

DEROGATION FROM THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN ARMED CONFLICT

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POLICY EXCHANGE'S JUDICIAL POWER PROJECT

Dr Jonathan Morgan

Senior Lecturer in Law, University of Cambridge

Professor Richard Ekins,

Associate Professor, University of Oxford,

Professor Guglielmo Verdirame

Professor of International Law, King's College London

1. Policy Exchange's Judicial Power Project considers the scope of judicial power within the constitution, aiming to restore balance to the constitution by making clear the good sense of separating judicial and political authority. The Project's first research paper, *Clearing the Fog of Law* (March 2015)¹, addressed the judicialisation of war, and recommended, inter alia, that in future conflicts the Government should derogate from the European Convention on Human Rights (ECHR).

Summary

2. The European Court of Human Rights (the Strasbourg Court) has misinterpreted the ECHR, improperly extending it to apply to military action outside the territory of member states. This has made the ECHR govern the conduct of the UK's armed forces in overseas armed conflict, action which should instead be governed exclusively by International Humanitarian Law (IHL). The latter body of law is designed to reconcile military reality and humanitarian concerns. The improper extension of the ECHR has serious implications for military effectiveness.

3. The Government is right to consider addressing the extension of the ECHR by derogating from the ECHR, by way of Article 15 of the Convention. This is a rational and lawful course of action, for which the ECHR itself provides. Derogation is permitted "in time of war", which should not be read down to apply only to wars in which the national survival of the UK is at stake. Likewise, derogation in relation to armed conflict abroad must be "strictly required by the exigencies" of war. It is possible that the courts will conclude that derogation is never permitted in respect of armed conflict abroad, but such a finding would sit at odds with recent developments in Strasbourg jurisprudence. If courts opted for such an implausible and unhelpful approach, the Government may have no option but to consider more radical measures (including amendment of the Human Rights Act 1998 or principled defiance of the Strasbourg Court) to secure the military effectiveness of UK operations.

Concerns about the ECHR's Application to Armed Conflict

4. The Government's concerns about the application of the ECHR to armed conflicts are warranted (see further *Clearing the Fog of Law*). The provisions of the ECHR should not be applied to armed conflicts for which they were never designed. Extending the reach of the ECHR destabilises the delicate and considered balance between humanitarian concerns and military necessity embodied in IHL.

5. It is wrong to suppose that the ECHR merely "supplements" IHL, and/or can always be read consistently with it. On the contrary, on its face the ECHR would produce absurd results when applied to armed conflict. Article 2, ECHR (right to life), would apparently prevent targeting enemy combatants with lethal force unless strictly necessary for protection of life. That would entirely destroy the military doctrine of offensive force. Article 5, ECHR (right

¹ <https://policyexchange.org.uk/wp-content/uploads/2016/09/clearing-the-fog-of-law.pdf>

to liberty and security), would apparently preclude ever taking Prisoners of War since that is not listed as one of the stated exceptions within Article 5. As Lord Wilson has recently observed, such a conclusion “would bring the Convention into widespread international disrepute”: *Serdar Mohammed v Secretary of State for Defence* [2017] UKSC 2, [143].

6. No doubt IHL is in some areas unclear, underdeveloped, or even unsatisfactory. If that is so, the proper response lies with vigorous efforts to build international support for multilateral improvement of the IHL system, through the adoption of treaties or the clarification of applicable rules of customary international law. It is unsatisfactory to circumvent that process through the novel application of human rights treaties by way of judicial initiative. This is especially unsatisfactory when (as outlined in the previous paragraph) rules of human rights law are so ill-suited to armed conflict that they require radical re-interpretation to be applied (however awkwardly) in that context.

7. Arguably, such a process of re-interpretation threatens to undermine human rights laws as much as IHL. An example is the need to read IHL-type detention into Article 5 ECHR. On the doubts and difficulties, we note judicial disagreements at the highest level. In the Strasbourg Court, compare *Al-Jedda v United Kingdom* (2011) 53 EHRR 23 with *Hassan v United Kingdom* (2014) 38 B.H.R.C. 358. In domestic courts, compare the opinions of the majority with the trenchant dissent by Lord Reed in *Serdar Mohammed v Secretary of State for Defence* [2017] UKSC 2 (where the disagreement centred on how those two Strasbourg authorities were to be reconciled).

8. As recently as 2001, the Strasbourg Court ruled that the ECHR did not apply outside “the legal space” of the contracting states (and thus it did not apply to Serbia at the relevant time): *Bankovic v Belgium* (2001) 44 EHRR SE 5. That limitation was defended by Judge Luzius Wildhaber shortly after his retirement: “Reflections of a Former President of the European Court of Human Rights” [2010] EHRLR 163, 169, 174. The extraterritorial limitation was emphatically accepted by the Judicial Committee of the House of Lords in *Al Skeini* [2007] UKHL 26. It was only in *Al Skeini v United Kingdom* (2011) 53 EHRR 18 that the Strasbourg Court declared that the ECHR did, after all, apply extraterritorially—to the Iraq conflict.

9. This decision was a watershed, but a regrettable one. It has led directly to the difficulties outlined above. As the Court of Appeal said in *Serdar Mohammed v Secretary of State for Defence* [2015] EWCA Civ 843, [96]:

“Difficult questions, both legal and practical, will undoubtedly arise as to how the ECHR protections, designed to regulate the domestic exercise of state power, are to be applied in the very different context of extraterritorial military operations... [Moreover,] the precise relationship between the ECHR and international humanitarian law in relation to extraterritorial military operations is a matter of great complexity and uncertainty.

10. One amongst several problematic cases to follow *Al Skeini* is *Al-Jedda v United Kingdom* (2011) 53 EHRR 23, about which Lord Sumption recently observed (*Serdar Mohammed* [2017] UKSC 2, [49]):

“It caused consternation among those concerned with the enforcement of international humanitarian law, because it appeared to undermine its role in armed conflicts as well as the efficacy of international peacekeeping operations.”

However, Lord Sumption considered it unnecessary to consider this further because of the Strasbourg Court’s later decision in *Hassan v United Kingdom* (2014) 38 BHRC 358. The *Hassan* judgment certainly does mark an improvement in the Strasbourg Court’s handling of armed conflict. The Court held that IHL can be read into Article 5 of the ECHR with the consequence that, in an international armed conflict, detention on IHL grounds not expressly contemplated under that provision must still be regarded as compatible with the Convention. *Hassan* is a helpful development and it does go some way towards mitigating the damage caused by the previous jurisprudence of the ECHR. However, the resolution is limited and unstable and the attempt to amalgamate human rights and IHL risks damaging both. The Government is, in our view, fully justified in wishing to address the root cause of the problem, namely the extraterritorial extension of the ECHR.

Feasibility of Derogation under Article 15, ECHR

11. The ECHR was never intended by its framers to apply to contracting states’ armed forces when engaged in conflicts outside the territories of contracting states. Lord Collins stated in the Supreme Court that extraterritorial application was “plainly not contemplated in the drafting process [of the ECHR]”; it was “hardly conceivable that in 1950 the framers of the Convention would have intended the Convention to apply to the armed forces of Council of Europe states engaged in operations in the Middle East or elsewhere outside the contracting states” (*R (Catherine Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29, [303]). The Strasbourg Court acted improperly in radically extending the ECHR to such situations.

12. However, as Lord Mance observed in the same *Oxfordshire Coroner* case ([2010] UKSC 29, para [198]), the ECHR does contain a mechanism that could go some way to meeting the concerns discussed above:

“[T]he Convention does contain at least one provision aimed at addressing this concern [i.e. the one reflected in the common law immunity for “combat operations” or “battle damage”]. Under article 15 of the Convention states are, in time of war or other public emergency, permitted, to the extent strictly required by the exigencies of the situation, to derogate from article 2 in respect of deaths resulting from lawful acts of war. *By article 15 the contracting states were catering for the natural concern that military operations against an enemy should not be unduly hampered.*” [emphasis added]

Thus, derogation under Article 15 is an obvious way to address concerns about the reach of the ECHR. As Lord Mance says, it is the means the ECHR itself provides.

13. Article 15(2) specifies that some rights are non-derogable: namely, the right to be free from torture (Article 3), from forced labour (Article 4(1)), from punishment without legal process (Article 7), and the right to life (Article 2) “except in respect of deaths resulting from lawful acts of war”. But this does not make derogation pointless in the present context. Derogation would help restore the relevant legal standard for considering breaches of the right to life in relation to war—i.e. the rules of IHL. Derogation would also suspend Article 5 rights to liberty that have been used to undermine detention of enemy fighters. So derogation would address some of the most troubling areas in which the ECHR has been invoked since *Al Skeini v UK*.

14. Article 15(1) specifies two conditions. The **first condition** is that it can only be invoked “In time of war or other public emergency threatening the life of the nation”. This condition is unfortunately ambiguous. Does it require “war threatening the life of the nation or other public emergency threatening the life of the nation”; or does the qualification “threatening the life of the nation” apply only to “other public emergencies” whereas “time of war” is unqualified? The latter, more permissive, interpretation is preferable. Derogation should be available during *any* “time of war”.

15. Admittedly there is some obiter judicial support for the former (restrictive) interpretation. (See *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [38] per Lord Bingham; *Smith v MoD* [2013] UKSC 41, [60] per Lord Hope; *Serdar Mohammed v Secretary of State for Defence* [2017] UKSC 2, [45] per Lord Sumption: but note that in these cases there was no derogation in place, so the conditions for derogating did not fall for judicial decision.) Such a reading would render Article 15 a dead letter as far as contemporary armed conflicts are concerned. It is implausible to suggest that the UK has engaged in “war threatening the life of the nation” since 1939-1945, so if this view be correct the power to derogate has never yet been available to the UK throughout the entire (67 year) history of the ECHR.

16. There are two ways of addressing this difficulty. First, the qualifier “threatening the life of the nation” could be interpreted to refer not only to the UK but also to the “nations” in the territories where the UK is intervening. The conflict with the Taliban in Afghanistan may not have threatened the life of the British nation, but it certainly threatened the life of the Afghan nation. This reading is very unlikely to be the one that the drafters would have intended. However, as discussed above, it is even more unlikely that the drafters ever envisaged the ECHR applying to Afghanistan. If the territorial reach of the ECHR is to be interpreted capaciously, then the same approach should be brought to bear on related ECHR provisions which confer rights on states. Failing to do so fundamentally upsets the balance between states and individuals in the Convention.

17. Secondly, the qualifier could be read as referring exclusively to “public emergency” but not to “time of war”. This interpretation meets the concerns about the improper displacement of IHL, which arise in relation to every armed conflict, not merely those that pose an existential threat to the UK. The utility Lord Mance saw in Article 15 would be severely compromised if it were only in wars of *national survival* that ECHR states were able to “[cater] for the natural concern that military operations against an enemy should not be unduly hampered”. It also bears emphasising that Article 15(2) refers to the possibility of derogations from Article 2 in respect of “lawful acts of war”. There is no reason why the category of “lawful acts of war” should not include lawful acts by UK armed force intervening in a foreign non-international armed conflict (as in the case of the conflict against Afghan insurgents).

18. There is some support for our broader view in the authorities. The Strasbourg Court’s Grand Chamber relied on the failure by the British Government to derogate under Article 15, when holding the UK in breach of Article 5 in *Al-Jedda v United Kingdom* (2011) 53 EHRR 23, [99]-[100]. It would be surprising for the European Court to have employed this reasoning if derogations were simply not legally possible in Iraq, being a conflict which (surely) did not “threaten the life of the [UK] nation”. But the point was not finally determined as it (by definition) did not fall for decision.

19. In *Serdar Mohammed* at first instance, Leggatt J suggested that Lord Bingham’s influential view in *Al Jeddah* [2007] UKHL 58, [38] had been superseded by the Strasbourg Court’s subsequent extraterritorial expansion of the ECHR: see [2014] EWHC 1369 (QB), [155]–[157]. As Professor Marco Sassòli has commented, “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” (“The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts”, in Orna Ben-Naftali (ed.) *International Humanitarian Law and International Human Rights Law* (OUP, 2011)). (As noted above however, Lord Sumption has recently disapproved Leggatt J’s views, “inclining” to prefer Lord Bingham’s position notwithstanding the extraterritorial expansion, on appeal in *Serdar Mohammed* [2017] UKSC 2, [45].)

20. The **second condition** in Article 15 limits “measures derogating from [the state’s] obligations under this Convention to the extent strictly required by the exigencies of the situation”. We consider that derogation is necessary during “the exigencies” of *all* armed conflict. This is in order that the situation be governed by the appropriate order of IHL, without the “complex and uncertain” overlay of the ECHR (as the Court of Appeal put it in *Serdar Mohammed* [2015] EWCA Civ 843, [96]). The point of derogation is for armed conflict to be *correctly regulated by IHL*, not to be *unregulated* altogether as some of the government’s critics have suggested.

21. Clear evidence of the practical problems that ECHR expansion have caused, and will cause, for military operations would need to be presented by the UK government if the Article 15 derogation were challenged in court (which it inevitably would be). The many expressions of concern from both

judges and senior military commanders about the impact of the ECHR provide prima facie evidence to support the claim.

22. In the event of multilateral military operations, the case for derogation would be strengthened if other European members of the military coalition lodged Article 15 derogations too. The Strasbourg Court noted in *Hassan v UK*, no contracting party has ever derogated from the ECHR regarding an overseas conflict. But there seems a simple explanation for that, overlooked by the Strasbourg Court but noted by Lord Reed in *Serdar Mohammed* [2017] UKSC 2, [310], namely that “until the case of *Al-Skeini v UK* it might not have occurred to contracting states participating in military operations overseas that they remained bound by their obligations under the Convention”. After *Al-Skeini*, the UK and its European partners have reason to derogate; there is a risk that the courts will hold failure to derogate against them.

23. It is hard to predict how the Strasbourg Court will decide whether derogation is “strictly required by the exigencies of the situation”. This, in our view, is the greatest legal risk to derogating in response to the ECHR’s territorial expansion.

Other Approaches

24. In addition to derogation, there are other approaches to the problem created by the Strasbourg jurisprudence. These could be seen as more or less “drastic” options. At the lower level is what the government has (of necessity) been doing to date, namely fighting cases brought against it based on the ECHR with the strongest possible legal arguments, and hoping to convince the courts (domestic and European) to accept its view. The government should continue to do this (and, in any event, it may have no choice); this approach is complementary to derogation rather than an alternative. At the other extreme, the government might conclude from doubts about the viability of derogation that it should lay proposals before Parliament to amend the Human Rights Act 1998 to remove its extraterritorial application, or even consider withdrawal from the ECHR.

25. The possibility of *Al-Skeini* being reversed by the Strasbourg Court should not be ruled out altogether. One advantage of dealing with a Court that has a far looser commitment to precedent than common law courts is that it can undo its own errors. It is of course important to wait for the right case in which to advance this argument, an assessment which Government lawyers will be best-placed to make.

26. In the meantime, the Government should also consider ways of crystallising the UK’s interpretation of international law – as regards the territorial scope of the ECHR and the overriding role of IHL in the regulation of armed conflict – in state practice, e.g. in statements adopted within the framework of NATO, the ICRC or the Council of Europe. In a number of the judgments discussed above, both domestic Courts and the European Court gave careful consideration to the practice of states for the purposes of both

identifying customary international law and interpreting treaty law. But the relevant practice was not always sufficiently extensive or clear.

27. If Parliament were to amend the HRA to limit its territorial reach, then ECHR claims could no longer be brought in UK courts re military action abroad. (Recall that this was Lord Bingham's view, in dissent, of the *current unamended* HRA's extent: *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26.) This could not prevent challenges originating in the Strasbourg Court itself (which might also condemn the UK for failing in its duty to provide an effective remedy (Article 13, ECHR) in the event of finding a substantive violation).

28. It might therefore seem that nothing short of denouncing the ECHR altogether would beyond all doubt remove the *Al-Skeini* problem. However, another possibility is for the UK to refuse to comply with adverse judgments of the Strasbourg Court in this field, as seen in the "prisoner voting" saga. Such a stance might well be condemned for violation of the UK's international obligations. Still, it is worth noting that in the analogous EU context, Lord Mance outlined a principled argument for domestic courts not to be obliged to follow where "the Court of Justice reaches a decision which oversteps jurisdictional limits which Member States have clearly set at the European Treaty level": *Pham v Home Secretary* [2015] UKSC 19, [90].)

29. This line of thought may, however, be premature. First, the UK Government should attempt to implement its policy, thus making use of the mechanism the ECHR provides by invoking Article 15 in future armed conflicts. Second, the Strasbourg Court has corrected some errors in the past and may yet do so again. Thirdly, even if the UK were to solve "its" problem with the ECHR, joint operations with European allies would continue to be affected by the ECHR's extension. This dimension of interoperability weighs strongly in favour of a concerted effort with European allies aimed at clarifying the position in state practice, with a change in the jurisprudence hopefully to follow. Fourthly, and more broadly, disengagement from the ECHR would have significant political and legal consequences.