

War, Crime and Human Rights

John Lea, *Honorary Professor of Criminology, University of Roehampton*

An important feature of 'hard Brexit' for many of its supporters is withdrawal from the jurisdiction of the Strasbourg - based European Court of Human Rights and the repeal of the UK 1998 Human Rights Act which incorporated the European Convention on Human Rights (ECHR) into UK law.

Among the motives for such change is the view that Human Rights law (HRL) obstructs the effective work of key coercive organs of the state such as the military and the police¹. These are both areas in which government ministers or departments have already, in various ways, articulated a desire to reduce the role of HRL as an effective check on excessive power.

Combat Immunity

HRL has, since the British participation in the occupations of Iraq and Afghanistan, crept into the military domain, as a result of decisions both by Strasbourg and the UK courts. At the 2016 Conservative party conference Defence Secretary Michael Fallon said, to the alarm of many lawyers and civil liberties groups, "Our legal system has been abused to level false charges against our troops on an industrial scale." (Bowcott, 2016). Fallon was referring to the then growing volume of litigation against British troops for torture and degrading treatment of Iraqi civilians. In October 2016, the government announced its intention to derogate from ECHR before embarking on future military operations.

¹ For reasons of space the role of HRL in relation to the state Security Services (MI5, MI6 and GCHQ) will not be considered here.

But what has annoyed some senior military brass and their political supporters is not just the role of HRL as a spotlight on abusive behaviour but also the increasing recourse to the courts by military personnel themselves for violations of their human rights. In 2006 the bereaved wife of a soldier (Sgt. Roberts) killed in action in Afghanistan successfully sued the Ministry of Defence (MoD) for negligence on the grounds that due to a shortage of body armour the soldier had been required to give his protective vest to another and his subsequent death could be attributed to MoD failure to supply adequate protective clothing.

The argument is being made (see Tugendhat and Croft 2013; Ekins et al. 2015) that the establishment of such an HRL - based duty of care on the part of the MoD - conflicts with the established doctrine of 'Combat Immunity' whereby field commanders have autonomy to decide how to engage the enemy, including the taking of calculated risks with the lives of troops. Decisions not to wear body armour or helmets must be left to commanders determining how best to engage the enemy or to relate to local populations. Such argument can of course be dismissed as disingenuous on the grounds that Sgt. Roberts was required to remove his body armour not to fight more effectively or to present a 'friendly face' to the local population, but precisely because of the shortage of equipment.

But the high profile issue concerns the allegations of torture and degrading treatment by British troops arising out of the 2003 invasion and occupation of Iraq. In 2003 the Iraqi civilian Baha Mousa was allegedly beaten to death in a British military interrogation facility. In the subsequent court martial most of the accused were acquitted for lack of evidence. It took a long public inquiry for the crimes to be established. Analogies were drawn with the murder of Steven Lawrence.

The case was organised by solicitor Phil Shiner and his firm Public Interest Lawyers (PIL). PIL were the main initiators of over 3,000 subsequent actions by Iraqi civilians for human rights abuses at the hands of British troops. The widely held inadequacy of military police investigation led to the establishment of the Iraq Historic Allegations Team (IHAT) made up of civilians and officers from both Home Office and Naval police forces.

There have been other inquiries but the key point here is that the same critics of the availability of HRL to military personnel are also the leading critics of its extension to the treatment of civilians in regions occupied by British forces. They see HRL as undermining traditional International Humanitarian Law (or Law of Armed Conflict) derived from the Geneva Conventions. The argument is that while the latter allows both lethal force as a first, rather than last resort and allows detention and internment for reasons of security, HRL emphasises that lethal force must be a last resort and detention must be followed promptly by police investigation and due process. Thus:

It is surely absurd that European and British courts now expect our forces to operate in violent combat conditions according to a system more suited to the regulation of police powers on a Saturday night in the West End of London (Ekins et al. 2015: 8).

Again, such an argument can be seen as sidestepping the issue of torture and degrading treatment. It might be asked precisely where in the Geneva Conventions abusive treatment of interned civilians or enemy combatants is legitimised. Even the Red Cross had complained about the alleged maltreatment of prisoners by British troops in Iraq while the Iraqi civilians who sued the MoD were not claiming compensation for death or injury in armed combat.

Last October (2016) the opponents of the application of HRL to UK military in armed conflict situations were handed a prize in the form of the collapse of PIL. Phil Shiner has been struck off by the Solicitors Regulation Authority and a file is currently with the National Crime Agency. Shiner's demise is allegedly related to 'ambulance chasing' practices and paying 'sweeteners' to Iraqi agents of PIL. These developments were the occasion for Fallon's announcement noted above and also the closure of most of the remaining cases against the MoD being handled by IHAT.

Operational Effectiveness

However, those who claim that the problem with HRL in armed conflict situations is that it is attempting to introduce domestic criminal justice concepts into military engagements may be interested to learn of the current attempt by the Metropolitan

Police to evade human rights duties in the interests of 'operational effectiveness', a concept that has some analogies to 'combat immunity'.

John Worboys, the 'black cab rapist', was jailed for life in 2009, for the rape and sexual assault of at least 100 women between 2002 and 2008. Two of his victims successfully took a civil action in 2014 against the Metropolitan police for violation of their human rights through negligence and failure to properly investigate victims' claims. Both the High Court in 2014 and the Court of Appeal in 2015 ruled that the police had a duty to investigate and were in breach of Article 3 of the 1998 Human Rights Act which refers to inhuman and degrading treatment and which places a positive duty on police to properly investigate such crimes.

It is precisely this clause, and the requirement of speedy investigation, that also annoys the advocates of military immunity from HRL. The similarity seems to be that just as military commanders must be free to detain civilians in conflict zones without the burden of HRL determining the conditions and duration of detention, so police commanders must have freedom to deploy their resources in relation to reported incidents without the threat of HRL litigation by victims determining whether and over what time period they conduct investigations.

Last March (2017) The Met, notably with the support of the Home Office, went to the Supreme Court to try to get the judgements overturned on the grounds that HRL was an interference with their 'operational effectiveness'. At the time of writing, the Supreme Court has yet to announce its decision but if this case is viewed together with the military cases discussed above, an insight is gained into the thinking by at least some members of government regarding the replacement of the Human Rights Act with a new British Bill of Rights as part of the Brexit process. Notions of Human Rights, rather than acting as the basis for holding to account the behaviour of state agencies will be firmly constrained by a distorted view of the latter's 'operational autonomy'.

The worry is that with substantial funding cuts to both police and military - yet alone other agencies with an identifiable duty of care - the abolition or dilution of obligations imposed by HRL comes to be rationalised as a reluctant response to cost constraints.

The principle that the requirements of human rights should be a key factor determining the necessary level of funding is abandoned.

Additionally, there is a dislike by many Conservatives of HRL as such (see, for example, Raab 2009). During the election campaign and following the terrorist atrocity at Borough Market, Theresa May reportedly said she would be prepared to 'rip up' HRL insofar as it obstructs counter-terrorism work by police and security agencies. This assumption that HRL as such is a constraint on organisational effectiveness signals a hazardous future for Human Rights in the UK. But in the present uncertain political climate nothing is predictable.

Bowcott, O. (2016) Plan for UK military to opt out of European convention on human rights. *Guardian* 4th October.

Ekins, R.; Morgan, J. and Tugendhat, T. (2015) *Clearing the Fog of Law: Saving our armed forces from defeat by judicial diktat*. London: Policy Exchange.

Raab, D. (2009) *The Assault on Liberty: What Went Wrong with Rights*. London: Fourth Estate.

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