

Lawfare

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Resisting the Judicialisation of War

Professor Richard Ekins and Julie Marionneau

Foreword by General David Petraeus



The Grenadier Guards line up outside Parliament ahead of the Queen's arrival

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Foreword

General David Petraeus

US Army (Ret.), Former Commander, United States Central Command and Coalition Forces in Iraq and Afghanistan

Despite recent reductions in number, British armed forces continue to rank amongst the most capable in the world. A very special relationship has been established between our two militaries over more than a century of serving shoulder-to-shoulder in the hardest tests of battle. I experienced this special relationship personally, during decades of the Cold War in Europe and during operations in the Balkans, Iraq, Afghanistan, and the greater Middle East.

“Lawfare” against British soldiers is thus a matter of very real concern to me. It is arguably as much of a threat to Britain’s fighting capacity as would be a failure to meet NATO budgetary targets, and it risks putting the special relationship under increasing strain. To be clear, the British military is rightly subject to the rule of law. During armed conflict, all soldiers must follow the principles in the Law of Armed Conflict, which are founded on the concepts of proportionality and military necessity.

The problem the British military has faced in recent years, to which Policy Exchange has properly drawn attention, is the “judicialisation” of conflict and, in particular, the displacement of the Law of Armed Conflict by European human rights law. British soldiers are increasingly subject to a different legal regime than are their American counterparts. The extension of the European Convention on Human Rights to the battlefield has made extensive litigation against British soldiers inevitable. This, in turn, risks promoting a culture of risk aversion in the ranks. In Afghanistan, it undermined the British military’s authority to detain enemy combatants and also to work with the Afghan government and NATO allies.

The unfair pursuit of British soldiers and veterans in the aftermath of operations is particularly concerning. This practice has caused enormous stress and anxiety on those who are caught up in investigations, sometimes years or even decades after their combat service. The extent to which those who served decades ago in Northern Ireland, including the highly distinguished soldier-scholar General Sir Frank Kitson, remain exposed to legal risk is striking and appalling. This is not only unfair to those who have served and sacrificed for their country, it also gravely undermines the morale of those serving now and raises an unnecessary concern for

potential recruits.

Lawfare is not an easy problem to resolve. I believe I understand the magnitude of the challenges and issues involved. But as the only individual to command the coalitions in both Iraq and Afghanistan, as well as US Central Command (responsible for the Middle East and Central Asia), and as one who cherished serving on operations together with British forces for seven and a half of my final ten years in uniform, I strongly believe we owe it to the fighting men and women of this country to protect them from abuse of legal processes.

It will be for whomever forms the UK's next government and Parliament to decide how best to respond. In that deliberation, the proposals outlined in this paper should receive serious consideration. Restoring the primacy of the law of armed conflict must be a priority if the UK is to remain a country of military consequence on the world stage, as I fervently hope it will. Moreover, this paper explains how to achieve this end, by derogating from the ECHR and limiting the extra-territorial application of the Human Rights Act 1998. The paper's prescription for protecting veterans from abuse in the courts, including measures specific to Northern Ireland, strike me as workable, desirable, and well-judged.

Reform will be controversial; challenge in court is likely. But the politicians who aspire to lead have a responsibility to defend those who defend the realm. It is a responsibility they should not neglect.

Resisting the judicialisation of war

The next government should:

- Amend the Human Rights Act 1998 to prevent its misuse in relation to UK forces and military action, limiting its temporal and extra-territorial application.
- Introduce a statute of limitations and related measures to protect UK forces and veterans from unfair pursuit for alleged wrongdoing.
- Introduce legislation to give legal effect to its policy about derogation from the European Convention on Human Rights (ECHR) in advance of future military action.
- Revive legislation to restore the Crown's immunity from negligence in relation to military action.
- Establish a Counter-Lawfare Commission to produce a comprehensive review of the impact of lawfare on UK national security and UK forces in particular.

Restore the primacy of the law of armed conflict

The conduct of military action abroad is increasingly subject to challenge in our courts, as well in the European Court of Human Rights (ECtHR). Enemy combatants and others have challenged key operational decisions of UK forces while they are in the field, especially in relation to detention, but also in relation to the use of force. These challenges have been by way of European human rights law, incorporated into our law by way of the Human Rights Act 1998 (HRA), and by way of the law of tort. In addition, families of fallen soldiers have commenced proceedings in the law of negligence against the Crown in relation to deaths of loved ones on the battlefield in Iraq.

This trend is highly problematic. It involves the judicialisation of war, as Lord Mance warned in *Smith v Ministry of Defence* [2013] UKSC 41, in which the conduct of military action is increasingly subject to oversight in the ordinary courts, with European human rights law and the law of tort displacing the law of armed conflict which UK forces are trained to follow and which is designed to take military realities and humanitarian considerations into account. The UK is not now engaged in large-scale troop deployments abroad, which has made reform seem less urgent. However, it is vital that the UK take stock now, as Policy Exchange has recommended in its landmark reports, *Fog of Law* (2013), *Clearing the Fog of Law* (2015) and *Protecting Those Who Serve* (2019), and restore the primacy of the law of armed conflict. If not, the UK risks going to war in future operations subject to a legal regime that will distort the conduct of military operations and will undercut the fighting capacity of UK forces. The risks are wide-ranging and include obstruction of ongoing UK operations by way of litigation, undercutting the freedoms UK forces should enjoy under the law of armed conflict, and encouraging a culture of risk-aversion and compliance on the part of UK forces which will be deeply inimical to fighting prowess.

The next government should:

- Maintain and strengthen a policy of derogating from the ECHR in relation to future military operations abroad. The policy should be given legislative force, requiring ministers to derogate (and thus avoiding a failure to derogate due to perceived litigation risk) and providing that no derogation may be quashed by our courts.
- Amend the HRA to limit its extra-territorial application, which would prevent litigation in our courts requiring UK forces to comply with European human rights law in relation to operations abroad.
- Adopt a policy of principled non-compliance with judgments of the European Court of Human Rights that purport to extend the ECHR to military action abroad. This policy would extend to UK military action the same position taken by successive governments and Parliaments in relation to prisoner voting. It is justified because in extending the reach of European human rights law the Court has brazenly departed from the terms of the ECHR.
- Exercise existing statutory powers to revive the Crown's immunity in the law of tort (including negligence) and revive proposed legislation to secure that immunity.

Protect veterans from abuse in the courts

Those who served, or are serving, in UK forces have been subject over the last decade to a damaging cycle of investigation and reinvestigation, with many veterans fearing prosecution arising out of historic allegations. UK forces are rightly subject to the rule of law, but this damaging cycle has arisen because the ECtHR has misinterpreted the ECHR, inventing and refining a new obligation in relation to deaths allegedly caused by state action, and because our own courts have misinterpreted the HRA and developed (invented) related common law doctrine.

The next government should:

- Commit to a package of reforms including amendment of the HRA to restore both its temporal scope (which would prevent domestic litigation in relation to Troubles-related deaths) and its spatial scope (which would prevent most domestic litigation in relation to conflicts abroad).
- Introduce legislation requiring the government to derogate from the ECHR in relation to military action abroad and to prevent domestic courts from quashing such a derogation, as they have in past cases.

In relation to the particular predicament of those who served in Northern Ireland, the next government should:

- Revise its commitment to the 2014 Stormont Agreement's provision for investigation of historic allegations. The Agreement has yet to be implemented and is increasingly unfair in view of the passage of time since the events in question.
- **Introduce a statute of limitations, modelled on Part 10 of the Criminal Justice Act 2003** (which concerns the conditions in which it is possible to retry a person acquitted of a serious offence). Legislation to this effect would prevent prosecutions, and investigations, unless compelling new evidence had arisen and unless it was in the interests of justice to proceed, which would seldom be the case in view of the passage of time since the deaths in question.
- Introduce legislation requiring consent of the Attorney General for England and Wales before any prosecution may be commenced against former or serving UK forces.
- Introduce legislation forbidding any investigation or prosecution of allegations that unreasonable force was used in performing an arrest or preventing crime unless and until the Attorney General for Northern Ireland certifies that in his view there was no honest belief in the reasonableness of the force used.

Counter Lawfare

The effectiveness of the UK warfighting apparatus does not always compare well to that of its adversaries and rivals and this is a problem that needs addressing in a coherent way. Rapid Iranian and Russian battlefield successes and strategic advances in a number of theatres in recent years have provided an uncomfortable contrast to UK experiences in Iraq, Afghanistan and Syria. There are many reasons for this and it is true that democracies, which abide by the rule of law, have often found themselves at short-term strategic disadvantage compared to other states. However, there are actions that the next government should consider to mitigate the creep of restrictions upon operational effectiveness.

A growing concern is the cumulative detrimental effect that “lawfare” and the “judicialisation” of the battlefield has had on operational latitude, organisational efficiency and morale in the armed forces. The expansion of European human rights law into the legal space traditionally governed by the law of armed conflict has been of particular concern. So is the risk that states and non-state actors will make use of UK legal processes to undermine the operational effectiveness and morale of UK forces, especially in the context of hybrid warfare. This trend risks putting the UK at a disadvantage to its competitors in combat, as well as diminishing its value to allies.

The next government should:

- Establish a Counter-Lawfare Commission to produce a comprehensive review of the impact of Lawfare on UK national security and the Armed Forces, a review which should in turn inform the forthcoming National Security Strategy and Strategic Defence and Security Review. The Commission should be appointed with care: personnel is policy.
- One of the urgent tasks of this Commission should be to offer guidance on the forthcoming revision of the Law of Armed Conflict Manual. The revised manual should be a salient and significant contribution to international discourse about the Law of Armed Conflict, helping resist the encroachment of international human rights law and addressing tomorrow's vital questions in cyber and space law. As pointed out in *Fog of Law and Clearing the Fog of Law*, clarifying tendentious points of law helps improve the operational effectiveness of our troops and avoids surrendering the initiative in legal change to courts or hostile powers.



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