. The traditional understanding of extraterritorial application was set out in *Bankovic* [2001] when the Grand Chamber of the European Court of Human Rights (ECtHR) held that the notion of jurisdiction was "essentially territorial" and that "only in exceptional circumstances" would acts performed outside a state's own territory constitute "an exercise of jurisdiction" within the meaning of Article 1.[38] More recent cases have developed on this area of law.

In *Al Skeini*, the families of six Iraqis who died in Basra in 2003 brought legal action against the MoD, claiming that the British authorities had failed to conduct adequate investigations into the deaths of their relatives. Four of the deceased had been shot by British troops out on patrol; one was a bystander who had been shot and killed in the course of an exchange of fire between British troops and Iraqi gunmen; and the sixth, Baha Mousa, died at a military base while in the custody of British troops. In March 2004, Geoff Hoon, the then Secretary of State for Defence, decided not to order an independent inquiry into the deaths and denied liability for them. The

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[35] ibid, p 297
[36] ibid, p 299
[37] Thomas Tugendhat and Laura Croft, op cit, p 54
[38] *Bankovic* v *Belgium* [2001] 11 BHRC 435, para 67

families of the deceased Iraqis applied for judicial review.[39] The court had firstly to decide whether Article 1 of the ECHR and the Human Rights Act 1998 (HRA) applied. The court also had to decide whether the Secretary of State had failed in his procedural duty under the Convention to investigate possible breaches by British troops of Article 2 (the right to life) and, in the case of Baha Mousa, Article 3 (the prohibition of torture), of the ECHR.[40]

The High Court found that Baha Mousa's death in the custody of British forces in Iraq did come within the scope of the ECHR and the HRA, and that in his case, there had been a breach of the obligation arising under Articles 2 and 3 of the Convention to carry out a proper investigation.[41] However, the High Court ruled that "as Iraq was not within the regional sphere of the Convention", the complaints of the first five claimants did not fall within the UK's jurisdiction for purpose of Article 1 of the Convention.[42] This decision was upheld by the Court of Appeal in 2005 and the House of Lords in 2007.[43] The Law Lords unanimously held that "the obligation to secure the Convention rights would arise only where a contracting state had such effective control over an area as to enable it to provide the full package of rights and freedoms guaranteed by Article 1 of the Convention" and that the British presence in Iraq fell far short of such control.[44]

However, the Grand Chamber of the European Court of Human Rights (ECtHR) took a different view in *Al Skeini*. It noted that one of the exceptional circumstances in which the ECHR would apply extraterritorially was when a state bound by the ECHR exercised 'public powers' on the territory of another state.[45] The ECtHR ruled that the UK "assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government", in particular "responsibility for the maintenance of security in south-east Iraq".[46] It followed that during the period in question, the UK "exercised authority and control over individuals killed in the course of such security operations" and that there was therefore a jurisdictional link between the UK and the Iraqis who had been killed.[47] The ECtHR also held that the UK had failed to carry out an adequate investigation under Article 2 into the deaths of five of the Iraqis (with the exception of Baha Mousa, into whose death a public inquiry was held).

Further legal claims have been brought against the Government regarding the form that inquiries into deaths and allegations of abuse should take in order to comply with the requirements of the ECHR. In 2010, the Government established an Iraq Historic Allegations Team (IHAT) to investigate allegations of abuse of Iraq citizens by British service personnel.[48] The reporting chain within IHAT included members of the Royal Military Police (RMP), and in November 2011 the Court of Appeal ruled that this meant that "the practical independence of IHAT [was], at least as a matter of reasonable perception, substantially compromised", because the RMP had been involved in detentions in Iraq.[49] The MoD made changes to the arrangements for IHAT and in May 2013, the High Court ruled that IHAT was independent and "objectively,

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[39] *R (on the application of Al Skeini and others)* v *Secretary of State for Defence* [2004] EWHC 2911 (Admin)
[40] [2004] All ER (D) 197 (Dec)
[41] [2004] EWHC 2911 (Admin), para 344
[42] [2004] All ER (D) 197 (Dec)
[43] [2005] EWCA Civ 1609 and [2007] UKHL 26
[44] Rosalind English, ""Snatch Rover" Case—Inviting Judges into the Theatre of War?', UK Human Rights Blog, 20 June 2013
[45] *Al Skeini and others* v *United Kingdom* [2011] ECHR 55721/07, para 131
[46] ibid, para 149
[47] ibid, paras 149–50
[48] HC *Hansard*, 1 November 2010, cols 27–8WS
[49] *R (on the application of Mousa)* v *Secretary of State for Defence* [2011] EWCA Civ 1334, para 38

can be seen as independent".[50] However, the High Court also decided that in relation to cases where deaths had occurred, IHAT was "not sufficient" to meet the requirements under Article 2 of the ECHR for investigating the circumstances of those deaths.[51] Instead, the court ruled that inquest-style inquiries should be conducted into each of the deaths, with the possibility of doing the same for a sample of the more serious cases of alleged abuse.[52] The Divisional Court ruled in October 2013 that compelling service personnel to give evidence would "be the only effective and fair way of determining what happened" because of the "overwhelming probability […] that soldiers will be reluctant to give evidence at all".[53]

It is estimated that there may be as many as 150 to 160 deaths to be investigated, and 700 to 800 cases involving allegations of mistreatment.[54] The Baha Mousa inquiry cost £25 million, and the Al Sweady inquiry, which is still ongoing, has cost more than £17 million so far.[55] Other inquiries established by the Secretary of State (prior to the High Court ruling in May that there should be inquest-style inquiries into each death) are costing about £7.5 million a year.[56]

Commentators on the ECtHR's judgment in *Al Skeini* have highlighted the uncertainties that it leaves for domestic courts. Misa Zgonec-Rozej, from the International Secretariat of Amnesty International, commented on the Court's "inability to construe in clear and consistent terms the concept of extraterritorial jurisdiction" and criticised it for "simply tailor[ing] it to suit the specific facts and circumstances of any given case".[57] Brice Dickson notes that "it left a number of questions unanswered, not the least of which was whether all or only some of the Convention rights could be claimed by residents in this area of Iraq".[58] Tugendhat and Croft point out the anomaly that it creates, whereby "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".[59]

3.2 *Al-Jedda*: Detention

In 2005, Hilal Abdul Razzaq Ali Al-Jedda, who had been arrested on suspicion of being a member of a terrorist group involved in weapons-smuggling and then detained in a British detention centre in Basra, took legal action to challenge his indefinite detention without trial.[60] The House of Lords upheld the decision of the lower courts that the UK was authorised by UN Security Council Resolutions (UNSCRs) to exercise powers of detention "where it was necessary for imperative reasons of security in Iraq".[61] The Law Lords also held that the obligations contained in the UNSCRs prevailed over the obligations imposed by Article 5 of the ECHR (the right to liberty and security) because of the wording of Article 103 of the UN Charter which states: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". Once again, the Grand

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[50] *R (on the application of Mousa)* v *Secretary of State for Defence* (No 2) [2013] EWHC 1412 (Admin), para 109
[51] ibid, para 179
[52] ibid, paras 212–31
[53] *R (on the application of Mousa)* v *Secretary of State for Defence* [2013] EWHC 2941 (Admin), para 15
[54] [2013] EWHC 1412, para 3
[55] ibid, para 4
[56] ibid
[57] Misa Zgonec-Rozej, '*Al Skeini* v *United Kingdom*', *American Journal of International Law*, January 2012, 106:1, pp 131–7
[58] Brice Dickson, *Human Rights and the United Kingdom Supreme Court*, 2013, p 96
[59] Thomas Tugendhat and Laura Croft, op cit, p 15
[60] *R (on the Application of Al-Jedda)* v *Secretary of State for Defence* [2005] EWHC 1809 (Admin)
[61] *R (on the Application of Al-Jedda)* v *Secretary of State for Defence* [2007] UKHL 58

Chamber of the ECtHR took a different view, holding that because the UNSCR authorised the UK to detain prisoners, but did not oblige it to do so, Article 103 of the UN Charter was not engaged.[62] The ECtHR found unanimously that Al-Jedda fell within the UK's jurisdiction, and by sixteen votes to one that the UK had violated his rights under Article 5(1) of the ECHR.

In their Policy Exchange report, Tugendhat and Croft maintain that detention is "a tool" for the armed forces, which may sometimes be their "least bad choice" in order to protect themselves, their allies, or the local population. The authors also point out that detention is already regulated in international humanitarian law, which allows the detention in humane conditions of those deemed a security risk until the end of hostilities.[63] They argue that the ECtHR judgment in *Al-Jedda*, which gives detainees rights under the ECHR, has significant implications for compensation claims against the UK, the conduct of future operations by the military and the drafting of future 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. 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 [...]
>
> 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 [...] 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.[64]

However, Marko Milanovic, an academic who specialises in the area of the extraterritorial application of human rights treaties, welcomed the ECtHR's ruling in *Al-Jedda* as "an incredibly important development".[65] The ECtHR's expectation that the Security Council should use "clear and explicit language" if it "intend[ed] states to take particular measures which would conflict with their obligations under international human rights law" would, believed Milanovic, "go a long way in providing a meaningful human rights check on the Security Council".

4. Obligations of UK Government to Armed Forces Personnel

4.1 *Smith*: Convention Rights and Combat Immunity

Cases have also been brought concerning the extent to which ECHR rights apply to British service personnel deployed outside the UK. The most recent of these came in June 2013, when the Supreme Court ruled on three cases relating to the deaths and serious injuries of British

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[62] *Al-Jeddah* v *United Kingdom* [2011] ECHR 27021/08
[63] Thomas Tugendhat and Laura Croft, op cit, p 37
[64] ibid, p 41
[65] Marko Milanovic, 'European Court Decides *Al Skeini* and *Al Jedda*', EJIL: Talk! (blog of the *European Journal of International Law),* 7 July 2011

servicemen in Iraq.[66] The first set of claims (the "Challenger claims") arose from a so-called friendly fire incident, in which one soldier was killed and two were injured.[67] The claimants alleged that the MoD had failed to properly equip the Challenger tanks involved and had failed to give soldiers adequate tank-recognition training. The second set of claims (the "Snatch Land Rover claims") arose from the deaths of two privates who were killed by the detonation of improvised explosive devices level with the Snatch Land Rovers in which they were travelling. Relatives of the two men claimed that the MoD breached the implied positive obligation in Article 2 of the ECHR to take preventive measures to protect life "in light of the real and immediate risk to life of soldiers who were required to patrol in Snatch Land Rovers".[68] (The Snatch Land Rover is a relatively lightly armoured vehicle and its vulnerability has apparently led some soldiers to refer to it as a "mobile coffin".[69]) The third claim (the "Ellis negligence claim") made further allegations of negligence against the MoD.[70] (The Supreme Court issued one judgment covering the three sets of claims; for convenience this is referred to as the judgment in *Smith*.)

The MoD argued that the Snatch Land Rover claims should be struck out because at the time of their deaths, the two British servicemen were not within the jurisdiction of the UK for the purposes of the ECHR, and on the facts as pleaded the MoD did not owe a duty to them at the time of their deaths under Article 2 (the right to life). The MoD also argued that the Challenger claims and the Ellis negligence claim should be struck out on the principle of combat immunity, and because it would not be fair, just or reasonable to impose a duty of care on the MoD in the circumstances of those cases.[71]

The Supreme Court held unanimously that, in relation to the Snatch Land Rover claims, the two privates were within the UK's jurisdiction for the purposes of the ECHR at the time of their deaths. The Supreme Court press summary of the judgment in *Smith* notes that this followed the reasoning of the ECtHR in *Al Skeini* (see section 3 of this Note):

> [...] elements can be extracted from [*Al Skeini*] which point clearly to the conclusion that the Court reaches in this case. It formulates a relatively general principle that extra-territorial jurisdiction can exist whenever a state through its agents exercises authority and control over an individual. It also indicated that Convention rights can be "divided and tailored" to the particular circumstances of the extra-territorial act in question, as opposed to being an indivisible package. A state's extra-territorial jurisdiction over local inhabitants exists because of the authority and control that is exercised over them as a result of the authority and control that the state has over its own armed forces. They are all brought within the state's jurisdiction by the application of the same general principle.[72]

The Supreme Court considered the question of whether, and to what extent, Article 2 (the right to life) of the ECHR imposes positive obligations on the Government to prevent the deaths of its own soldiers in active operations against the enemy. The majority view was that

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[66] The three cases were *Smith and others (Appellants)* v *The Ministry of Defence (Respondent)*, *Ellis (Respondent)* v *The Ministry of Defence (Appellant)* and *Allbutt and others (Respondents)* v *The Ministry of Defence (Appellant),* [2013] UKSC 41

[67] Supreme Court, 'Press Summary', 16 June 2013

[68] ibid

[69] BBC News, 'Iraq Damages Cases: Supreme Court Rules Families Can Sue', 19 June 2013

[70] Supreme Court, 'Press Summary', 16 June 2013

[71] ibid

[72] ibid

"the court must avoid imposing positive obligations on the state in connection with the planning for and conduct of military operations in situations of armed conflict which are unrealistic and disproportionate".[73] However, in some circumstances it would be "reasonable to expect the individual to be afforded the protection" of Article 2. Policy decisions made at a high level of command and things done on the battlefield would fall outside the scope of Article 2, but "finding whether there is room for claims to be brought in the middle ground" would require "the exercise of judgment [...] in the light of the facts of each case".[74] Permission was therefore given for the Snatch Land Rover Article 2 claim to be brought to trial, but Lord Hope (with whom the majority agreed) warned that it was "far from clear" that the claimants would be able to show the UK had breached its obligation under Article 2 to take preventative operational measures.[75]

With regard to the Challenger claims and Ellis negligence claims, the majority view of the Supreme Court was that "the doctrine of combat immunity should be construed narrowly, and should not be extended beyond its established scope to the planning of and preparation for active operations against the enemy".[76] The majority held that these claims should not be struck out on the ground of combat immunity, or on the ground that it would not be "fair, just or reasonable" to extend the MoD's duty of care to those cases.[77] These claims will also proceed to trial, therefore.

In conclusion, Lord Hope reflected on the need for the courts to balance the individual rights of members of the armed forces with the public interest of the continued effective operation of the military:

> The sad fact is that, while members of the armed forces on active service can be given some measure of protection against death and injury, the nature of the job they do means that this can never be complete [...] the law will always attach importance to the protection of life and physical safety. But it is of paramount importance that the work that the armed services do in the national interest should not be impeded by having to prepare for or conduct active operations against the enemy under the threat of litigation if things should go wrong.[78]

In his dissenting opinion, Lord Mance (with whom Lord Wilson agreed) "would have struck out all three sets of claims in their entirety, essentially because they are not suitable for resolution by a court".[79] He warned that:

> [...] the approach taken by the majority will in my view make extensive litigation almost inevitable after, as well as quite possibly during and even before, any active service operations undertaken by the British army. It is likely to lead to the judicialisation of war [...].[80]

Robert Weir QC, who represented the Snatch Land Rover claimants, welcomed the decision that soldiers could rely on the HRA wherever they were. He said that this rectified the "bizarre

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[73] [2013] UKSC 41, para 76
[74] ibid
[75] ibid, para 81
[76] Supreme Court, 'Press Summary', 16 June 2013
[77] ibid
[78] [2013] UKSC 41, para 150
[79] ibid
[80] ibid

and anomalous" distinction that had been drawn previously "that a soldier lost his Convention rights the moment he stepped off a military base", and the "logical inconsistency" after *Al Skeini* that "a soldier could bring a civilian within the jurisdiction of the UK without himself falling within the jurisdiction".[81] This reaction was echoed by the Equality and Human Rights Commission (EHRC) and the human rights organisation JUSTICE, which had both been granted permission to intervene in the case. Andrea Coomber, JUSTICE's Director, called the judgment "clear and sensible" since "the human rights of UK troops should be protected wherever they serve", rather than depending on "a step left or right over a boundary fence".[82] The EHRC argued that "simply being in armed service should not mean our armed forces lose all protections of their rights".[83] It believed that the ruling provided "a reasonable balance between the operational needs of our armed forces and the rights of those serving in our armed forces to be protected in the same way as we expect them to protect the rights of civilians abroad".[84]

In contrast, the Government has expressed concerns that the judgment could have a negative impact on military operations. The *Daily Mail* reported that Philip Hammond, the Secretary of State for Defence, was "so furious" that he was "considering demanding a revocation" and "believed it strengthened the case for Britain quitting the ECHR".[85] Mr Hammond was quoted by the newspaper as saying:

> There are real concerns that British troops could be prevented from carrying out their missions from fear of falling foul of human rights legislation. We can't have troop commanders living in fear of how lawyers back in London might interpret their battlefield decisions that are vital to protecting our national security.
>
> There could be serious implications for our ability to work with international partners who are not bound by the ECHR.

Andrew Robathan, Minister for the Armed Forces, told the House of Commons that the Government had "some concerns" and would "be looking carefully at that judgment".[86] Lord Astor of Hever, Parliamentary Under-Secretary of State at the MoD, said that the Government was "concerned that the ruling creates uncertainty".[87] He explained that "urgent cross-government discussions" and meetings with lawyers were taking place to consider the options available, but the Government would continue to defend its position against "ill-founded legal claims, while continuing to provide our forces with the equipment they need, and ensuring that, where casualties occur, generous provision is made for troops and their families through the Armed Forces compensation scheme".

In their report for the Policy Exchange, Tugendhat and Croft describe *Smith* as "the apogee of judicial encroachment", arguing that "in effect, it extends a civilian understanding of duty of care

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[81] Robert Weir QC, 'In Combat', *New Law Journal*, 4 July 2013, Vol 163 Issue 7567,
[82] JUSTICE press release, 'Supreme Court Unanimously Affirms Human Rights Protection for Troops Overseas', 19 June 2013
[83] EHRC press release, 'Commission Welcomes Supreme Court Ruling on Armed Forces and Human Rights Protection', 19 June 2013
[84] ibid
[85] James Chapman, 'Minister Warns That New Human Rights Ruling Will Hurt Our Troops By Introducing Health-and-Safety Attitude to the Battlefield', *Daily Mail*, 22 June 2013
[86] HC *Hansard*, 25 June 2013, col 271
[87] HL *Hansard*, 25 June 2013, cols 656–7

and rights guaranteed by the ECHR to servicemen and women in combat".[88] They express concern about its "narrowing of the application of combat immunity"[89] and

> [...] the insertion of the judiciary into operational matters [which] undermines the fundamental strength of the British armed forces: agility [...] 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.[90]

As well as a change in the culture of the British military, they also posit a number of other longer-term consequences of the change in the application of combat immunity. The fear of future legal challenges to decisions made on the battlefield could impose an "unmanageable strain" in terms of "the record keeping capacity required to satisfy British courts" that battlefield actions were "legal and authorised".[91] They also argue that the Supreme Court decision has made it "very difficult for the Government to defend itself effectively against allegations that it could have done more" in terms of force protection measures and training. Tugendhat and Croft also express concerns about the costs of taxpayer-funded court cases, public inquiries and compensation payments, as well as the possibility of future vexatious claims sponsored by foreign powers or sub-state forces with the intention of "paralysing the armed forces through legal process".[92]

4.2 Health and Safety

The Policy Exchange report also raised issues about applying health and safety and duty of care standards to military training. The authors point to what they see as a potential conflict between "the requirement to train people better for the tough challenges they face [and] the requirement to make training less perilous".[93] They stated their concern that "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".[94]

The Health and Safety at Work Act 1974 does not apply in respect of the MoD's work activities and operations abroad, but it does apply to the MoD, its agencies and the armed forces within Great Britain.[95] However, even where the legislation applies, the MoD—as a government department—is covered by Crown privilege, which means that it is not subject to criminal enforcement action in the courts. Instead, there are administrative arrangements in place through which the Health and Safety Executive can censure Crown bodies over health and safety offences which would otherwise had led to a prosecution.[96] Tugendhat and Croft claim that "the armed forces may actually overcompensate" in seeking to comply with the requirements of the Health and Safety at Work Act, despite having immunity from prosecution.[97]

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[88] Thomas Tugendhat and Laura Croft, op cit, p 28
[89] ibid, pp 32–6
[90] ibid, p 32
[91] ibid, p 33
[92] ibid, pp 35–6
[93] ibid, p 47
[94] ibid, p 48
[95] Health and Safety Executive, 'Application of Health and Safety Legislation to the MoD', accessed 30 October 2013
[96] Health and Safety Executive, 'Enforcement Against Crown Bodies', accessed 30 October 2013
[97] Thomas Tugendhat and Laura Croft, op cit, p 50

According to MoD statistics, the most common mechanism of non-fatal major and serious incidents to armed forces personnel and MoD civilian employees was 'Training/Exercise', with 1020 incidents reported in 2011–12 (45 percent of all incidents reported).[98] Philip Hammond, the Secretary of State for Defence, issued a policy statement on health and safety in defence in June 2013, in which he "emphasise[d] the importance which I attach to the health and safety of those who deliver defence activities (including the armed forces and MoD civilians)".[99] The policy statement requires that the MoD "minimise work-related fatalities, injuries [and] ill-health [and] reduce health and safety risks so that they are as low as reasonably practicable". It also requires that where the MoD has exemptions from health and safety legislation, "we maintain departmental arrangements that produce outcomes that are, so far as reasonably practicable, at least as good as those required by UK legislation". The policy statement does not touch on the issue of whether maintaining health and safety standards have an impact on the rigour of training.

On the issue of responsibility of care, the Armed Forces Covenant notes that:

> The Government has a responsibility to promote the health, safety and resilience of servicemen and women; and to ensure that they are appropriately prepared, in the judgment of the chain of command, for the requirements of army training activities or operations on which they are to be engaged. However, operational matters, including training and equipment, fall outside the scope of the Armed Forces Covenant.[100]

Under the Corporate Manslaughter and Corporate Homicide Act 2007, companies and organisations can be found guilty of corporate manslaughter as a result of serious management failures resulting in a gross breach of a duty of care.[101] Section 4 of the Act provides specific exemptions for 'military activities', so that the MoD has no duty of care under the Act when it comes to:

- Operations, including peacekeeping operations and 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.
- Activities carried out in preparation for, or directly in support of, such operations.
- Training of a hazardous nature, or training carried out in a hazardous way, which is necessary to improve or maintain the effectiveness of the armed forces with respect to such operations.
- Activities carried on by members of the special forces.

In the Policy Exchange report, Tugendhat and Croft argue that this exemption which "mirrors the established principle of combat immunity" could be affected by the *Smith* judgment, which "has effectively broadened the MoD's duty of care, so that it now embraces some activities on the battlefield that were previously understood to be exempt". They claim that "this change to

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[98] Defence Analytical Services and Advice (DASA), *MoD Health and Safety Statistics Annual Report 2011/12*, 31 October 2012, p 2

[99] Ministry of Defence, *Health, Safety and Environmental Protection in Defence: A Policy Statement by the Secretary of State for Defence*, June 2013

[100] Ministry of Defence, *The Armed Forces Covenant*, May 2011, pp 7–8

[101] Health and Safety Executive, 'About Corporate Manslaughter', accessed 30 October 2013

the duty of care formula has [...] opened the door to possible criminal culpability for the MoD".[102]

5. Future Prospects

Lord Astor of Hever, Parliamentary Under-Secretary of State at the Ministry of Defence, stated in October 2013 that the "legal position is not yet clear" as a number of cases are still before the courts.[103] He declared that "in view of the importance of the principles at stake, the Government will defend their position vigorously in the key cases still before the courts".[104] As noted above, the substantive claims in the Snatch Land Rover, Challenger and Ellis negligence cases are still to be considered by the courts.

Marko Milanovic has pointed out that a decision from the ECtHR is pending in *Pritchard*, a case which involves some similar questions to those considered by the Supreme Court in *Smith*.[105] *Pritchard* concerns the fatal shooting of a British soldier in Iraq, whose father alleges under Articles 2 (right to life) and 13 (right to an effective remedy) of the ECHR that the UK authorities failed to carry out a full and independent investigation into his son's death.[106] The question of whether the ECHR generally applies extraterrorially to the soldiers of parties to the Convention acting abroad will once again be under consideration. Milanovic suggests that "the European Court will treat the unanimous, considered views of seven justices of the UK Supreme Court with some weight in coming to its own opinion".[107]

In their report for the Policy Exchange, Thomas Tugendhat and Laura Croft argued that the UK "must look for further exemptions to the laws that are being applied—and repel the mission creep of judicial oversight".[108] Aurel Sari, an academic who specialises in the legal status of foreign armed forces under international law, rejected Tugendhat and Croft's approach that the application of civilian laws to the military is inappropriate and should be restricted. Whereas Tugendhat and Croft argue in favour of applying international humanitarian law and not human rights law to military operations, in Sari's view "it is a mistake to assume that international humanitarian law is always better suited as a regulatory framework for deployed operations" as it may not be applicable in post-conflict environments or non-international armed conflict.[109] According to Sari:

> Nothing about the civilian nature of international human rights law makes it inherently unsuitable for the military. Indeed, we should not forget that many overseas deployments of the British armed forces are motivated and publicly justified in the name of humanity and the rule of law. Rather, the solution lies in finding an appropriate balance between the high standards demanded by human rights and fundamental freedoms on the one hand and considerations of military effectiveness on the other

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[102] Thomas Tugendhat and Laura Croft, op cit, p 51
[103] HL *Hansard*, 23 October 2013, col 1004
[104] ibid, col 1003
[105] Marko Milanovic, 'UK Supreme Court Decides *Smith (No 2) v The Ministry of Defence*', EJIL Talk! (blog of the *European Journal of International Law*), 24 June 2013
[106] ECtHR, *Factsheet—Extraterritorial Jurisdiction of ECHR Member States*, June 2013
[107] Marko Milanovic, 'UK Supreme Court Decides *Smith (No 2) v The Ministry of Defence*', EJIL Talk! (blog of the *European Journal of International Law*), 24 June 2013
[108] Thomas Tugendhat and Laura Croft, op cit p 55
[109] Aurel Sari, 'Better Get a Lawyer: Are Legal Constraints Defeating Britain's Armed Forces on the Battlefield?', EJIL: Talk! (blog of the *European Journal of International Law*), 25 October 2013

hand. Such a balance is woven into the very fabric of international humanitarian law, but is absent from international human rights law.

Tugendhat and Croft proposed seven specific options for the Government to consider:

1. Parliament should legislate to define combat immunity.

2. The MoD should revive Crown immunity (section 10 of the Crown Proceedings Act 1947) in times of national emergency or warlike operations.

3. Parliament should legislate to exempt fully the MoD from the Corporate Manslaughter and Corporate Homicide Act 2007.

4. The UK should derogate from the ECHR during deployed operations.

5. The UK should seek explicit language in United Nations Security Council Resolutions to provide a legal basis acceptable to the ECtHR.

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.

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.[110]

Lord Craig of Radley (Crossbench) recently asked the Government if it is considering reviving Crown immunity to cover warlike operations outside the United Kingdom, or introducing new legislation to define combat immunity.[111] In response, Lord Astor of Hever said that the Government was "not ruling out any options", but hoped that the court would provide clarification of combat immunity as the Government continued to defend the ongoing litigation.

With regard to the fourth option in the Policy Exchange report, Article 15 of the ECHR allows a state to derogate from certain obligations under the Convention "in time of war or other public emergency threatening the life of the nation [...] to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law". Tugendhat and Croft argue that it would be consistent with the UK's other obligations under international law to derogate from the ECHR and declare an intent to apply the law of armed conflict to conflict overseas.

The majority opinion of the Supreme Court in *Smith* was that "the phrase 'threatening the life of the nation' suggests that the power to derogate under this article is available only in an exceptional situation of crisis or emergency which affects the whole population". The majority held that it would not be right to assume that the issues in *Smith* "can be answered by exercising the right to derogate".[112] Tugendhat and Croft claimed that the "novel interpretation" of the Supreme Court and the ECtHR that the ECHR applies extraterritorially

[110] These options are summarised at pp 11–13 and set out in detail at pp 56–61 of Thomas Tugendhat and Laura Croft, *The Fog of War: An Introduction to the Legal Erosion of British Fighting Power*, Policy Exchange, October 2013
[111] HL *Hansard*, 23 October 2013, col 1003
[112] [2013] UKSC 41 paras 64–5

made it "reasonable" to extend the principle of derogation in time of war or other emergency to operations abroad (in other words, if extraterritorial application is possible, extraterritorial derogation ought also to be possible).[113] Sari accepted that "a compelling case can be made that the derogation clauses of human rights instruments such as the ECHR must be interpreted dynamically to apply in an extraterritorial manner", but noted that "this argument has not been tested in court".[114] He also suggested that the pending accession of the European Union to the ECHR might complicate the UK's ability to derogate from the ECHR:

> With the Union's accession to the ECHR, its provisions will become an integral part of EU law and become binding on the member states as such. Since it is accepted that the ECHR can apply to the EU in an extraterritorial manner [...] it follows that a derogation made by the British Government under Article 15 of the ECHR does not necessarily absolve it of its corresponding obligation under EU law to comply with the Convention as a matter of EU law. If this is the case, the utility of derogations made under the ECHR may be seriously compromised.

Further, Sari argues that even if future UNSCRs gave explicit authorisation for activities which the ECtHR might otherwise find to be in breach of the ECHR (such as detentions), it is "not inconceivable" that following the EU's accession to the ECHR, the UK could "continue to be bound by the ECHR as a matter of EU law, despite having obtained explicit authorisations from the Security Council". He expresses some doubts as to whether the Government would in any case be able to convince the UN Security Council in a timely manner that such explicit authorisations were necessary.

As mentioned above, according to the *Daily Mail*, Philip Hammond, the Secretary of State for Defence has raised the possibility of not just derogating from the ECHR, but withdrawing from it altogether.[115] For further discussion of the legal and political consequences of withdrawing from the ECHR, see the House of Commons Library Standard Note, *Is Adherence to the European Convention on Human Rights a Condition of EU Membership?* (12 March 2013, SN06577).

Lawyers for the claimants in some of the cases brought against the MoD have resisted the prospect of cuts to legal aid and other proposed reforms to the legal system. Jocelyn Cockburn, who represented the Snatch Land Rover claimants, said it was "essential that we recognise the human rights and dignity of our own soldiers". She said that her clients would not have been able to bring their case if the proposed cuts to legal aid had been enacted and that it was "therefore crucial that the cuts are urgently reconsidered".[116] Phil Shiner, of Public Interest Lawyers, who represents numerous clients bringing claims relating to alleged unlawful killings and torture by British troops in Iraq, warned that the Government's "determination to restrict the circumstances in which judicial review claims can be brought and funded" would allow such abuses to "continue unchecked".[117] For further discussion of proposed reforms to legal aid and judicial review, see the Government consultation papers *Transforming Legal Aid: Next Steps* and *Judicial Review: Proposals for Further Reform* (September 2013).

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[113] Thomas Tugendhat and Laura Croft, op cit, p 58
[114] Aurel Sari, 'Better Get a Lawyer: Are Legal Constraints Defeating Britain's Armed Forces on the Battlefield?', EJIL: Talk! (blog of the *European Journal of International Law*), 25 October 2013
[115] James Chapman, 'Minister Warns That New Human Rights Ruling Will Hurt Our Troops By Introducing Health-and-Safety Attitude to the Battlefield', *Daily Mail*, 22 June 2013
[116] Hodge Jones & Allen press release, 'Snatch Land Rover', 19 June 2013
[117] Public Interest Lawyers press release, 'High Court Judgment Provides Detail of Inquiries Investigating Hundreds of Unlawful Killing and Torture Cases', accessed 30 October 2013