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Executive Summary

- The Government's proposed derogation from the European Convention on Human Rights (ECHR) before 'significant future military operations' is falsely premised, inadequately evidenced and is likely to cause more costly litigation on the lawfulness of the derogation instead of limiting civil claims against the Ministry of Defence (MoD). The Government's diagnosis and prescription are both flawed.

- Only a small number of the thousands of allegations of international law violations have been proven to be false. In contrast, true allegations, such as those in the Baha Mousa Inquiry, have been uncovered through legal action, and have led to tangible reforms in military training. Many remaining allegations still await transparent and rigorous investigation.

- The Government's assertion that the extra-territorial application of the ECHR undermines the armed forces' operational effectiveness is not supported by adequate evidence. It reflects an institutional preference for international humanitarian law (IHL) over international human rights law (IHRL), when the two branches of law co-apply in armed conflict; and an unwarranted resistance to the civilian judiciary adjudicating on cases involving the armed forces.

- The Government's announcement will not achieve what it seeks. Even with a derogation, there would be litigation on the definition of deaths arising from 'lawful acts of war' under Art 2 ECHR. The prohibition and investigatory obligations under Art 3 are non-derogable, and a State's obligations under Art 5 cannot be reduced to compliance with IHL, particularly in non-international armed conflicts.

- The proposed derogation is unlikely to satisfy the substantive limits within Art 15. Limiting civil remedies for alleged ECHR violations is not required by the 'exigencies' of fighting overseas. Instead, it runs counter to broader policy

considerations, including access to justice and compliance with the UK's international law obligations.

- This submission focuses on the first three of the Committee's questions, before concluding with broader reflections and recommendations.

Q1. What evidence supports the Government's view that "our legal system has been abused to level false charges against our troops on an industrial scale"?

1. Despite frequent assertions, there is evidence for only a small number of false claims against the armed forces. First, the Government's own statistics and the announcement of the Iraq Historic Allegations Team (IHAT)'s imminent closure do not prove the falsity of the claims or allegations made. Second, the MoD's 'spin' around the Al-Sweady Public Inquiry deliberately downplays findings about true allegations. That Inquiry is evidence of a small number of manifestly false allegations, but also of nine instances of ill-treatment by British forces against Iraqi detainees. These are not negligible findings, especially in the context of other incidents, particularly the inhumane treatment that led to the death of Baha Mousa;[1] and the sexual abuse of looters in the Camp Breadbasket incident.[2] Third, the actions of the former solicitor Mr. Phil Shiner significantly increased the number of allegations brought against the armed forces, but his dishonesty does not imply the falsity of each allegation made, nor the dishonesty of each of his clients.
2. First, the figures offered by the Government Response to the Joint Committee on Human Rights (JCHR) do not amount to evidence of 'false charges … on an industrial scale'. Simply aggregating the number of civil claims concerning operations in Iraq (1191) and Afghanistan (99),[3] and the number of allegations of criminal conduct received by the IHAT (3388), and Operation Northmoor (646) does not constitute evidence that 'our legal system has been abused'; nor that the claims are false, since the Government itself acknowledges that '[v]irtually none' of the cases not yet settled has been heard. Similarly, aggregating the number of IHAT claims 'sifted out' (1666) and closed or 'in the process of being closed' (690) does not prove

[1] *R v. Payne* (2007); Sir William Gage, 'The Baha Mousa Public Inquiry Report' (2011).
[2] Audrey Gillan, 'Four Guilty, but Questions Remain' *The Guardian* (24 February 2005).
[3] Government Response to the Questions Posed in the Joint Committee on Human Rights' Letter, 13 October 2016, Annex, 10-11.

the falsity of any or all of these allegations, and nor is such a point made in the part of the Government Response relating to these figures.

3. Further information is needed on IHAT's methodology and reasoning when closing cases, given the minimal details on its website,[4] and each quarterly release.[5] In particular, the decision of IHAT's Deputy Head on 19 September 2016 and 24 October 2016 to discontinue investigations on 68 and then 489 'lower-level allegations of ill-treatment'[6] is highly problematic. There is no discussion of how 'lower-level … ill-treatment' relates to criminal law (does it constitute assault, harassment, or worse?) or to international law (is it inhuman or degrading treatment or punishment in IHRL, or inhumane treatment as prohibited by IHL?). Independent scrutiny of IHAT's methods is absent but necessary given the political pressure to reduce its caseload to 'about 60 investigations' by the middle of 2017,[7] prior to its hurried closure.[8] This runs counter to positive obligations under Article 2 ECHR, which require 'public scrutiny of the investigation or its results to secure accountability in practice as well as in theory'.[9]
4. Second, the Al-Sweady Public Inquiry is often invoked as the best example of false allegations made, and there were 'completely baseless allegations' that British troops had killed and mutilated Iraqi civilians following the Battle of Danny Boy in 2004.[10] Nonetheless, in a conclusion marginalised in Parliamentary and media debate, the Inquiry found that nine detainees had suffered 'ill-treatment' in British military detention.[11] In one instance, repeated punches and kicks to a detainee's head, shins and ribs are considered to be merely 'ill-treatment', and an incident that one military witness thought not worth reporting.[12]
5. Third, the decision by the Legal Aid Agency to terminate the legal aid contract for Public Interest Lawyers (PIL),[13] and the ruling of the Solicitors Disciplinary Tribunal that Mr. Phil Shiner be struck off for dishonesty is evidence of multiple counts of

[4] The Iraq Historic Allegations Team.
[5] IHAT, Work Completed, December 2016.
[6] *ibid.*
[7] Government Response, (n.5), 11; 'Who Guards the Guardians? MoD Support for Former and Serving Personnel' (Defence Select Committee 2017).
[8] Peter Walker, 'Iraq War Claims Unit to Be Shut Down, Says UK Defence Secretary' *The Guardian* (10 February 2017).
[9] *Al-Skeini and Others v. The United Kingdom*, (2011) 53 EHRR 18, para. 168.
[10] House of Commons Hansard Debates, 17 December 2014 Col 1407.
[11] The Al-Sweady Public Inquiry Report, 17 December 2014, Volumes I-II.
[12] *ibid.*, Vol I Part I, paras 2.553, 2.562.
[13] LAA Terminates Shiner Firm's Legal Aid Contract, Law Society Gazette, 2 August 2016.

misconduct by one individual,[14] including using a middleman to make 'unsolicited direct approaches' to clients. This arguably increased considerably the number of allegations made,[15] but does not prove the falsity of all allegations of violations by UK troops. One of the consequences of PIL's closure is that none of its former clients are now legally represented and they are therefore unable to analyse any IHAT decisions concerning them. Instead of using the ruling of a disciplinary body to argue for derogation from the ECHR ostensibly to preclude future civil claims against the MoD, the Government should move beyond a culture of *ad hominem* arguments, and address the substance of the remaining allegations with transparency and rigour.

Q2. What evidence supports the Government's view that the extra-territorial applicability of the ECHR undermines the operational effectiveness of the Armed Forces?

6. Evidence is lacking that the ECHR's extra-territorial applicability undermines the operational effectiveness of the armed forces. The MoD argues that both the ECHR's extra-territorial effect and the co-applicability of the IHL and IHRL are harmful, but the mechanisms allegedly causing this harm are not specified.[16] Earl Howe does not explain how this risk might eventuate, merely that 'military advice is' that operational effectiveness might be 'seriously undermin[ed]' from 'growing legal uncertainty and an unprecedented level of litigation'.[17]

7. It is plausible that the extra-territorial effect of the ECHR, and the co-applicability of IHL and IHRL during armed conflict is a cause of 'legal uncertainty', as the precise interaction of these two bodies of law is yet to be fully settled; but the MoD still needs to make the case that this harms operational effectiveness. Military training should reflect prohibitions in IHL and IHRL. The most recent iteration of the British Army's Military Annual Training Tests does so,[18] with training on captured persons (CPERS) reformed since 2013. [19]

[14] Solicitors Regulation Authority, 'News Release - Professor Phil Shiner and the Solicitors Disciplinary Tribunal' 2 February 2017.
[15] *ibid.*
[16] Government Response (n. 5).
[17] Earl Howe (Minister of State (MoD), Military Operations – European Convention on Human Rights Derogation: Written Statement – HLWS169, 10 October 2016.
[18] Military Annual Training Tests 7 (Law of Armed Conflict) 2015 (obtained by FOI request).
[19] *ibid.,* 2013.

8. The obligations to investigate alleged violations of Articles 2 and 3 ECHR are well established; and following the case of *Hassan v. the United Kingdom*, it appears that Article 5 ECHR can be 'read down' to accommodate the authority to detain in the IHL of international armed conflict, even in the absence of a derogation.[20]

9. Litigation against the armed forces can act as an important corrective to flawed policies, and, just as the threat of court-martial prosecution is part of the machinery of military discipline, civil litigation is a further deterrent for disrespect of international law. If clear procedures are in place to prevent a recurrence of the violations proven, such as in the Baha Mousa Public Inquiry, there should not be repeat litigation on similar points.

10. It is submitted that the real reason for an assertion that the extra-territorial effect of the ECHR harms operational effectiveness is an institutional preference for IHL over IHRL; and a strongly-felt resistance to civilian judges adjudicating on cases involving the armed forces. Strong evidence for this can be found in two recent reports from the Policy Exchange think tank.[21]

11. The first of these includes an early iteration of the Government's present proposal, in the words of the report, to 'invoke derogation' 'by default'. Like the Government Response to the JCHR, the first report argues that the law of armed conflict (LOAC: the MoD's preferred terminology for IHL) should be the governing legal framework, and that IHRL is unsuited to war. Neither of the reports analyses carefully the international case law (much of it from the International Court of Justice,[22] not the ECHR) on the co-applicability of IHL and IHRL; they assert that it is harmful without taking relevant jurisprudence into account.

12. Both reports seek to remove all avenues for civil litigation against the MoD. The authors of the 2015 report refer to ECHR and Human Rights Act case law as 'judicial

[20] *Hassan v. The United Kingdom*, GC, no. 29750/09 (2014).
[21] Tom Tugendhat and Laura Croft, 'The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power' (Policy Exchange 2013); Jonathan Ekins, Jonathan Morgan and Tom Tugendhat, 'Clearing the Fog of Law: Saving Our Armed Forces from Defeat by Judicial Diktat' (Policy Exchange 2015).
[22] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 168.

imperialism', and criticise the judges' failure to 'discipline themselves by limiting the reach of the ECHR'.[23] They argue for combat immunity to be placed on a statutory footing, and, ignoring established case law, assert that IHL should be the sole body of international law in armed conflict.

13. Neither report provides evidence that the ECHR undermines the armed forces' operational effectiveness; merely that the authors dislike its extra-territorial effect, because cases can be brought as a result. The Government's intention to derogate from the ECHR appears to be part of a broader political project to prevent judicial decision-making in cases involving the armed forces,[24] and to deny access to justice for individual litigants (whether they are foreign nationals, serving personnel,[25] or their bereaved relatives). This would undermine their right to an effective remedy in IHRL,[26] and remove judicial scrutiny to check that the UK respects IHL 'in all circumstances'.[27]

Q3. Are the substantive requirements of Article 15 ECHR likely to be satisfied in the circumstances in which the Government intends to derogate?

14. Where provided for in a treaty such as the ECHR or the International Covenant on Civil and Political Rights (ICCPR),[28] derogation is subject to several requirements that reflect its exceptional nature. States have not invoked 'in time of war' as a ground for derogation under Article 15(1) ECHR.[29] According to its text, 'war', as any other public emergency, must threaten the life of the nation,[30] which refers 'to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.'[31] In respect of military engagement overseas, the Government would have to demonstrate how the armed conflict or situation concerned fulfils these criteria.

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[23] Ekins, Morgan and Tugendhat, (n. 23), 8, 11.
[24] Policy Exchange, Judicial Power Project.
[25] Rt. Hon. Sir Michael Fallon, 'Better Combat Compensation: Written Statement - HCWS299'.
[26] Article 13, ECHR; Article 2, ICCPR.
[27] Common Article 1, Four Geneva Conventions 1949.
[28] Article 15, ECHR; Article 4, ICCPR.
[29] William A. Schabas, *European Convention on Human Rights: A Commentary* (OUP, 2015), 594-95.
[30] *ibid.*, 594.
[31] *Lawless v. Ireland (no.3)*, (1961) EHRR 15, para.28.

15. A presumption, as considered by the Government's first announcement, that a future situation will require derogation runs counter to the ECHR's jurisprudence according to which the existence of an emergency situation needs to be assessed 'primarily with reference to those facts which were known at the time of the derogation'.[32] It turns the exceptional into the rule and risks prejudicing the assessment of whether there is a need to derogate. The ECtHR may, in order to ensure the integrity of the Convention, be less willing to grant a broad margin of appreciation to a State applying a presumption to derogate.

16. The strict proportionality test applied by the ECtHR requires that measures taken pursuant to Article 15(1) are 'a genuine response to the emergency situation ... and fully justified by the special circumstances … and that adequate safeguards were provided against abuse.'[33] In respect of military operations overseas, the stated aim of reducing the 'flood of litigation' would not be required by the exigencies of the situation. The lawfulness of any conduct, and challenges thereto, is not proven to harm operational effectiveness (see paragraphs 6-13 above), unless the government were to claim the right to engage in military operations without any IHRL constraints and judicial scrutiny.

17. Derogations in respect of Articles 2 and 5 ECHR are limited, while Article 3 is non-derogable in its entirety, so derogating would not free the government from substantive and investigatory obligations. Article 2 may be derogated from only 'in respect of deaths resulting from lawful acts of war'. Where there is any doubt in this regard, the positive obligation under Article 2 would still apply, and the Government would have to investigate any allegations of unlawful killings.[34] In *Hassan*, the ECtHR found that, even in the absence of a derogation, the ECHR's provisions, here Article 5, are to be 'interpreted and applied in the light of the provisions of international humanitarian law … where this is specifically pleaded by the respondent State'.[35] The judgment by the Grand Chamber can be expected to stand, making any derogation unnecessary, at least in the context of international armed conflicts.[36]

[32] *A. and Others v. The United Kingdom*, (2009) 49 EHRR 29, para. 174.
[33] *ibid.,* para. 176.
[34] *Al-Skeini*, (n 11), para. 164.
[35] *Hassan*, (n 22), para. 107.
[36] See ICRC, *Customary International Humanitarian Law Database*, Rule 99.

However, simply applying IHL rules will not automatically comply with the ECHR, including in case of a derogation, as human rights safeguards need to be in place that go beyond the rudimentary rules of IHL.[37] In addition, the non-derogability of Article 3 requires adequate safeguards against torture to be in place.[38] Article 3 is also relevant for the scope of derogation from Articles 2 and 5, particularly in respect of ill-treatment resulting in death, conditions of detention, and the negative psychological impact of prolonged indefinite detention.[39]

18. Any derogation must not be 'inconsistent with [a State's] other obligations under international law', including under the ICCPR, the Convention against Torture, the International Convention against Enforced Disappearance and the four Geneva Conventions and Additional Protocols. According to the Human Rights Committee, this includes Article 10 ICCPR,[40] the non-derogability of effective remedies, the need for procedural safeguards,[41] and non-discrimination.[42] Consequently, the Government cannot restrict or altogether exclude access to effective remedies for alleged violations.

19. The proposal to restrict the Human Rights Act's territorial scope is an ill-conceived response to the ECtHR's jurisprudence on the extraterritorial application of the ECHR.[43] It would create the very situation that Judge Bonello criticised in *Al-Skeini*: '[i]n substance the United Kingdom is arguing, sadly, I believe, that it ratified the Convention with the deliberate intent of regulating the conduct of its armed forces according to latitude: gentlemen at home, hoodlums elsewhere.'[44]

Conclusion and Recommendations

20. The Government's proposed derogation from the ECHR is falsely premised, inadequately evidenced and is likely to increase litigation on the lawfulness of the derogation. We therefore recommend that:

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[37] *Hassan* (n. 22), para. 106, Partly Dissenting Opinion of Judge Spano Joined by Judges Nicolaou, Bianku and Kalaydjieva, paras. 18-19.
[38] *Aksoy v. Turkey*, (1996) 23 EHRR 553, paras. 79-84.
[39] *M.M.M. et al. v. Australia*, UN Doc. CCPR/C.108/D/2136/2012 (2013), para. 10.7.
[40] *General Comment No. 29: States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11(2001), para. 13(a).
[41] *ibid.*, paras 14 and 15.
[42] *ibid.*, para. 8.
[43] *Al-Skeini,* (n.11), paras. 130-50.
[44] *ibid.,* Concurring Opinion of Judge Bonello, para. 18.

- Any decision to derogate from the ECHR in respect of military operations overseas should be exceptional, not prejudiced by a policy preference, required by, and proportionate in the circumstances.

- The Government recognise that IHL and IHRL are not only co-applicable, but contain shared norms. IHL is non-derogable in its entirety, and prohibits, *inter alia*, murder of non-combatants, torture and inhumane treatment.

- The Government refrain from a rhetoric that pits international law against operational effectiveness, which deflects from recent efforts to improve military training in IHL, and risks members of the armed forces believing that the law is the enemy.

- Investigations continue into alleged violations of IHL and IHRL by the armed forces, in accordance with the UK's obligations under international law, including impartiality, effectiveness, transparency and public scrutiny.

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