1. Introduction

1. This submission is made by Prof. Françoise Hampson, Prof. Noam Lubell, and Dr. Daragh Murray, based at the University of Essex Human Rights Centre and School of Law. The authors appreciate this opportunity to engage with the Joint Committee on Human Rights.¹

2. This submission will address derogations from human rights law treaties in the context of military operations. The derogation regime does not nullify the applicability of human rights law, rather it allows for the modification of specific human rights obligations in response to emergency or exceptional circumstances.

3. It is the authors’ opinion that derogations play a key role within the international human rights law system and that derogations during military operations may be both appropriate and necessary. In particular, in situations of armed conflict, derogations may be required in order to ensure the coherent co-application of international human rights law and the law of armed conflict. As such, appropriate derogations permit the application of both human rights law and the law of armed conflict, ensuring the existence of a legal ‘bottom line’ that is appropriate to the situation.²

4. This submission will:

   - discuss the derogations regime,
   - the procedural requirements,
   - derogations in relation to military operations occurring outside armed conflict, and
   - derogations in relation to military operations occurring during armed conflict.

2. The derogations regime

5. Derogations form an accepted part of the international human rights law system. They are a feature of the International Covenant on Civil and Political Rights, the

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¹ Prof. Hampson & Prof. Lubell previously submitted third party interventions to the European Court of Human Rights in the cases of Hassan v. the United Kingdom and Georgia v. Russia (No. 2). All three authors were also recently involved in a project which produced a Practitioners’ Guide to Human Rights Law in Armed Conflict (OUP 2016).
² See further below para. 10.
European Convention on Human Rights, and the American Convention on Human Rights. Derogations are intended to ensure flexibility within the human rights law system, and to facilitate an appropriate legal response to exceptional and emergency situations where the unmodified application of international human rights law may be inappropriate and unrealistic. There is no derogations regime within the law of armed conflict.

6. Derogations are one element of the flexibility built into human rights law. Other elements include limitations built into certain rights, and the manner in which the law is applied and interpreted in light of prevailing circumstances. Human rights law is therefore capable of applying in diverse situations, from normal peacetime application, to disturbances and tensions, natural disasters, and armed conflict. This inherent flexibility means that derogations will not be required in all situations.

7. The issue of derogation is of particular importance with respect to the European Convention on Human Rights. This is because, as opposed to prohibiting arbitrary interferences in human rights, the European Convention exhaustively lists the grounds on which a State may resort to potentially lethal force, and the only grounds on which a person may be detained. Derogation will be required to modify these grounds.

8. In the context of military operations, derogation may be required to ensure the coherent co-application of different legal frameworks. During armed conflict, for example, both the law of armed conflict and human rights law apply. In certain cases these bodies of law establish divergent standards; forcible measures and detention being prominent examples. Derogation may be required to facilitate the co-application of these two bodies of law, and to ensure, for example, that a law of armed conflict-compliant use of force is not regarded as a violation of the right to life.

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3 Article 4, International Covenant on Civil and Political Rights; Article 15, European Convention on Human Rights; Article 27, American Convention on Human Rights. Certain human rights law treaties do not contain derogation provisions. This is typically a result of the nature of the rights established in those treaties. Of particular note in this regard is the International Covenant on Economic, Social and Cultural Rights.

4 See, for example, Articles 18(3), 19(3), 22(2) International Covenant on Civil and Political Rights; Articles 8(2), 9(2), 10(2), 11(2) European Convention on Human Rights.

5 For example, certain rules prohibit ‘arbitrary’ interferences, see Articles 6(1), 9(1), International Covenant on Civil and Political Rights. Equally, human rights bodies typically apply a certain degree of flexibility when applying human rights law. See, for example, Al-Skeini and Others v. the United Kingdom, Judgment, ECtHR, App. No. 55721/07, 7 July 2011, para. 137; McCann and Others v. the United Kingdom, Judgment, ECtHR, App. No. 18984/91, 27 September 1995, paras. 195-200.

6 See, Article 2(2) and Article 5(1), European Convention on Human Rights. These articles may be compared with, for example, Articles 6(1) and 9(1), International Covenant on Civil and Political Rights.

7 Article 15, European Convention on Human Rights.


9 See further, below Sections 5.1 and 5.2.
9. Human rights law requires explicit authorisation – i.e. a clear legal basis – for all conduct that interferes with specific rights. Accordingly, any conduct that diverges from the normal human rights standard, such as conduct permitted under the law of armed conflict, must have an explicit legal basis. In relation to military operations, this explicit legal basis may be established either in the law of armed conflict or through domestic law.\textsuperscript{10} In relation to both bases, derogation may be required in order to modify the otherwise applicable human rights law standard. Derogation can thus ensure consistency between the law of armed conflict and human rights law.

10. Failure to derogate when necessary poses a threat to the rule of law. In exceptional and emergency situations it is unlikely that States will apply human rights law in its unmodified (i.e. peacetime) form. In this context, a departure from peacetime human rights law, without derogation, means that legal rules are sidestepped and that no minimum standards will be applied. This highlights the fundamental importance of derogation. The derogation regime facilitates an appropriate modification of human rights law, ensuring that minimum rules are applicable and that the scope of permissible conduct is understood.

3. Procedural requirements and the extent of permissible derogations

11. Derogation measures are subject to a number of requirements. In particular:

- Derogation measures must be publicly announced, and submitted to the appropriate body;
- The derogation notification must be made prior to the adoption of the measures;
- The derogation notice must specify the rights – or elements thereof – subject to derogation, and how they are being derogated from. i.e. the alternative measures adopted in place of the normally applicable rules must be specified.\textsuperscript{11} The necessity motivating the adoption of the measures must also be stated.
- Derogation measures must be ‘strictly required by the exigencies of the situation’. A determination is therefore made to ensure that the measure ‘was a genuine response to the emergency situation, that it was fully justified by the special circumstances of the emergency and that adequate safeguards were provided against abuse’.\textsuperscript{12}

\textsuperscript{10} See Serdar Mohammed v. Ministry of Defence, High Court of Justice, Case No. HQ12X03367, 2 May 2014, paras. 6(i) and (iv); Serdar Mohammed & Others v. Secretary of State for Defence, Court of Appeal, Case Nos. A2/2014/1862; A2/2014/4084; A2/2014/4086, 30 July 2015, para. 125.


\textsuperscript{12} A and others v. the United Kingdom, Judgment, European Court of Human Rights, App. No. 3455/05, 19 February 2009, para. 184.
• Effective parliamentary scrutiny of the existence of an emergency and the appropriateness of the proposed measures may also be required.\textsuperscript{13}

12. A question arises as to the extent to which derogation is permissible vis-à-vis extraterritorial operations. A concern is that extraterritorial operations may not be considered a threat to the derogating State (in the context of a threat ‘to the life of the nation’),\textsuperscript{14} and may therefore be impermissible.\textsuperscript{15} Three comments may be made in this regard. First, the necessary logic of \textit{Hassan v. the United Kingdom} indicates that the European Court of Human Rights will consider derogation measures enacted in relation to extraterritorial armed conflicts. The European Court allowed the UK to invoke the law of armed conflict, without derogation, while expressly stating that derogation would be required in non-international armed conflict. If a State is involved in an extra-territorial non-international armed conflict, it must derogate to be able to invoke the law of armed conflict, and so derogation must be possible in extraterritorial armed conflicts.\textsuperscript{16} Second, extraterritorial armed conflicts may require emergency domestic measures. It is not always possible to draw a clear distinction between territorial and extraterritorial situations.\textsuperscript{17} Third, it may be reasonable to interpret the ‘public emergency threatening the life of a nation’ requirement as including the nation being assisted.\textsuperscript{18}

4. Derogations in relation to military operations occurring outside armed conflict

13. UK armed forces may be deployed to extraterritorial situations not amounting to armed conflict. The law of armed conflict is not necessarily applicable merely because the armed forces are deployed.\textsuperscript{19} For instance, UK armed forces may be deployed to assist a Government’s public order response to internal disturbances


\textsuperscript{15} Of course, instances of international armed conflict where the survival of the State is at stake constitute a clear exception.

\textsuperscript{16} The Court examined whether, during international armed conflict, Article 5 could be interpreted as permitting internment absent derogation. In evaluating whether derogation was required, or not, the Court inevitably accepted that derogation was possible in relation to extraterritorial military operations. See, \textit{Hassan v. the United Kingdom}, Judgment, European Court of Human Rights, App. No. 29750.09, 16 September 2014, paras. 96-107.

\textsuperscript{17} For example, in 1991 – in the context of the international armed conflict occurring on the territory of Iraq and Kuwait – the UK Government enacted internment measures against Iraqi citizens located within the United Kingdom. See, Françoise Hampson, ‘The Geneva Convention and the Detention of Civilians and Alleged Prisoners of War’ (1991) Public Law, pp. 507-522. It is further noted that, in armed conflict, the law of armed conflict applies in the entire territory of all parties to the armed conflict.


\textsuperscript{19} In order for the law of armed conflict to apply, the situation must be classified as either an international or non-international armed conflict. See, \textit{Prosecutor v. Dusko Tadic}, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY, Case No. IT-94-1, 2 October 1995, para. 70.
or tensions, to evacuate British and other civilians, or to assist in the emergency
response to a natural disaster. For the latter example, the imposition and
enforcement (i.e. including detention measures) of a curfew may be necessary to
ensure the safety of the population and to prevent criminal activity. Derogation
may therefore be required, although the threshold for derogation is high.\textsuperscript{20}

5. Derogations in relation to military operations occurring during
armed conflict

14. The law of armed conflict applies to situations of international and non-
international armed conflict and establishes certain rules that differ from those of
human rights law. Two key questions arise. First, what is the interplay between
the two bodies of law? Second, in order to rely on the law of armed conflict is it
necessary to derogate from human rights law?

15. The International Court of Justice has confirmed that human rights law continues
to apply during situations of armed conflict,\textsuperscript{21} and this finding has recently been
applied by the European Court of Human Rights.\textsuperscript{22} However, its precise
relationship with the law of armed conflict is uncertain. The authors of this
submission participated in a process intended to address this issue, and to offer
practical guidance to those engaged in military operations.\textsuperscript{23} It is suggested that
for any given situation one body of law will provide the primary legal
framework, while the other will be a secondary legal framework to be applied
and interpreted in light of the primary framework.

16. To facilitate the application of the law in practice, armed conflict situations may
be grouped into two broad categories: situations in which the law of armed
conflict provides the primary framework (the ‘active hostilities framework’), and
situations in which human rights law provides the primary framework (the
‘ssecurity operations framework’).\textsuperscript{24}

17. In international armed conflict, all conflict-related issues are typically regulated
in accordance with the ‘active hostilities’ framework, while all non-conflict

\textsuperscript{20} See in this regard Human Rights Committee, General Comment No. 29, ‘States of Emergency’, UN Doc.
CCPR/C/21/Rev.1/Add.11, 31 August 2001.
\textsuperscript{21} Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, ICJ, 19
December 2005, para. 216.
\textsuperscript{22} Hassan v. the United Kingdom, Judgment, ECHR, App. No. 29750/09, 16 September 2014, para. 102.
\textsuperscript{23} Daragh Murray, Practitioners’ Guide to Human Rights Law in Armed Conflict (Dapo Akande, Charles Garraway, Françoise
Hampson, Noam Lubell & Elizabeth Wilmshurst (eds.), OUP, 2016).
\textsuperscript{24} For instance, in international armed conflict, the law of armed conflict may constitute the primary framework vis-à-vis
internment. As such, the internment review body may be a ‘competent body’ as required by the law of armed conflict, and not
a judicial body as required by human rights law. However, human rights law continues to apply as the secondary framework,
and the competent body must therefore ‘provide sufficient guarantees of impartiality and fair procedure to protect against
arbitrariness.’ See, Hassan v. the United Kingdom, Judgment, ECHR, App. No. 29750/09, 16 September 2014, para 106.
related issues are regulated in accordance with the ‘security operations’ framework. However, there may be exceptions. For example, the law of armed conflict permits the internment of enemy civilians in State territory, and establishes procedural regulations in this regard. This situation would typically be regulated by the ‘active’ hostilities framework. However, where the international armed conflict is taking place extraterritorially, and the situation in the interning State is calm, a human rights body may require that the procedural requirements established under international human rights law provide the primary framework. In non-international armed conflict, the ‘security operations’ framework applies more broadly, and will apply to (a) all situations not constituting high-intensity fighting involving sustained and concerted military operation, and (b) situations where a State exercises effective territorial control.

18. To summarise, it is important to highlight that the law of armed conflict does not displace human rights law during armed conflict, and that human rights law may constitute the primary legal framework in relation to a number of situations in both international and non-international armed conflict.

19. In establishing whether derogations are required in order to ensure that human rights law is compatible with the law of armed conflict, situations of international and non-international armed conflict must be examined separately.

20. UK armed forces are predominantly deployed to situations of non-international armed conflict. For instance, although both the conflict in Afghanistan and in Iraq began as international armed conflicts, for the overwhelming majority of the UK armed forces’ deployment these conflicts were non-international.

5.1. International armed conflict

21. In *Hassan v. the United Kingdom* the European Court of Human Rights allowed the UK to rely on the law of armed conflict to justify the internment of a civilian even though the State had not derogated, and despite this being a form of detention not permitted under the unmodified application of the European Convention. The Court examined the practice of States parties to both the European Convention on Human Rights and the International Covenant on Civil and Political Rights and found that it was not the practice of States to derogate in relation to detention operations in international armed conflicts. The Court stated, however, that it would permit such reliance on the law of armed conflict.

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25 This, for example, may apply to the internment activity discussed above in footnote 16.
26 See, Practitioners’ Guide to Human Rights Law in Armed Conflict, Chapter 4.
only on the basis of explicit legal authorisation established under that body of law. This explicit authorisation exists only in international armed conflict. It would therefore appear that, in relation to internment authority, derogation may not be strictly necessary in international armed conflict.

22. The reasoning underpinning the conclusion in Hassan may apply more broadly in international armed conflict. However, this assumption may not extend to modification of the Article 2 protection on the right to life, which is non-derogable except with respect to lawful acts of war. Consequent to the explicit text of Article 15, derogation may be required in order to invoke lawful acts of war.28

5.2. Non-international armed conflict

23. In Hassan the European Court of Human Rights appeared to indicate that it would not accept reliance on the law of armed conflict in order to establish authority for internment in non-international armed conflict, absent a derogation.29 The Court’s statement was obiter and did not discuss the issue in great detail.

24. Derogation is therefore likely to be particularly important in non-international armed conflict. The treaty law of armed conflict applicable to non-international armed conflict does not establish explicit authorisation in relation to a significant proportion of the activities routinely conducted in non-international armed conflict. This is demonstrated by the recent Serdar Mohamed litigation in the UK, which centred upon the existence of a legal basis authorising internment by UK forces in Afghanistan.30 In such situations, derogation is necessary but may not be sufficient in and of itself. It may be necessary for the State to also establish an explicit legal basis to underpin its activity, on the basis of either domestic or international law (i.e. an explicit Security Council Resolution).

25. Reliance on customary international law as a source of explicit authorisation is also problematic. International law in general, and customary international law in particular, typically operates on the basis that all conduct is permitted unless explicitly prohibited.31 As such, customary international law typically establishes

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29 This is because explicit legal authorisation for internment does not exist in non-international armed conflict. It should be highlighted that the Court was divided on whether a State could invoke the law of armed conflict without derogation in international armed conflict but unanimous that State could not do so in non-international armed conflict. The relevant comment was not limited to internment but phrased generally.

30 Although the Government argued that the law of armed conflict established an implicit legal basis for internment, this was rejected by the High Court. Although it was not a focus of the Supreme Court litigation, the judges – acting obiter – indicated scepticism regarding the existence of an implicit legal basis.
prohibitions and not explicit authorisation. In this instance, the problem is not caused by human rights law but rather by a lack of specificity vis-à-vis the rules applicable in non-international armed conflict.

26. Derogation will therefore be necessary to ensure that – where appropriate – military operations can be conducted in accordance with the law of armed conflict.

6. Conclusion

27. In the context of military operations derogation may be required in order to (a) facilitate an appropriate response to an emergency situation, or (b) to ensure coherence between the law of armed conflict and international human rights law.

28. Derogation therefore constitutes an essential first step in ensuring the appropriate regulation of military operations. It is, however, only the first step, and a number of additional issues arise. It is suggested that the UK Government should take a lead in identifying the standards applicable to military operations, particularly in relation to two key issues. First, it is suggested that the UK should engage with the Council of Europe, perhaps through the CDDH and a resolution of the Committee of Ministers, in order to clarify the rules on detention in non-international armed conflicts. Second, in light of the uncertainty inherent in non-international armed conflict, it would be extremely useful if the Government produced a Manual on the Law of Non-International Armed Conflict, in order to detail the legal framework within which the UK armed forces act. This would facilitate an understanding of when derogation is required, and would clearly set out the legal parameters within which the UK armed forces act.

29. It appears that a significant motivating factor underpinning the Government’s announcement that it would derogate from the European Convention on Human Rights in situations of armed conflict is a desire to avoid litigation before the European Court of Human Rights. However, an exclusive focus on derogation may be misguided. The Government should develop an overview of the

31 See, for example, The Case of the S.S. Lotus (France v. Turkey), Judgment, Permanent Court of International Justice, Judgment No. 9, 7 September 1927, para. 44.

32 See above para. 6.

33 The International Institute of Humanitarian Law published a manual in 2006. However, this is too short and out-of-date to meet the identified need. The 2004 UK Manual of the Law of Armed Conflict, reissued to incorporate existing amendments in 2011, contains a chapter on non-international armed conflict. This is also too short and out-of-date to meet the identified need. The UK Manual could be comprehensively updated and published in a new edition. Alternatively, the chapter on non-international armed conflicts could be removed, and a new Manual on Non-International Armed Conflict developed. Either approach should involve military lawyers with experience of operations. The content should not be driven by the demands of litigation. In order to meet the identified need, the Manual has to provide a legal framework for operations. This requires a considerable degree of precision.
relationship between human rights law and the law of armed conflict,\textsuperscript{34} and argue individual cases in light of this understanding. Without establishing this understanding, it will be difficult to ensure coherence in pleadings across cases, undermining chances of success. Ultimately, pleadings should be based on an accurate understanding of the law of armed conflict and international human rights law, and their inter-relationship. Pleadings must also accommodate the requirements of the military, and in order to facilitate this, the Foreign and Commonwealth Office should consult not just the Ministry of Defence civilian legal advisors, but also service lawyers with operational experience.

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\textsuperscript{34} It is hoped that the \textit{Practitioners' Guide to Human Rights Law in Armed Conflict} may be of assistance in this regard.