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Commentary



Military Operations and Withdrawal From the European Convention on Human Rights

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Abstract

This comment explores the links between the application of the European Convention on Human Rights (Convention or ECHR) to military operations and critiques of the Convention in the United Kingdom. It argues strongly against the idea that it is ‘anomalous’ and ‘unprincipled’ to extend the application of the ECHR to overseas military operations. It also argues that the UK should be capable of discharging basic human rights protections, such as effectively investigating allegations their soldiers have committed murder or torture, without compromising national security. The second section reflects on the consequences of withdrawal. It examines how the application of the ECHR to military operations has improved the transparency and accountability of the UK Government and offered several tools to secure the ongoing accountability of the Government. It is argued that withdrawal from the Convention would compromise this process of increasing accountability and remove these beneficial tools.

Keywords

military operations – human rights – European Convention – effective investigation – right to life – prohibition on torture – denunciation – withdrawal

1 Introduction

There has been much talk in the United Kingdom (UK) recently about withdrawing from the European Convention on Human Rights (ECHR or Convention). The morbid observer of critiques of the ECHR within the UK notes that they have varying levels of salience, ranging from legitimate concern (e.g., determining the appropriate limits of judicial decision making),¹ to fantastical nonsense (e.g., ‘cat-gate’).² In this comment I will examine how the case for withdrawing from the ECHR has been linked to the application of the ECHR to military operations and explore the consequences of withdrawal from the standpoint of military operations.

In the first section, I argue that the application of the ECHR to military operations has driven calls for withdrawal and changes to the Human Rights Act (HRA).³ It has served as a perennial source of controversy, cutting across several central critiques of the ECHR. To illustrate, I will focus on two lines of critique. First, calls for the ECtHR and UK courts to adopt a more ‘originalist’ interpretation of the ECHR. Secondly, that the ECHR/HRA compromise the national security of the UK.

In the second section, I explore the potential consequences of withdrawal, examining some of the benefits that applying the ECHR to military operations has had. First, I argue that the ECHR has led to better protection of soldiers and improved the transparency and accountability of government ministries. Second, I argue that withdrawal from the ECHR and repeal of the HRA would remove several necessary tools to secure the ongoing accountability of the Government for military operations. Finally, I argue that the UK would lose an important external arbiter to challenge legislation that compromises human rights protection.

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- 1 J Sumption, ‘Judicial and Political Decision-Making: The Uncertain Boundary’ (2011) 16(4) *Judicial Review* 301.
 - 2 ‘Cat-gate’ refers to the former UK Prime Minister falsely claiming that the HRA blocked the deportation of an illegal immigrant because the immigrant had a pet cat. A Wagner, ‘Catgate: Another Myth Used to Trash Human Rights’ (The Guardian, 4 October 2011): <<https://www.theguardian.com/law/2011/oct/04/theresa-may-wrong-cat-deportation>>.
 - 3 Human Rights Act 1998 (HRA 1998).

2 Expansionist Interpretation of the ECHR

Jonathan Sumption, a former UK Supreme Court (UKSC) judge and ardent critic of the ECHR/HRA, once described the European Court of Human Rights (ECtHR) as ‘the international flagbearer for judge-made fundamental law extending well beyond the text which it is charged with applying’.⁴ The ECtHR has clearly extended the ECHR beyond the confines of its original text. The ECtHR has, for example, recognised implied *non-refoulement* obligations, not mentioned anywhere in the text, under Articles 2, 3,⁵ 5,⁶ and 6.⁷ The right to private and family life has been applied to several unexpected areas, including environmental rights,⁸ assisted suicide,⁹ and reproductive health issues.¹⁰ This has prompted claims that the ECtHR is stepping beyond its legitimate mandate. Leonard Hoffmann, a former law lord, argued that the ECtHR should not be entitled to ‘introduce wholly new concepts, such as the protection of the environment, into an international treaty which makes no mention of them’.¹¹ Sumption criticised this process of implication and extension, observing that these ‘sub-principles and rules go well beyond what is required to vindicate the rights expressly conferred by the Convention’.¹² These expansionist interpretations have been offered as a justification for amending the HRA in the UK.¹³ In a statement introducing the Bill of Rights Bill,¹⁴ which was intended to replace the HRA, Dominic Raab decried the ‘mission creep’ that the ECtHR was engaged in, which has ‘resulted in human rights law being used for more and more purposes, with elastic interpretations that go way beyond anything that the architects of the Convention had in mind’.¹⁵

4 Lord Sumption, ‘The Limits of Law’ (Sultan Azlan Shah Lecture, 20 November 2013): <<https://www.supremecourt.uk/docs/speech-131120.pdf>>.

5 *FG v Sweden* [GC] 43611/11 (ECtHR, 23 March 2016) para 110.

6 *El-Masri v ‘The Former Yugoslav Republic of Macedonia’* [GC] 39630/09 (ECtHR, 13 December 2012) para 239.

7 *Othman (Abu Qatada) v the United Kingdom* 8139/09 (ECtHR, 17 January 2012) para 261.

8 *Lopez Ostra v Spain* 16798/90 (ECtHR, 9 December 1994).

9 *Pretty v the United Kingdom* 2346/02 (ECtHR, 29 April 2002).

10 *ABC v Ireland* [GC] 25579/05 (ECtHR, 16 December 2010).

11 L Hoffmann, ‘The Universality of Human Rights’ (Judicial Studies Board Annual Lecture, 19 March 2009): <https://www.judiciary.uk/wp-content/uploads/2014/12/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.pdf>.

12 Sumption (n 1) 309.

13 Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights – Consultation Response* (CP No 704, 2022) para 47.

14 Bill of Rights Bill HC Bill (2022–23) [117].

15 D Raab, ‘Introduction of the Bill of Rights’ (HCWS129, 22 June 2022) <<https://questions-statements.parliament.uk/written-statements/detail/2022-06-22/hcws129>>.

I would argue that the application of the ECHR to extraterritorial military operations is the poster child for this maligned expansionist interpretation by the ECtHR. The human rights jurisdiction of states is primarily territorial,¹⁶ yet in many cases both the ECtHR and UK courts have applied the ECHR extraterritorially.¹⁷ The courts have imposed obligations on the armed forces that have no textual basis in the Convention, such as the procedural¹⁸ and operational obligations under Article 2 ECHR.¹⁹ Indeed the apotheosis of expansionist interpretation arose in *Al-Saadoon and Mufdhi v the United Kingdom*,²⁰ where the ECtHR applied an interim measure extraterritorially to prevent applicants from being transferred from UK jurisdiction in Iraq to Iraqi jurisdiction where they could face the death penalty. The ECtHR used a procedural tool, which has no textual basis in the Convention,²¹ to enforce an obligation (*non-refoulement*) with no textual basis in the Convention, outside the territorial jurisdiction of the state. It transpired that the Convention text was merely the chrysalis from which this beautiful protective butterfly has emerged. These specific applications of the ECHR have driven calls for change. In 2021, Policy Exchange, a right-wing civil society organisation, stated:

Parliament should legislate to address (reverse) the judicial expansion of the territorial scope of the HRA. The Act's extra-territorial application is unjustified and clearly constitutes a departure from Parliament's lawmaking intention in 1998. In this way, convention rights have been extended abroad, following the deployment of UK forces, including in contexts where their only relevant control over claimants is the ability to exercise military force. This extension abroad is anomalous and unprincipled, giving rise to major practical problems for effective overseas operations.²²

16 *Bankovic and Others v Belgium and Others* [GC] 52207/99 (ECtHR, 12 December 2001) para 59.

17 *Al-Skeini and Others v the United Kingdom* [GC] 55721/07 (ECtHR, 7 July 2011); *Serdar Mohammed v Ministry of Defence* [2017] UKSC 2, [2017] AC 821.

18 *Al-Skeini and Others* (n 17).

19 *Smith v Ministry of Defence* [2013] UKSC 41, [2014] AC 52.

20 *Al-Saadoon and Mufdhi v the United Kingdom* 61498/08 (ECtHR, 2 March 2010).

21 The power to issue interim measures is set out in Rule 39 of the Rules of Court and failures to abide by interim measures are treated as violations of Article 34 ECHR, but the power to issue them is not mentioned anywhere in the text of the Convention.

22 R Ekins and J Larkin, 'Human Rights Law Reform: How and Why to Amend the Human Rights Act 1998' (Policy Exchange, 2021): <<https://policyexchange.org.uk/wp-content/uploads/2022/02/Human-Rights-Law-Reform.pdf>> 32.

There are a few things worth unpacking in this quote. Firstly, I should acknowledge that there are significant and well-documented problems with how the ECtHR has dealt with extraterritorial jurisdiction.²³ It has been lamentably inconsistent in its approach, acutely so in its recent *Georgia v Russia (II)* case.²⁴ But that does not mean that we should throw the baby out with the bathwater and that states should not be held to any extraterritorial human rights obligations. As I and others have argued, human rights law and international humanitarian law each have a role to play in regulating military operations of different kinds.²⁵ This was clearly demonstrated by the ECtHR in cases such as *Hassan v the United Kingdom*.²⁶ Further, the idea that Parliament was unaware of the potential extraterritorial application of the Convention when they passed the Human Rights Act in 1998, or that this is a recent development, is frankly outrageous. The ECHR has been applied extraterritorially since 1965²⁷ and extraterritorially to military operations since 1975.²⁸ If Parliament intended to incorporate the Convention into domestic law in 1998, it was incorporating a treaty that was already being applied extraterritorially to the actions of military personnel during conflicts. Finally, the idea that the ECtHR is some outlier in applying human rights law to military operations, that it is ‘anomalous’ and ‘unprincipled’, is also fanciful. The International Court of Justice (ICJ), from as early as 1996, has acknowledged that the protection of the International Covenant for the Protection of Civil and Political Rights does not cease in times of war.²⁹ Other regional human rights systems, such as the Inter-American system, have a long history of applying human rights law to military

23 See, for example, S Wallace, *The Application of the European Convention on Human Rights to Military Operations* (Cambridge University Press 2019) Chapter 2; M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011).

24 *Georgia v Russia (II)* [GC] 38263/08 (ECtHR, 21 January 2021). For detailed analysis, see M Longobardo and S Wallace, ‘The 2021 ECtHR Decision in *Georgia v Russia (II)* and the Application of Human Rights Law to Extraterritorial Hostilities’ (2022) 55(2) *Israel Law Review* 145.

25 Wallace (n 23) 13; K Watkin, ‘Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict’ (2004) 98 *American Journal of International Law* 1; A Gioia, ‘The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict’, in *International Humanitarian Law and International Human Rights Law*, O Ben-Naftali (ed), (Oxford University Press 2012).

26 *Hassan v the United Kingdom* [GC] 29750/09 (ECtHR, 16 September 2014).

27 *X v Federal Republic of Germany* 1611/62 (ECmHR, dec, 25 September 1965).

28 *Cyprus v Turkey* 6780/74 and 6950/75 (ECmHR, dec, 26 May 1975).

29 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 25.

operations, including armed conflict.³⁰ In this context, not applying the ECHR to military operations would make it the outlier in international terms. Policy Exchange's critique is disingenuous and reeks of a British exceptionalist 'do as I say, not as I do' attitude.

2.1 *National Security*

The idea that the ECHR compromises the UK's national security has a long history. The ECHR has constrained the UK's ability to deport perceived threats to national security, such as Abu Qatada³¹ and Karamjit Singh Chahal.³² It has prevented the UK from indefinitely detaining suspected terrorists³³ and, to a more limited extent, modified problematic elements of controls placed on suspected terrorists.³⁴ The Abu Qatada case touched a nerve among critics of the ECHR/HRA. In response to Qatada's case, Theresa May stated that the Government 'have to do something about the crazy interpretation of our human rights laws',³⁵ suggesting that the UK scrap the HRA and consider withdrawing from the ECHR.³⁶ A subsequent Conservative Party election manifesto promised to update the HRA to ensure balance between the rights of individuals and 'our vital national security'.³⁷ When Dominic Raab introduced the Bill of Rights Bill to Parliament he claimed that 'human rights, especially Article 8, have been used to frustrate the deportation of criminals', and that proposed amendments to the HRA 'will restore credibility to the system and ensure we can protect the public by deporting those who pose a serious threat'.³⁸

The application of human rights law to extraterritorial military operations has similarly been framed as an issue of national security. This has prompted both calls to derogate from the ECHR for military operations and to withdraw from the ECHR altogether. The Defence Secretary, Philip Hammond, observed

30 See for example, *Arturo Ribón Avilán v Colombia*, Case 11.142, Inter-American Commission on Human Rights Report No 26/97 (30 September 1997); *Juan Carlos Abella v Argentina*, Case 11/137, Inter-American Commission on Human Rights Report No 55/97 (18 November 1997).

31 *Othman (Abu Qatada)* (n 7).

32 *Chahal v the United Kingdom* [GC] 22414/93 (ECtHR, 15 November 1996).

33 *A and Others v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.

34 For a balanced view, see H Fenwick, 'Terrorism and the Control Orders/TPIMs Saga: A Vindication of the Human Rights Act or a Manifestation of "Defensive Democracy"?' (2017) *Public Law* 609.

35 HC Deb 8 July 2013, vol 566, col 24.

36 *Ibid.*

37 The Conservative Party, 'The Conservative and Unionist Party Manifesto 2019' (2019) <<https://www.conservatives.com/our-plan/conservative-party-manifesto-2019>> 48.

38 Raab (n 15).

that ‘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’.³⁹ Richard Ekins bemoaned ‘introducing the vagaries of European human rights law’ to military action, observing that ‘the consequences for national security [...] rightly make this a cause for much concern’.⁴⁰

The plea that operational effectiveness demands disapplication of human rights norms is echoed elsewhere. In 2016, Michael Fallon, then Secretary of State for Defence, announced that the UK would be derogating from the Convention ‘before embarking on significant future military operations’.⁴¹ The stated motivation for such derogations was that the application of the ECHR to military operations risked ‘seriously undermining the operational effectiveness of the armed forces’.⁴² There is also a related narrative that compliance with the ECHR is a strategic weakness for the UK, compromising the military’s operational capabilities and, by extension, the UK’s national security. The UK specifically argued that the ECHR should not apply to service personnel participating in a Multi-National Force deployed in Afghanistan because it would have ‘introduced serious operational difficulties’ and ‘impaired the effectiveness of the Multinational Force in its operations’.⁴³

This challenge was specifically used as a justification for repealing the HRA in the UK Conservative Party’s manifesto, which stated: ‘we will ensure our Armed Forces overseas are not subject to persistent human rights claims that undermine their ability to do their job’.⁴⁴ Policy Exchange has linked concerns about expansionist interpretations of the ECHR with national security concerns, arguing that:

39 T Tugendhat and L Croft, ‘The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power’ (Policy Exchange, 2013): <<https://policyexchange.org.uk/wp-content/uploads/2016/09/the-fog-of-law.pdf>> 78.

40 R Ekins, ‘Lawfare and the Judicialisation of War in the Conservative Party Manifesto’ (Policy Exchange, 20 May 2017): <<https://policyexchange.org.uk/blogs/judicialisation-of-war-in-the-conservative-party-manifesto/>>.

41 HC Deb 10 October 2016, vol 615, col 3ws.

42 Ibid. For detailed analysis of this proposal see V Tzevelekos, ‘The United Kingdom’s Presumption of Derogation from the ECHR Regarding Future Military Operations Overseas: Abuse of Rights, Articles 17 and 18 ECHR, and à la carte Human Rights Protection’ (2019) 22(1) *Austrian Review of International and European Law* 137.

43 *Al-Jedda v the United Kingdom* [GC] 27021/08 (ECtHR, 7 July 2011) para 68.

44 The Conservative Party, ‘Conservative Party Manifesto 2015’ (2015) <<https://ucrel.lancs.ac.uk/wmatrix/ukmanifestos2015/localpdf/Conservatives.pdf>> 77.

Amending the HRA to limit, or to end altogether, its extra-territorial application is necessary to avoid implicating courts in adjudicating disputes for which their processes are ill-suited and which may compromise national security.⁴⁵

There are some legitimate concerns underlying these critiques. The co-application of human rights law and international humanitarian law is a complex issue and, as I have argued extensively elsewhere, determining the appropriate scope of a state's obligations during military operations is challenging.⁴⁶ However, that does not mean that we should abandon the protections offered by the Convention, but that we should seek to do a better job of applying the Convention to military operations.⁴⁷ We should not lose sight of what the vast majority of these extraterritorial cases are about. They are not cases in which victims are asking the UK to protect qualified rights like the right to private and family life in warzones, they are cases about basic protections against arbitrary detention⁴⁸ and cases in which it is alleged that the UK has not properly investigated claims that its soldiers committed murder and acts of torture.⁴⁹ The UK's military should be capable of effectively investigating allegations that their own soldiers may have committed war crimes without seriously compromising operational effectiveness or national security. Abstract concerns about national security should not serve as a pretext to override such basic obligations, especially those that are also incumbent on the state under International Humanitarian Law.⁵⁰

These two examples show how the extraterritorial application of the ECHR/HRA has driven calls for withdrawal from the ECHR and repeal of the HRA. In the next section, I argue that withdrawal would have a profound impact on this area of law.

45 Ekins and Larkin (n 22) 32.

46 Wallace (n 23) 43ff.

47 Ibid 217–219.

48 *Hassan* (n 26).

49 See, for example, *Al-Skeini and Others* (n 17); W Gage, *The Baha Mousa Public Inquiry Report* (The Stationery Office 2011).

50 See, for example, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, Article 147 (Fourth Geneva Convention).

3 Consequences of Withdrawal for Military Operations

In the previous section, I established the clear link between calls to withdraw from the ECHR and the application of the ECHR to extraterritorial military operations. In this section, I want to explore what the UK would lose from withdrawing. I argue the impacts are threefold. First, the UK would lose a dynamic force for legal innovation, which has led to better protection of soldiers and improved transparency and accountability of government ministries. Second, the UK would lose several necessary tools to secure the ongoing accountability of the Government for military operations. Finally, the UK would lose an external arbiter to challenge legislation that compromises human rights protection.

3.1 *Legal Innovation*

The application of the ECHR to extraterritorial military operations has had a transformative effect on the Ministry of Defence (MOD), requiring it to be much more transparent and accountable for its actions. There are several examples of this phenomenon, but I will focus on two: the extraterritorial application of the procedural obligations and operational obligations in Article 2.

A milestone in UK human rights law was the application of so-called ‘Article 2 inquests’ to extraterritorial operations. Following the case of *R (Middleton) v HM Coroner for Western Somerset*,⁵¹ Article 2 compelled the UK to adapt inquests to provide more scrutiny of the wider circumstances surrounding a person’s death. As the UK’s jurisdiction extended extraterritorially to Iraq and elsewhere, the UK needed to carry out effective investigations into deaths of soldiers and others the soldiers had contact with. The ECtHR has struggled at times to calibrate the exact scope of this obligation,⁵² but it has applied the obligation with increasing flexibility and deference to the circumstances as time went on.⁵³ The application of this obligation has shone a spotlight on the MOD, revealing several failures to provide adequate equipment to its soldiers, which directly contributed to their deaths. A shortage of body armour, for example, was revealed at the inquest into the death of Sergeant Steven Roberts, who died during the Iraq invasion. The coroner concluded that ‘Sgt Roberts’s death was as a result of delay and serious failures in the acquisition [...] of

51 *R (Middleton) v HM Coroner for Western Somerset* [2004] UKHL 10, [2004] 2 AC 182.

52 Wallace (n 23) Chapter 4.

53 *Hanan v Germany* [GC] 4871/16 (ECtHR, 16 February 2021).

enhanced combat body armour, none being available for him to wear'.⁵⁴ The revelation of these failures in turn prompted the MOD to change their policy to ensure that all soldiers deployed were equipped with enhanced body armour.

While inquests have served as a persistent source of scrutiny, other causes of action have also been impactful. The case of *Smith v MOD* at the UKSC was ground-breaking.⁵⁵ The case concerned soldiers who had been killed by roadside bombs in Iraq while they were driving in Land Rovers. Equipment that would assist in detecting roadside bombs was available at the time, but had not been equipped on the vehicles in these cases. The appellants argued that the failure to modify the vehicles or provide better armoured vehicles violated the obligation to protect the soldiers under Article 2. The UKSC determined that the ECHR was applicable because:

a finding that in all circumstances deaths or injuries in combat that result from the conduct of operations by the armed forces are outside the scope of Article 2 would not be sustainable. It would amount, in effect, to a derogation from the state's substantive obligations.⁵⁶

The UKSC would hesitate to question high-level decisions on procurement involving political choices about allocating resources and operational decisions in the field while in direct contact with the enemy, but there was a middle ground between these two extremes where Article 2 would apply.⁵⁷ This meant that the MOD had an obligation to protect soldiers deployed during extraterritorial military operations. The Government eventually reached a settlement with the families involved in these cases and issued them a full apology.⁵⁸

These are just two examples, among many, of situations where the application of the ECHR/HRA has led to improved protection of soldiers and increased the accountability and transparency of the MOD. In the absence of the legal avenues presented by the ECHR/HRA, it is difficult to see how these outcomes could have been achieved.

54 R Norton-Taylor, 'Unforgivable Body Armour Delays Caused Soldier's Death, Says Coroner' (The Guardian, 19 December 2006): <<https://www.theguardian.com/uk/2006/dec/19/iraq.military>>.

55 *Smith* (n 19).

56 *Ibid* para 58.

57 *Ibid* para 76.

58 C Coleman, 'Mother Wins MoD Apology Over 'Snatch' Land Rover Death' (BBC News, 18 August 2017): <<https://www.bbc.co.uk/news/uk-40958686>>.

3.2 *Ongoing Accountability*

While the previous cases have paved the way for greater accountability and transparency during military operations, several situations have arisen where the UK has moved towards protecting ECHR rights, only to backtrack or miss the mark. In these situations, the ECHR/HRA has helped to pressure the UK Government to change direction. The investigations established into unlawful conduct in Iraq and Afghanistan are instructive examples.

In *Al-Skeini v the United Kingdom*, the ECtHR found that the UK had failed to properly investigate several potential violations of Article 2 by service personnel in Iraq.⁵⁹ In response, the UK established an investigation into the conduct of the military during operations in Iraq. The Iraq Historical Allegations Team (IHAT) was established to conduct independent and effective investigations into alleged violations of Articles 2 and 3 in Iraq.⁶⁰ An investigation into allegations of violations of Articles 2 and 3 in Afghanistan, Operation Northmoor, was established later.⁶¹ Both of these investigation operations were criticised for the lack of prosecutions that emerged. Despite IHAT receiving over 3,000 allegations,⁶² no prosecutions were brought.⁶³ This headline outcome of IHAT, important as it is, overshadows the role the ECHR/HRA has played in securing meaningful investigations and compensation for the victims of unlawful conduct by service personnel in Iraq and Afghanistan.

The UK relied on IHAT as evidence that it was complying with the *Al-Skeini* judgment. However, there were questions about the independence and impartiality of IHAT. The families of victims were able to use the HRA to challenge IHAT's structures and processes. Firstly, as IHAT was staffed by army members who were involved in matters of detention and internment in Iraq, the Court of Appeal ruled that 'the practical independence of IHAT is, at least as a matter of reasonable perception, substantially compromised'.⁶⁴ IHAT was then reconstituted so that civilian police and Royal Navy Police replaced them.

59 Committee of Ministers, 'Al-Skeini v UK – Updated Action Plan' (21 March 2016) DH-DD(2016)316.

60 Iraq Historic Allegations Team (IHAT): <<https://www.gov.uk/government/groups/iraq-historic-allegations-team-ihat#allegations-under-investigation>>.

61 C Mills and J Dawson, 'Overseas Operations (Service Personnel and Veterans) Bill 2019–21' (Briefing Paper Number 8983, 17 September 2020): <<https://researchbriefings.files.parliament.uk/documents/CBP-8983/CBP-8983.pdf>> 5.

62 Iraq Historic Allegations Team (n 60).

63 International Criminal Court, 'Situation in Iraq/UK – Final Report' (9 December 2020): <<https://www.icc-cpi.int/sites/default/files/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf>> 6.

64 *R (Ali Zaki Mousa) v Secretary of State for Defence* [2011] EWCA Civ 1334, [2011] 11 WLUK 613, para 38.

In another case, victims claimed that IHAT did not meet the procedural obligations under Articles 2 and 3 because there was insufficient scope for public scrutiny of the investigation and participation of the next-of-kin.⁶⁵ As a result, a separate judicial inquiry tasked with investigating the circumstances surrounding Iraqi deaths involving British forces, called the 'Iraq Fatality Investigations', was established.⁶⁶ This has since carried out a number of investigations into deaths once the prospect of prosecution has been discounted. The MOD has also compensated hundreds of victims out of court following human rights litigation under Articles 2, 3, and 5.⁶⁷

Operation Northmoor was also criticised for not leading to prosecutions, but again the ECHR/HRA has been instrumental in addressing shortcomings in that investigation. The families of victims of extra-judicial killings in Afghanistan brought judicial review claims using the HRA against the Government, claiming that the incidents were not properly investigated and covered up by government officials.⁶⁸ Before the cases of *Yar v Secretary of State for Defence* and *Noorzai v Secretary of State for Defence* came to trial, and in direct response to them, the UK Government decided to establish a statutory public inquiry, which will look into 'alleged unlawful activity by British armed forces during deliberate detention operations in Afghanistan in the period from mid-2010 to mid-2013'.⁶⁹ It is worth noting that the allegations underpinning these judicial review cases were investigated by Operation Northmoor and no prosecutions were undertaken.⁷⁰ As a result, the inquiry will also look into the 'adequacy of subsequent investigations into such allegations'.⁷¹

65 *R (Ali Mousa and Others) v Secretary of State for Defence* [2013] EWHC 1412 (Admin), [2013] 5 WLUK 674.

66 Iraq Fatality Investigations: <<https://www.gov.uk/government/collections/iraq-fatality-investigations>>.

67 *Alseran v MOD* [2017] EWHC 3289 (QB), [2019] QB 1251; 'Ministry of Defence Paid Nearly £22 Million in Iraq War Compensation Claims' (ITV News, 13 June 2017): <<https://www.itv.com/news/2017-06-13/ministry-of-defence-paid-nearly-22-million-in-iraq-war-compensation-claims>>.

68 Leigh Day, 'Bereaved Families Welcome Unprecedented Statutory Inquiry into Allegations of Extrajudicial Killings by UK Special Forces in Afghanistan' (15 December 2022): <<https://www.leighday.co.uk/news/news/2022-news/bereaved-families-welcome-unprecedented-statutory-inquiry-into-allegations-of-extrajudicial-killings-by-uk-special-forces-in-afghanistan/>>.

69 HC Deb 15 December 2022, vol 724, col 1259.

70 D Sabbagh, 'Alleged Massacres of Afghans by SAS Not Properly Investigated, Court Told' (The Guardian, 9 November 2021): <<https://www.theguardian.com/uk-news/2021/nov/09/alleged-massacres-of-afghans-by-sas-not-properly-investigated-court-told>>.

71 HC Deb (n 69).

The outcomes in each of these examples is far from ideal. It reveals the intransigence of the MOD, but it also shows how beneficial the ECHR/HRA architecture can be in seeking justice. It has ensured ongoing accountability, with the UK adapting investigations, paying compensation, providing apologies to victims, and creating more expansive investigations.

3.3 *External Arbiter*

The potential withdrawal from the ECHR will remove the ability of victims to challenge legislation which violates human rights law. The UK courts do not have the power to strike down legislation that is incompatible with human rights law.⁷² Where legislation is capable of operating incompatibly with the ECHR,⁷³ some UK courts are permitted to issue a declaration of incompatibility, identifying the errant legislation to the UK Government.⁷⁴ While it is up to the Government to determine how to respond to such declarations, the UK has an exemplary record of rectifying these incompatibilities.⁷⁵ In the event that a victim cannot challenge legislation that violates their rights, there is also the possibility of taking an application to the ECtHR. When a violation is found, states will often amend legislation as part of their action plan to comply with the judgment.⁷⁶ If the UK leaves the ECHR, this vital avenue of legal protection will be removed. This is particularly relevant in the context of military operations as the UK moves to implement legislation which challenges basic human rights protections. There are two examples worth assessing here, namely the Overseas Operations Act (Service Personnel and Veterans) 2021 and the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023.

The Overseas Operations Act 2021 introduced a presumption against prosecution of current or former armed forces personnel for alleged offences committed in the course of duty outside the UK more than five years ago.⁷⁷

72 The UK adheres to a doctrine of legislative supremacy/parliamentary sovereignty, under which acts of the legislature cannot be considered invalid in the eyes of the courts. See, for example, *British Railways Board v Pickin* [1974] AC 765 (HL).

73 *R (T) v Secretary of State for the Home Department* [2014] UKSC 35, [2015] AC 49, para 52.

74 HRA 1998 (n 3) s 4.

75 Ministry of Justice, *Responding to Human Rights Judgments 2021–2022* (CP No 763, December 2022) Annex A.

76 See, among many examples, the UK's response to the case of *Thynne, Wilson and Gunnell v the United Kingdom* [Plenary Court] 11787/85 (ECtHR, 25 October 1990), which involved introducing new legislation, the Criminal Justice Act 1991, to amend sections of the Criminal Justice Act 1967 which gave rise to the violation in that case. The Human Rights Act contains a specific provision to fast-track amendments to legislation in response to ECtHR judgments: HRA 1998 (n 3) s 10(1)(b).

77 Overseas Operations Act 2021, s 2.

It also places constraints on the discretion of courts to extend the one-year limit for people to bring ECHR claims before UK courts. The presumption is designed to cover the actions of UK forces in Iraq and Afghanistan, and while it excludes some offences, such as torture and genocide,⁷⁸ it can apply to murder, manslaughter, the infliction of grievous bodily harm, and arbitrary detention – all of which have been alleged against UK forces in Iraq and Afghanistan.⁷⁹

Under the Northern Ireland Troubles (Legacy and Reconciliation) Act, the UK has introduced conditional immunities from prosecution for offences that fall within the scope of Articles 2 and 3.⁸⁰ It can bar investigations into incidents that occurred during the so-called ‘Troubles’ period in Northern Ireland by any organisation other than a newly created ‘Independent Commission for Reconciliation and Information Recovery’,⁸¹ and bar prosecutions for Troubles-related offences not involving death or serious injury, or which are not connected to offences involving death or serious injury.⁸² The Act will also stop inquests into Troubles-related deaths in certain circumstances.⁸³

It is not clear how the Overseas Operations Act and the Northern Ireland Troubles (Legacy and Reconciliation) Act will be applied in practice, but both pieces of legislation have the potential to violate multiple rights, including Articles 2, 3, 13, and 34 ECHR. I do not have space to explore each potential violation here, but I can elaborate on one. Any investigation into death or ill-treatment must be capable of establishing the facts and holding those at fault accountable.⁸⁴ By creating a barrier to accountability, the UK creates potential violations of the procedural obligations under Articles 2 and 3 ECHR. Other international human rights bodies have taken a strong stand against the adoption of amnesties and comparable measures preventing prosecutions.⁸⁵ The exact position at the ECtHR has been less clear. In the 2012 *Tarbuk v Croatia* case, a Chamber of the ECtHR observed that:

78 Ibid sch 1.

79 B Shiner and T Chowdhury, ‘Ministry of Defence Impunity: The Overseas Operations (Service Personnel and Veterans) Act 2021’ (2022) *Public Law* 289, 293–294.

80 Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, s 19.

81 Ibid s 38.

82 Ibid ss 39–41.

83 Ibid s 44.

84 *Armani Da Silva v the United Kingdom* [GC] 5878/08 (ECtHR, 30 March 2016) para 233.

85 See United Nations Human Rights Committee, ‘General Comment No. 31’ (26 May 2004) CCPR/C/21/Rev.1/Add.13, para 18; United Nations Human Rights Committee, ‘General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life’ (30 October 2018) CCPR/C/GC/36, para 27; Inter-American Court of Human Rights *Barrios Altos Case Chumbipuma Aguirre et al v Peru* (2002) 41 ILM 91, para 43.

even in such fundamental areas of the protection of human rights as the right to life, the state is justified in enacting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the state and the interests of individual members of the public.⁸⁶

However, a 2014 Grand Chamber judgment, *Margus v Croatia*, appeared to take a harder line, stating:

The obligation of states to prosecute acts such as torture and intentional killings is thus well established in the Court's case-law. The Court's case-law affirms that granting amnesty in respect of the killing and ill-treatment of civilians would run contrary to the state's obligations under Articles 2 and 3 of the Convention since it would hamper the investigation of such acts and necessarily lead to impunity for those responsible. Such a result would diminish the purpose of the protection guaranteed under Articles 2 and 3 of the Convention and render illusory the guarantees in respect of an individual's right to life and the right not to be ill-treated.⁸⁷

The more recent Grand Chamber judgment takes precedence. As such, the move to grant immunity from prosecution in the Troubles Bill, while shutting down other means of discharging the state's procedural obligations (through civil proceedings and inquests), places the Bill on a collision course with the ECHR. Indeed, the Irish Government has lodged an inter-state application against the United Kingdom before the ECtHR challenging this legislation.⁸⁸ At the same time, the Overseas Operations Act presents the prospect of the UK undertaking a poor investigation in-theatre during an extraterritorial military operation that exonerates the armed forces personnel, then relying on that investigation to ground a presumption against prosecution later, creating serious questions over the compatibility of this legislation with the ECHR. If the UK withdraws from the ECHR and repeals the HRA, there will be very limited scope to challenge such laws in UK courts.

86 *Tarbuk v Croatia* 31360/10 (ECtHR, 11 December 2012).

87 *Margus v Croatia* [GC] 4455/10 (ECtHR, 27 May 2014).

88 *Ireland v the United Kingdom* 1859/24 (ECtHR).

4 Conclusion

The ECHR and HRA have influenced the UK's legal system in countless transformative ways. Even if the UK were to denounce the ECHR tomorrow, putting that genie back in the bottle would be extremely challenging because human rights law has suffused the legal system. Much like the EU's legacy in domestic UK law, changes prompted by the ECHR/HRA are now baked into a range of other legislation (e.g., Coroners and Justice Act 2009). Uninstalling this legislation would be a colossal undertaking of dubious merit. Withdrawing from the ECHR would be incredibly damaging. It would curtail legal innovations, like the Middleton inquests and the creative interpretation of Article 2 in *Smith v MOD*, which have been instrumental in securing greater transparency and accountability at the MOD. It would restrict victims' capacity to challenge how human rights judgments are implemented and make testing whether legislation complies with human rights provisions virtually impossible. Ultimately, the UK should not withdraw for a simple reason given by Justice Bonello because: 'those who export war ought to see to the parallel export of guarantees against the atrocities of war'.⁸⁹

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89 *Al-Skeini and Others* (n 17) Concurring Opinion of Judge Bonello.