Written Evidence Submitted from Dr Conall Mallory, Northumbria University (DRO0025)

Executive Summary

1. This paper argues that:
   - The government should be mindful of the true purpose of Article 15 ECHR in its decision on whether to derogate during the course of future overseas military operations.
   - The legal effects of any extraterritorial derogation would be limited as other relevant ECHR and international law obligations would continue to apply.
   - Extraterritorial derogations would only be permissible in a narrow set of circumstances and the notion that a state can presumptively derogate from the ECHR is incorrect.

The Derogating Power

2. Introducing the policy of future extraterritorial derogations, the Secretary of State for Defence stated that the measures were necessary to prevent extensive litigation ‘damaging our troops, undermining military operations, and costing taxpayers’ millions’. Any attempt to derogate for these reasons is not in accord with the purpose of the derogation provision.

3. The derogating power is contained within Article 15 of the ECHR. The text of Article 15 is based on the draft Article 4 of what is now the International Covenant on Civil and Political Rights 1966 (ICCPR). As such, and as both treaties were drafted simultaneously, we can see the original purpose of the derogating power in Article 15 ECHR in the drafting history of the ICCPR.

4. The derogating power in Article 4 was included in the ICCPR at the behest of the United Kingdom who argued that, without a derogation provision, any state that faced either a war or public emergency would most likely seek to suspend the operation of all of its international human rights obligations. Instead of rendering individuals vulnerable to a situation where all of their rights have been suspended, the derogating power strikes a balance by only allowing the state to derogate from specified rights in a narrow set of circumstances.

5. The United Nations Human Rights Committee has described the ‘predominant objective’ of the derogating power as to facilitate conditions where the state can achieve ‘[t]he restoration of a state of normalcy where full respect for the Covenant can again be secured’. Rather than being intended to limit litigation, the purpose of the derogating power is therefore to afford the state a sufficient degree of latitude so that it can take measures necessary to address an emergency. This overriding purpose of the derogation power should be at the forefront of the current extraterritorial derogation debate.

The Legal Effects of Derogating

6. If applied appropriately, derogating from the Convention would mean that some of the United Kingdom’s obligations under the ECHR would not be applicable on overseas military ventures. Most notably the government may be able to derogate from the Article 2 Right to Life in respect of deaths resulting from lawful acts of war and the Article 5 Right to Liberty. Nonetheless, other relevant international law obligations would continue to apply therefore calling into question whether the effects of an extraterritorial derogation would meet the aims set out by the government.

7. Derogating from the Convention would not bring to an end judicial scrutiny of the armed forces and any attempt to present the power of extraterritorial derogations as such is disingenuous. Even if the United Kingdom were to derogate from the Article 2 Right to Life, an obligation to investigate killings could still arise under other provisions of international
Indeed the investigations into killings and ill-treatment carried out by the Iraq Historic Allegations Team (‘IHAT’) were not only fulfilling the United Kingdom’s obligations under the ECHR but to use the MoD’s own phrasing, ‘[w]ithout IHAT’s vital work, our Armed Forces would be open to referral to the International Criminal Court’. Furthermore, Article 3 of the ECHR, which prohibits Torture, Inhuman and Degrading Treatment, is an absolute right which cannot be derogated from under any circumstances. This means that any allegation of ill-treatment arising from an overseas military operation would still require investigation.

8. Judicial scrutiny would also continue in relation to the precise nature of the derogating measure. Individuals who believe that they have been deprived of their rights would still be free to apply to the court to consider whether the relevant circumstances were appropriate for a derogation and whether any derogating measure was strictly required by the exigencies of the situation.

9. The practical implications of derogating are also becoming increasingly less necessary as the ECtHR moves towards a more tailored understanding of how human rights obligations apply in overseas armed conflicts. The Article 5 Right to Liberty could be viewed as the most useful provision to derogate from in the context of an armed conflict, as it would allow the United Kingdom to use internment practices during hostilities. In the recent case of Hassan v United Kingdom, however, the ECtHR demonstrated a degree of flexibility concerning preventative detention measures on overseas missions. It is now permissible in an international armed conflict, for a Contracting Party to the ECHR to intern prisoners of war, or civilians who pose a security threat, so long as there are effective procedural safeguards in compliance with international humanitarian law. Elsewhere, in both the Al-Skeini and Others v United Kingdom and Jaloud v the Netherlands cases, the ECtHR was willing to take into account the particularly challenging circumstances faced by states when conducting Article 2 compliant investigations into deaths abroad.

10. With the legal effects and potential benefits of derogating being limited, it may be preferable for the government to return to its approach of constructively engaging with these issues at the ECtHR.

Applying Article 15 Extraterritorially

11. In recent years an increased frequency in extraterritorial military engagements by the Contracting Parties to the ECHR has brought about a parallel rise in litigation concerning the extraterritorial application of human rights laws. Although this litigation has been rife with ambiguity and indeterminacy the ECtHR is moving towards a clearer understanding of the parameters of a Contracting Party’s extraterritorial human rights obligations. The apex of this case law is the seminal Al-Skeini and Others v United Kingdom judgment where the Court provided a series of guiding principles on the Convention’s application.

12. In summary, a state has extraterritorial obligations when it exercises jurisdiction abroad. Extraterritorial jurisdiction arises in a spatial sense when a state takes effective control over an area abroad, or in a personal sense, when its agents exercise authority and control over an individual. Examples of when this latter category would arise include through the exercise of public powers normally wielded by the territorial state, or through the use of force which brings an individual within the state’s control. The key distinction between the spatial and personal grounds is that when a state exercises spatial jurisdiction it is obligated to secure all of the rights within the Convention, whereas when the state exercises personal jurisdiction its obligations can be ‘divided and tailored’ according to the situation.

13. While it is unlikely that the drafters of the Convention initially intended for the derogating power in Article 15 to apply extraterritorially, a similar argument can be made that the substantive obligations within the Convention were not originally intended to be applied abroad either. As these substantive obligations within the treaty are now understood to apply
extraterritorially, there is a presumption that the associated provisions determining how rights are to be applied, like the derogating power under Article 15, should also be understood in this manner. There is nothing within the text of Article 15 to directly rebut this presumption and such a reading would ensure consistency between the Convention’s provisions.

14. As a state will only need to extraterritorially derogate from the ECHR when it exercises extraterritorial jurisdiction, these issues need to be read together. As the purpose of the derogating provision is to allow a state to take measures necessary to restore normalcy, an extraterritorial derogation is more likely to be acceptable in circumstances where the United Kingdom exercises spatial jurisdiction after taking effective control over an area abroad. This situation most closely mirrors the domestic position where the state is the guarantor of security and individual rights. It also echoes circumstances of occupation where the occupying state is obligated to, as far as possible, restore public order and security.

15. An extraterritorial derogation may also be permissible in situations where a Contracting Party to the ECHR operates personal jurisdiction through the exercise of public powers normally wielded by the forum state. In *Al-Skeini*, the United Kingdom was found to have exercised public powers within southern Iraq as it had assumed authority for the maintenance of security in the region. Similar to the situation when a state exercises effective control of an area, parallels can be drawn here with the state’s exercise of powers within its own territory. However, in any future situation with similarities to those faced by British forces in Iraq the United Kingdom should only derogate where there is a holistic strategy to establish a level of normalcy in which full respect for Convention rights can be secured. This would require a distinctly different approach to that taken in Iraq where, as the Iraq Inquiry noted, ‘the UK’s most consistent strategic objective in relation to Iraq was to reduce the level of its deployed forces’.

16. It is less likely that an extraterritorial derogation would be suitable in a situation where a Contracting Party exercises personal jurisdiction in only a fleeting sense. While the case law on extraterritorial jurisdiction continues to develop, there are some indications that shooting an individual will bring them within the state’s jurisdiction for the purposes of the Convention’s extraterritorial obligations. This would give rise to the possibility that aerial bombardments or brief incursions into a foreign state would bring about extraterritorial jurisdiction. In these situations, an extraterritorial derogation would be considerably less appropriate as the military operation would arguably be less likely to regain the degree of control sufficient to secure a state of normalcy.

17. Any derogation must be in accordance with the substantive requirements of Article 15 ECHR. This requires that there exists a ‘war or other public emergency threatening the life of the nation’, that the derogating measures are ‘strictly required by the exigencies of the situation’ and that those measures are ‘not inconsistent’ with the state’s other international law obligations.

18. These requirements would also need to be understood extraterritorially for any derogation to be appropriate. In this sense, it is considerably more acceptable for the phrase ‘threatening the life of the nation’ to refer to the nation where the relevant military operation takes place, rather than to any perceived threat to the United Kingdom that has resulted in the deployment of British forces abroad. Such an interpretation was expressly criticised by Lord Hope in *Smith and Others v Ministry of Defence* where he noted that a situation when a derogation would be permissible would be ‘far removed from those where operations are undertaken overseas with a view to eliminating or controlling threats to the nation’s security’.

19. The threshold for events ‘threatening the life of the nation’ was defined in *Lawless v Ireland* as ‘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’. In the past, internal conflicts and extensive terrorist threats have satisfied this rigorous threshold. It would be considerably less acceptable if the activities ‘threatening the life of the
nation’ were caused by the United Kingdom’s choice to use force in that state. For this reason the nature of, and justification for, the military operation may have a significant role to play in determining the legitimacy of any derogation.

20. The ECtHR has traditionally been deferential to state authorities in the assessment of whether a situation requires derogating measures. In Aksoy v Turkey the Court commented that as a result of ‘their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it’.

Given its proximity to any extraterritorial emergency situation where the military are deployed, the Ministry of Defence would be the most informed, and therefore most appropriate, government department to decide on whether the emergency ‘threatened the life of the nation’. Nonetheless, regular oversight of both the decision to derogate and the derogating measures would be essential. This is particularly the case in an extraterritorial context as recent governments have demonstrated a disregard for the rights of foreign nationals in favour of ensuring domestic support for military operations. The Iraq Inquiry noted as much, stating that ‘[t]he Government’s consideration of the issue of Iraqi civilian casualties was driven by its concern to rebut accusations that coalition forces were responsible for the deaths of large numbers of civilians, and to sustain domestic support for operations in Iraq’.

21. The derogating measures must be ‘strictly required by the exigencies of the situation’. Following Brannigan and McBride v United Kingdom, the type of issues which would need consideration include the ‘nature of the rights affected’, ‘the circumstances leading to’ the derogation and the duration of the emergency situation. This further demonstrates the significance of the nature and justification for the military operation in determining the legitimacy of any derogation.

22. The highly fact-sensitive nature of the test in Article 15 ECHR means that the notion of a ‘presumptive derogation’ is simply illogical. As the test requires an assessment of whether the measures ‘are strictly required by the exigencies of the situation’, without knowledge of either the measures, or the situation, nothing can be presumed. This issue is of considerable importance as the government’s communication to the JCHR written questions on the proposal in November 2016 indicated its understanding that a presumptive derogation was compatible with Article 15. The government’s most recent communication in February 2017, where it noted that the decision whether to derogate will ‘depend entirely on the circumstances’, is to be preferred.

Conclusion

23. The government’s interpretation of the purpose of the derogation provision, its understanding of the legal effects of what the derogating power can achieve, and its suggestion that a presumptive derogation may be permissible, are regrettable. At best, this approach suggests some misunderstandings of the derogating power. At worst, it suggests that the government may be intent on derogating from the Convention regardless of the facts and thus inevitably setting it on a collision course with the ECtHR.

ii Article 4 International Covenant on Civil and Political Rights, UN doc. E/CN.4/AC.1/4 annex 1, p.7 (art 4.).
CCPR/C/21/Rev.1/Add.11 (2001) [1].
v For instance, the International Criminal Court has jurisdiction for the war crime of ‘Wilful Killing’. Article
vi Arabella Lang, Iraq Historic Allegations Team, Commons Briefing papers CBP-7478 (Jan 22 2016) 4.
viii Hassan v United Kingdom (App. 29750/09), judgment of 16 September 2014.
ix The United Kingdom intervened as a Third-Party in the case of Jaloud v the Netherlands (App. 47708/08),
judgment of 20 November 2014.
xv Al-Skeini [GC] [137].
xiii Article 43 Regulations concerning the Laws and Customs of War on Land (The Hague, 18 October 1907)
‘The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take
all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting,
unless absolutely prevented, the laws in force in the country’.
xvii See Andreou v Turkey (App. 45653/99) and Isaak v Turkey (App. 44587/98).
x Turnberry v Ireland (App. 21987/93) 18 December 1996 [68].
(2016), HC 264, 170.
xxiii Brannigan and McBride v United Kingdom Series A No 258-B (1994) [43].
xxiv Sir Michael Fallon response to JCHR, letter dated 22 November 2016, Q7.
xxv Sir Michael Fallon letter to JCHR, letter dated 28 February 2017 [7].

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