



Human Rights Law Clinic Papers 2017

ASSESSING THE UK CONSERVATIVE PARTY PROPOSAL TO ESTABLISH A STANDING DEROGATION CONCERNING BRITISH ARMED FORCES

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Introduction

The Joint Select Committee on Human Rights has launched an inquiry into an unprecedented proposal by Prime Minister, Theresa May, and Defence Secretary, Michael Fallon. The proposed plan is for the United Kingdom (UK) to derogate from its obligations under the European Convention on Human Rights (ECHR) in times of armed conflict and for this derogation to be 'presumed'.¹ There has been no published date as to how this derogation mechanism would operate or be implemented, but the purported basis for this proposal is to: "Put an end to the industry of vexatious claims that has [sic] pursued those who served in previous conflicts".² Whilst Marko Milanovic argues that this declaration of an industry of 'vexatious' claims are not evidenced and false; the total military budget spent on said 'vexatious' claims is, at most, £100m per annum, a mere scratch on the £55bn total budget for military spending.³

Robert Bourns, President of the Law Society of England and Wales stated that: "It is the role of the justice system to determine the validity of claims, a function that is and must remain separate from Government."⁴ Harriet Harman has expressed concern regarding the scrutiny of the proposed derogation plan by stating:

"If and when [the] time comes, there is unlikely to be time for proper, considered scrutiny of the government's case for derogation. The scrutiny needs to start now, so that Parliament is ready to do its job of rigorously scrutinising the justification for any future derogation."⁵

This memorandum aims to do just that: scrutinise the current proposal's legal applicability. As the Government's proposal to derogate on a 'presumed' or 'standing' basis is unique, there are an abundance of potential pitfalls of the proposal that require in depth exploration. Focus will remain upon the precise requirements of Article 15 of the ECHR; specifically the requirements that: derogations may only be made with respect to a, 'war or other public emergency threatening the life of the nation'; the requirement of notification of derogation be given with the term provided for under Article 15(3); and the implications of the potential extraterritorial scope of not only Article 15, but the ECHR as a whole.⁶

Furthermore, implementing legislation is required, as law must prescribe any limitation of rights, including the mechanism of derogation. This is also widely accepted as good derogation practice and has previously been undertaken by Great Britain, for example during the later repealed Part IV of the Anti-terrorism, Crime and Security Act 2001 which acted as the implementing legislation for the UK's derogation of 2001.⁷ It is thus reasonable to assume that the Government would introduce implementing legislation in the context of the current proposal of a 'presumed' extraterritorial derogation. The memorandum will explore the contentious issues that such legislation should attempt to clarify, namely the grounds for internment in armed conflict and applicable procedural safeguards, the procedural

¹ Ministry of Defence, 'Government to protect Armed Forces from persistent legal claims in future overseas operations' (*Gov.uk*, 04 October 2016) at URL: <<https://www.gov.uk/Government/news/Government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations>> (accessed 09 January 2017).

² Theresa May, Conservative Party Conference (2016).

³ Marko Milanovic, 'UK to Derogate from the ECHR in Armed Conflict', *EJIL:Talk!*, 05 October 2016, at URL: <<http://www.ejiltalk.org/uk-to-derogate-from-the-ECHR-in-armed-conflict/>> (accessed 10 January 2017), para 8.

⁴ Law Society, 'Derogating from ECHR shuts door to cases of genuine abuse', *Law Society*, 04 October 2017, at URL: <<http://www.lawsociety.org.uk/news/press-releases/derogating-from-ECHR-shuts-door-to-cases-of-genuine-abuse/>> (accessed 14 January 2017), para 5.

⁵ Joint Committee on Human Rights, 'ECHR: Committee launches inquiry into government's proposed derogation - news from parliament' (*Parliament.co.uk*, 13 December 2016), at URL <<https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2015/ECHR-derogation-launch-16-17/>> (accessed 23 January 2017), para 2.

⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), Article 15.

⁷ Anti-terrorism, Crime and Security Act 2001.

obligations under the non-derogable rights under Articles 2 and 3 of the ECHR (the right to life and the prohibition of torture and ill-treatment).

The scope and means of implementation of the current proposal will have potentially monumental effects for both Great Britain's reputation within human rights governance and the general standing, and respect for, the ECHR as a whole. Consequently, Harman's encouragement of scrutiny is to be heeded, in order to prevent potential effects to the detriment of Great Britain's global standing and violations of its international obligations.

Permissibility of the proposal

The 'standing' or 'presumed' nature of the Government's proposed derogation is unprecedented and potentially problematic. Without a published derogation plan, it is difficult to ascertain the instances in which the proposed derogation would be 'active' or 'inactive', but for the purposes of this memorandum, it is assumed that in any case of British troops being stationed or undertaking activities overseas, the proposed derogation would be 'active'. This section of the memorandum evaluates the permissibility of an 'active' derogation in times of armed conflict. To do so requires examination of: notification requirements; democratic oversight; extraterritoriality; and activation of a derogation based on a threat to the life of another nation.

Notification of derogations

There exists abundant opinion opposing a 'presumed' derogation. As explained by Marko Milanovic, a derogation amounts to a singular act of a matter of fact and that individual derogations must therefore be made by a public act each time.⁸ Both Article 4 of the International Covenant on Civil and Political Rights (ICCPR) and Article 15 of the ECHR require the proclamation of the existence of a 'war or other public emergency threatening the life of the nation' and a subsequent proclamation of the specific derogating measures adopted to respond to said 'war' or 'emergency'. According to the Siracusa Principles, this notification of derogation must contain: the derogated provisions, a copy of the proclamation of a state of emergency, the date and length of derogation and notification upon its termination; all usually contained within the derogation implementing legislation.⁹ It is here that the first challenge arises in the context of the UK's proposed derogation plan. A derogation requires specific notification of activation and termination. As such, can a 'presumed' derogation legitimately bypass this requirement of notification or are the notification requirements of Articles 4(3) of the ICCPR and 15(3) of the ECHR a stumbling block of the proposed derogation plans?

The European Court of Human Rights (ECtHR) in *Aksoy v Turkey* stated that, the measures of notification are to be examined motu proprio by court.¹⁰ In *Brannigan and McBride v UK*, it emphasised the need for permanent review of both the emergency and derogation measures spelled out in the derogation notification.¹¹ In General Comment 29 of the UN Human Rights Committee, the body established to monitor implementation of the ICCPR, the importance of the notification requirements of Article 4 of the ICCPR was emphasised.¹² The Human Rights Committee saw notification as essential for evaluation of the necessity of

⁸ Marko Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in Nehal Bhuta (ed), *The Frontiers of Human Rights: Extraterritoriality and its Challenges, Collected Courses of the Academy of European Law* (Oxford University Press 2014) 55–89 Heading Automaticity and proclamation, para 1.

⁹ UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, at URL: <<https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>> (accessed 17 Jan 2017), paras 42-50.

¹⁰ *Aksoy v Turkey* [1996] 68 EHHR. paras 85-86.

¹¹ *Brannigan and McBride v The United Kingdom* [1993] 5 EHHR. para 2.C(ii).

¹² UN Human Rights Committee, *CCPR Comment No. 29: Article 4: Derogations during a State of Emergency*, UN Doc CCPR/C/21/Rev.1/Add.11 (2001), para 17.

derogation, as required by the 'exigencies of the situation', exigencies that would require constant monitoring by other state parties.¹³ The ECtHR in *Cyprus v Turkey* highlighted that the absence of a notification of derogation rendered Turkey in breach of Articles 5, 8 and 1 in the absence of an official derogation in line with Article 15.¹⁴ The Court in *Greece v UK* also underlined that the notification must be prompt, in that case finding that a three-month delay rendered the derogation invalid.¹⁵

Democratic oversight

Following the declaration of incompatibility issued by the UK House of Lords in *A and Others v UK*,¹⁶ resulting in withdrawal of the UK's derogation of 2001, the Joint Committee on Human Rights stressed the importance of Parliamentary scrutiny of any future proposed derogations.¹⁷ It is likely that the current proposal will run afoul of the need for Parliamentary scrutiny, if it is to act as a form of 'standing' derogation, which thereby does away with case-specific Parliamentary oversight. It has been emphasised that states with stable democracies and legal systems capable of reviewing executive actions should not derogate on a 'presumed', 'standing' or 'serial' basis in response to a perceived on going emergency.¹⁸ One only need look as far as Israel, Nicaragua and Azerbaijan as evidence of the potential of what a 'standing' derogation, free from legislature scrutiny, can do to the enforceable human rights of its citizens domestically and can potentially do to the standing of a state within the international human rights law framework and institutions.¹⁹

One way in which the Government's proposed derogation could be seen as valid, in line with the requirements of Articles 4(3) of the ICCPR and 15(3) of the ECHR and the need for parliamentary scrutiny is through changing the nature of the derogation plan. If the derogation was not be introduced on a 'standing' basis and was, in fact, to be represented by a pre-prepared body of derogation implementing legislation, validity may be awarded. If a 'war or other public emergency' was perceived that required a derogation, this pre-prepared body of implementing legislation could be brought, each time, for both Parliamentary and Secretary General scrutiny. Thus satisfying the notification requirements of Article 4(3) of the ICCPR and Article 15(3) of the ECHR, as each time the body of law was scrutinised, it would be specific as to the circumstances in which it would apply, with a start and termination date. The scrutinised body of implementing legislation need not change; scrutiny would be as to the applicability of the implementing legislation in the specific situation potentially requiring derogation, rather than the current proposal of a 'standing' derogation, lacking in situational specificity.

Extraterritoriality

Extraterritoriality in law concerns the applicability of law beyond the scope of its jurisdiction of origin. An extraterritorial derogation requires that the ECHR's jurisdiction be of the same nature: extraterritorial – applicable outside the territory of the State party. The very proposal

¹³ Dominic McGoldrick, 'The interface between public emergency powers and international law' (2004) 2(2) *International Journal of Constitutional Law* 380–429. Heading, The existence of the emergency must be officially proclaimed, 6.

¹⁴ *Cyprus v Turkey* [2015] 131 EHHR. para 180.

¹⁵ *Greece v UK* [1952] ICJ Rep. para 152(d).

¹⁶ *A and Others v The United Kingdom* [2009] 16 EHHR. para 167.

¹⁷ Joint Committee on Human Rights 2010, op cit, para 7.

¹⁸ Christopher J. Fariss, Emilie Hafner-Burton and Laurence Helfer, 'Emergency and Escape: Explaining Derogations from Human Rights Treaties' (2011) 65(4) *International Organisations* 673, 683.

¹⁹ *Ibid*, 698.

of an extraterritorial derogation by the British Government is acknowledgement that an extraterritorial jurisdiction exists.²⁰

The ECtHR in *Bankovic & Others v Belgium* took a restrictive approach when evaluating the geographical jurisdiction of the ECHR (jurisdiction over a territory, as opposed to jurisdiction over a person), taking the view that extension of geographical jurisdiction was to be treated as exceptional and only possible within the *espace juridique* of the ECHR.²¹ The Court reversed its position concerning *espace juridique* in *Al Jedda v United Kingdom*²² and *Al Skeini v United Kingdom*,²³ instead finding that if 'effective control' is exerted over a territory or individuals, including in the context of an armed conflict, the ECHR's jurisdiction applies extraterritorially. Consequently, in *Mohammed v Ministry of Defence*, the court suggested that if the ECHR has extraterritorial scope, then so too does Article 15.²⁴ The ICJ also implied in its *Nuclear Weapons* and *Wall* Advisory Opinions that human rights protection the world over is to be extraterritorially applicable and, consequently, derogable extraterritorially only by application of the appropriate criteria set out in Article 4 of the ICCPR (and in this case, Article 15 of the ECHR).²⁵

The Government effectively seeks to do away with the obligations that follow British forces acting abroad through derogation. This therefore prompts examination of the substantive requirements of a valid derogation.

Activation of a derogation based on a threat to the life of another nation

The first, and arguably most stringent, requirement of Article 15 is that, to enable derogation from certain rights, there must be a 'war or other public emergency threatening the life of the nation'. This requirement is relatively easy to quantify in terms of a derogation that has purely domestic effect – involving derogation from the application of rights to persons within the territory of the derogating State – as seen recently in France. However when the proposed derogation is to have extraterritorial effect – involving derogation from State obligations concerning State conduct abroad – the threat to the 'life of the nation' becomes a contentious point. Should the UK be allowed to derogate from its obligations under the ECHR, on the basis of a threat to the life of another nation, in which British forces are to deploy? Jayne Rooney explored the idea that if the 'war or other public emergency' in that other nation existed before the UK's deployment of forces, and given that such deployment is/was voluntary, can the ECHR's extraterritorial obligations be derogated from?²⁶ To satisfy the requirement of the existence of a 'war or other public emergency threatening the life of the nation', could courts look towards an emergency existing overseas that is or was threatening the lives of servicemen and women deployed in that third State and could these servicemen and women represent 'the nation' within the meaning of Article 15?

In *Al-Jedda*, Lord Bingham echoed Rooney's concern's and refused to accept that a conflict entered into voluntarily overseas could threaten the life of the British nation, unless the nation was perceived as servicemen and women and the threat was permitted as existing in an overseas territory.²⁷ Any concept to consider 'the nation' to be an overseas community is

²⁰ Marko Milanovic, 'UK to derogate from the European Convention on Human Rights in Armed Conflict' (*EJIL:Talk!*, 05 October 2016) AT URL: <<http://www.ejiltalk.org/uk-to-derogate-from-the-ECHR-in-armed-conflict/>> (accessed 28 January 2017), para 11.

²¹ *Bankovic v Belgium* [2001] 089, EHHR12

²² *Al-Jedda v The United Kingdom* [2011] 27021/08, EHHR

²³ *Al-Skeini and Others v The United Kingdom* [2011] 55721/07 EHHR18

²⁴ *Mohammed and others v Ministry of Defence* [2017] 2 UKSC, para 45.

²⁵ *Legality of the threat of use of nuclear weapons: Advisory opinion of 8 July 1996*, (1998) ICJ Reports, Footnote 25.

²⁶ Jayne Rooney, 'Human rights in Ireland: Rooney on *Hassan v United Kingdom* and extraterritorial derogations' (humanrights.ie, 8 January 2014), at URL <<http://humanrights.ie/international-law/international-human-rights/rooney-on-hassan-v-united-kingdom-and-extraterritorial-derogations/>> (accessed 01 February 2017), para 8.

²⁷ *Al-Jedda*, op cit, para 38.

unlikely, even by application of the ECtHR of a wide margin of appreciation to Article 15. It is suggested that treating a foreign community as 'the nation' is far too tenuous, but stationed British troops representing 'the nation' may require further exploration.

The European Court in *Lawless v Ireland* determined that the margin of appreciation applied to Article 15 permits the 'threat' to the 'life of the nation' to be that of an overseas nature, threatening the arm of the State stationed overseas.²⁸ In *A & Others v Secretary of State*, Lord Hoffman suggested that a threat to the democratic institutions of the UK Government would suffice to satisfy the requirement of a 'threat to the life of the nation'. He stated:

"The Armada threatened to destroy the life of the nation, not by loss of life in battle but by subjecting English institutions to the rule of Spain and the inquisition".²⁹

In line with Hoffman's statement, Michael O'Boyle acknowledges that if an overseas conflict threatens to engulf a State party to the ECHR, then the threat to the life of the nation can be perceived.³⁰ The court in *Lawless* implied that the 'threat to the life of the nation' was a measure of the scale of emergency, rather than geographic scope and, thus, if the threat is imminent and would cease domestic community life and derogation will allow acts to be taken to potentially rectify this, then the threat may be overseas and at the same time constitute a threat to Great Britain on her territory.³¹ Hence, an overseas threat can potentially be perceived to satisfy the requirements of Article 15, although the interpretation of Article 15 in this sense would require a wide margin of appreciation by the courts.

Summary

The extraterritorial scope of the ECHR has been all-but-confirmed by the judgments in *Al-Skeini* and *Al-Jedda*, although the extraterritorial applicability of Article 15 is in contention, especially in the context of the current Government proposal to derogate on a 'standing' basis, in times of armed conflict. The specificity of the notification requirements of Article 15(3) render a 'standing' derogation unlikely permissible. Article 15(3) clarifies that derogations are a matter of fact, specific as to a time period that requires derogation, because of a perceived emergency or threat that existing measures under the ECHR could not combat. It is highly unlikely that this 'emergency or threat' could be perceived to be of a constant presence, warranting a derogation on a 'standing' basis. Assuming that a 'threat to the life of the nation' could be conceived as existing in an overseas territory, the threat would be under constant monitoring by Parliament and the Council of Europe and it is unlikely that the threat could be so constantly severe to require derogation on a 'standing' basis. Therefore, whilst theoretically an extraterritorial derogation is possible, a permissible extraterritorial derogation on a 'standing' basis appears unlikely; largely due to the requirements of notification and a 'war or other public emergency threatening the life of the nation'. Parliamentary scrutiny is to be essential in any future progression of this unique proposal; the magnitude of the potential consequences of the Government's proposal renders negligence to its terms and legality possibly disastrous.

Implementing legislation

The UK Joint Committee on Human Rights advocated the enactment of a statutory framework, when derogating from human rights treaties, to establish a clear legal basis for scrutiny, as currently, recourse to derogations runs the risk of becoming a solely executive act. The purpose of such derogation implementing legislation is to consolidate the details of the derogation and to act as the legal base on which the derogating State shall be measured

²⁸ *Lawless v Ireland* [1961] 332/57, EHHR 15 . para 90.

²⁹ *A and Others v The United Kingdom* [2009] 3455/05, EHHR 16 . para 91.

³⁰ Michael O'Boyle, 'Emergency Government and derogation under the European Convention on Human Rights' (Lecture to the Law Society, 2016)

³¹ *Lawless v Ireland* [1961] 332/57 EHHR 15 . para 25.

and held to account. It gives effect to the rule of law and principle of legality by preventing the possibility of unanticipated action being taken and retrospectively justified by reason of a vaguely defined derogation. For this reason, the derogation implementing legislation should clarify any uncertainties that may surround a proposed derogation,³² including a list of provisions provoking the necessity for a derogation (Turkey was criticised for its derogation as lacking details as to the precise provisions being derogated from, how and why).³³ In terms of the proposal by the Conservative Government, attention is paid to the non-derogable rights under Articles 2 and 3 of the ECHR and the procedural obligations that follow, the legality of detention in the context of an ECHR derogation and potential procedural obligations attached to detention.

Right to life and prohibition of torture and ill-treatment

The implementing legislation must make clear the procedural obligations contained within Articles 2 and 3 of the ECHR, regarding the right to life and freedom from torture and cruel, inhuman or degrading treatment. The European Court in *Al Saadoon and Mufdhi v UK* suggested that any use of force that ends the life of an individual or subjects them to torture or degrading treatment requires an investigation unless permissible as a 'legal act of war', a procedural obligation applicable at all times due to the non-derogable status of Articles 2 and 3.³⁴ The European Court's decision in *McCann and Others v UK* also highlighted the importance of the procedural elements of these Articles and the effects that these investigations should have.³⁵ In *Anguelova v Bulgaria*, it clarified the purpose of these investigations, stating that,

"The essential purpose of such an investigation is to secure the effective implementation of the domestic law which protects the right to life and in these cases involving state agents or bodies, must ensure accountability for deaths occurring under their responsibility."³⁶

The ECtHR in *Kelly and Others v The United Kingdom* requires that such an investigation be independent, provide legal aid to the family of the victim with full relevant disclosure of investigation. The circumstances of the alleged breach must be closely examined, in order to produce a conclusion as to the legality of the deprivation of liberty and of responsibility for this and subsequently provide prosecution, preventative measures and redress to the victim's family.³⁷ As the procedural elements of both Articles 2 and 3 are non-derogable, their specifics should be laid out within the implementing legislation for the aforementioned reason of providing grounds on which the derogation implementing Government can be checked.

Right to liberty

In the context of Article 5, the main issue of contention that requires clarification within the implementing legislation is that of internment in armed conflict. When IHL presides by application of the principle of *lex specialis*, namely in a situation of an international armed conflict (IAC), there is little debate regarding a State's 'power to intern', conferred by the Geneva Conventions. However, when this power to intern, awarded by the third and fourth Geneva Conventions, was interpreted in line with IHRL, the legality of detention in international armed conflict became more unclear. This was until the ECtHR passed

³² UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, UN DOC: CCPR/C/21/Rev.1/Add.11. para 17.

³³ Martin Scheinin, 'Turkey's derogation from human rights treaties – an update' (*EJIL: Talk!*, 18 August 2016) AT URL: <<http://www.ejiltalk.org/turkeys-derogation-from-human-rights-treaties-an-update/>> (accessed 03 February 2017). para 5.

³⁴ *Al-Saadoon and Mufdhi v The United Kingdom* [2010] 61498/08, EHHR

³⁵ *McCann and Others v The United Kingdom* [1995] 18984/91 EHHR 324

³⁶ *Anguelova v Bulgaria* [2002] 38361/97, EHHR. para 137.

³⁷ *Kelly and Others v The United Kingdom* [2001] 30054/96, EHHR, paras 94-98.

judgement in *Hassan v UK*. In this case, the UK argued that, due to the *lex specialis* principle, the ECHR's jurisdiction was displaced and their exercising of internment powers in Iraq was wholly legal under the third and fourth Geneva Conventions. The court rejected the UK's argument, as acceptance would have repealed the precedent of *Al-Skeini*.³⁸ Instead the court accepted that the ECHR does apply in IACs, but must be interpreted in line with IHL, which also governs these armed conflicts.³⁹ Specifically regarding internment under Article 5 of the ECHR, the court utilised the purpose of Article 5: to stop arbitrary detention. With this in mind, the court ruled that internment in IACs must be both in line with the third and fourth Geneva Conventions and must not be arbitrary, as to satisfy the purpose of Article 5 of the ECHR.⁴⁰ The grounds of permitted detention under Article 5(1) should accommodate the power conferred by the third and fourth Geneva Conventions to intern in IAC.^{41,42} The court chose not to deal with the issue of extraterritorial derogations and left the legality of internment in NIACs uncertain. The clarification that *Hassan* offers, with regards to the legality of internment in IACs, should be clarified in the implementing legislation, as to highlight the lack of need for derogation from Article 5 in IACs.

Armed conflicts are becoming increasingly difficult to categorise, accordingly, the implementing legislation must also clarify the legality of internment in NIACs, in line with Article 5 of the ECHR and relevant IHL. The UK Supreme Court addressed the appeals of *Abd Ali Hameed Al-Waheed v Ministry of Defence* and *Serdar Mohammed v Ministry of Defence* in the early stages of 2017.⁴³ The case concerned the legality of detention in NIACs. The case also addressed the procedural obligations conferred by Article 5, however for the purposes of this memorandum, focus will remain on the legality of detention in NIACs in general, rather than the specifics of the case in hand and the procedural elements that duly concerned the court. In *Mohammed and Others v Ministry of Defence*, the Supreme Court ruled that, when prescribed by law for 'imperative reasons of security', detention in NIACs is permitted under IHRL and IHL.⁴⁴ Security Council Resolution 1546,⁴⁵ alongside Rule 121 of Customary IHL (which includes Articles 22 and 23 of Geneva Convention III and Articles 83 and 85 of Geneva Convention IV) confer the power to intern combatants in both IACs and NIACs.⁴⁶ When summarising the judgment in *Mohammed*, Lord Sumption highlighted how the list of legally permissible internments under Article 5.1 of the ECHR was non-exhaustive and, although unclear, could extend permissible internments to situations of armed conflict, of both an international and non-international nature.⁴⁷ The Supreme Court essentially followed the reasoning behind the judgment in *Hassan* for permitting internment in IACs and extended its reasoning to NIACs, by allowing Article 5(1) of the ECHR to permit circumstances for detention in NIACs, as laid out by Articles 22 and 23 of the Geneva Convention III⁴⁸ and Articles 83 and 85 of the Geneva Convention IV.⁴⁹

³⁸ *Al-Skeini and Others v The United Kingdom* [2011] 55721/07, EHHR18

³⁹ *Hassan v United Kingdom* [2014] 29750/09. EHHR

⁴⁰ *Hassan v United Kingdom* [2014] 29750/09. EHHR. page 5, para 3.

⁴¹ Geneva Conventions, Volume 4, Relative to the Protection of Civilians in Times of War. International Committee of the Red Cross. 1958. Article 83 & 85.

⁴² Geneva Conventions, Volume 4, Relative to the Treatment of Prisoners of War. International Committee of the Red Cross. 1949. Article 22 & 23.

⁴³ *Mohammed and Others v Ministry of Defence* [2017] United Kingdom Supreme Court UKSC 2015/0218

⁴⁴ *Mohammed and Others v Ministry of Defence* [2017] United Kingdom Supreme Court UKSC 2015/0218. para 32.

⁴⁵ United Nations Security Council, 'Resolution 1546'. 2004. Page 11, para 1.

⁴⁶ https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule121

⁴⁷ *Mohammed and Others v Ministry of Defence* [2017] United Kingdom Supreme Court UKSC 2015/0218. Judgment summary at URL: <<https://www.supremecourt.uk/watch/uksc-2015-0218/judgment.html>> (accessed 4th Feb 2017)

⁴⁸ Geneva Conventions, Volume 4, Relative to the Treatment of Prisoners of War. International Committee of the Red Cross. 1949. Article 22 & 23.

⁴⁹ Geneva Conventions, Volume 4, Relative to the Protection of Civilians in Times of War. International Committee of the Red Cross. 1958. Article 83 & 85.

In summary, *Mohammed* allowed internment in NIACs, in line with the aforementioned IHL and held that Article 5 conferred this power to intern under Article 5(1)'s permissible circumstances for deprivation of liberty. The Court reflected recent scholarship, aligning the law of IACs and NIACs and the line between them becomes ever blurred.⁵⁰

In the context of the UK's proposed plan to derogate from the ECHR in times of armed conflict, the law regarding internment requires clarification. The implementing legislation should not state Article 5 as a derogated provision; Hassan and Mohammed have made clear that, if in line with customary IHL, detention in both IACs and NIACs is legal, provided that it is not arbitrary and thus does not require derogation. The lack of need for derogation from Article 5 protects its procedural limb, as the purposes of derogating from Article 5 have been achieved through the powers conferred by both Hassan and Mohammed, ensuring legal protection of those interned by UK armed forces overseas, in the hypothetical incidence of an extraterritorial derogation.

Conclusion

It is unlikely that a derogation could ever be applicable under Article 15 if 'presumed' or 'standing'; similarly 'a war or other public emergency threatening the life of the nation' would be very difficult to observe under the proposed derogation's 'presumed' nature. In ignorance of these conclusions, if the proposed derogation were to proceed, clarity need be sought in the derogation implementing legislation. Especially with regards to the procedural obligations conferred by Articles 2 and 3 and detention issues under Article 5; with the possibility for the need of clarity regarding the procedural elements of Article 5. The overarching question when evaluating the Conservative Government's proposal objectively is: are the difficulties and potential effects of a 'presumed' derogation worth its potential benefits? And what are these benefits, other than potentially greater operational freedom for British armed forces by putting an end to 'an industry of vexatious claims', neither of which have been evidenced?

The words of Benjamin Franklin appear relevant and encapsulate the wider potential detriment of a derogation from the ECHR of the proposed nature; "Those who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety."⁵¹ Not only does the Conservative Government's proposal potentially sacrifice the liberty of those subjected to the control of armed forces overseas but also the protection that the ECHR affords to servicemen and women. Parliament should consider how a derogation of this type would potentially affect respect for the ECHR as a whole and the global standing of Great Britain in global human rights governance. Bourns condemns the Conservative Government's proposal in this light by stating that,

"If the UK is seen to reinterpret international conventions, we risk undermining our standing internationally, our ability to hold other states to account and disrupting a far wider culture of international cooperation that has been built over many years."⁵²

Thus, Parliament must carefully consider firstly the applicability of the proposal and secondly, whether the potential detriment of such a proposal is worth it for benefits we are yet to be told of in certainty.

⁵⁰ Sarah Cleveland, 'Harmonizing Standards in Armed Conflict' (EJIL: Talk!, 2014) <<http://www.ejiltalk.org/harmonizing-standards-in-armed-conflict/>> accessed 3rd Feb 2017

⁵¹ Michael O'Boyle, 'Emergency Government and derogation under the European Convention on Human Rights' (Lecture to the Law Society, 2016). Page 3. Heading: Theory, para 3.

⁵² 'Derogating from ECHR shuts door to cases of genuine abuse', (*Law Society*, 04 October 2017) at URL <<http://www.lawsociety.org.uk/news/press-releases/derogating-from-echr-shuts-door-to-cases-of-genuine-abuse/>> (accessed 14 January 2017). para 8.