**The United Kingdom’s Presumption of Derogation from the ECHR**

**Regarding Future Military Operations Overseas:**

**Abuse of Rights and *À la Carte* Human Rights Protection**

Vassilis P Tzevelekos[[1]](#footnote-1)\*

**I. Introduction**

‘I also know how much stress is caused by legal claims years after conflicts have ended. It is right that we investigate serious allegations but we’ve seen our legal system abused to falsely accuse our armed forces. […] So we are working hard to get vexatious claims thrown out. […] But much of the litigation we face comes from the extension of the European Convention on Human Rights to the battlefield. This is damaging our troops, undermining military operations, and costing taxpayers’ millions. So I can announce today that in future conflicts we intend to derogate from the Convention. That would protect our Armed Forces from many of the industrial scale claims we have seen post Iraq and Afghanistan. Now this isn’t about putting our Armed Forces above the criminal law or the Geneva Conventions. Serious claims will be investigated – but spurious claims will be stopped. And our Armed Forces will be able to do their job, fighting the enemy, not the lawyers.’[[2]](#footnote-2)

It is with these words that the then UK Secretary of State for Defence (hereinafter, DS), Sir Michael Fallon, announced the intention of his government to derogate from the European Convention on Human Rights (ECHR, the Convention) before embarking on military activities overseas. One might be prompted to think that this was merely a political ‘firework’ destined to indulge the audience of the Conservative Party that the DS was addressing when he made this statement on the 4th of October 2016. (Political) fireworks are, most of the time, safe. For some, they are public nuisance, whilst others enjoy them. They are bright and spectacular, but also short-lived. Soon after festivities finish, people return home. Air pollution, however, persists. Sparkles may last only a few seconds, but gun powder can linger for quite a long time.

The truth is that we do not know yet whether DS’s announcement was intended to be a political ‘firework’, destined to leave behind nothing more than a polemic essence against the ECHR,[[3]](#footnote-3) or a considered decision regarding a well-thought out policy that the British government intends to pursue. What we do know is that we do not have before us a concrete case of derogation that could be examined in the light of the particular circumstances that allegedly justify it;[[4]](#footnote-4) such is the main difficulty of this study, as it is faced with the ‘ghost’ of a (series of) hypothetical derogation(s). Inevitably then, legal analysis shifts from the assessment of the lawfulness of a ‘tangible’ derogation, whose rationale, modalities, idiosyncrasies and specifics are known, to a more general consideration based upon public knowledge – *i.e.* the context, namely military operations overseas, and the goals pursued by the intended derogation, in the way that these have been explained by the Ministry of Defence.

The UK derogation(s) policy has already been discussed by scholars and (human rights) institutions who submitted written evidence to the Joint Committee on Human Rights of the UK Parliament[[5]](#footnote-5) (the Committee). This was in response to an inquiry that the Committee launched into the policy to ensure that the Parliament will have an adequate opportunity to scrutinise the reasons for any derogation.[[6]](#footnote-6) The study aspires to contribute to this literature by making an argument that is absent from the evidence collected by the Parliament.[[7]](#footnote-7) The thesis built in the pages that follow is that the ‘presumption to derogate’[[8]](#footnote-8) – as the UK government labels it – may lead to an *abuse of rights*, among other reasons discussed in more detail later in the study, because it is essentially meant for purposes that are not prescribed by the Convention, that is, because the aims pursued are not aligned with the *raison d’être* (the object and purpose) ofArticle 15 ECHR that permits derogations from the rights enshrined in the Convention. In similar terms and for the same reasons, the UK may be reproached of acting *mala fide* (in bad faith), thereby being in breach of its obligation to perform the ECHR in good faith.[[9]](#footnote-9) To prepare the ground for its main argument, the study critically explores the concept of “abuse of rights” from a theoretical perspective, first, in terms of general international law and, second, within the ECHR system. This way it contributes to the (rather scarce) literature on abuse of rights in ECHR law -highlighting especially the function and the role that Article 18 ECHR can play in that respect. To that end, it discusses in a critical fashion the case law of the European Court of Human Rights (ECtHR, the Court) and the test that its Grand Chamber (GC) recently established regarding Article 18. Moreover, while preparing the ground for its main argument, the study addresses (albeit briefly) an auxiliary question, namely whether the idea of a derogation is fit for purpose given the goals pursued by the British government. The point made in respect to the suitability of the policy is that it cannot serve its intended goals but to a limited extent, whilst also possibly generating undesirable legal side-effects. Finally, in its conclusions, the study argues that the UK’s intention to derogate from the ECHR when embarking in military activities outside of its territory might be seen as symptomatic of a broader trend of (British) scepticism *vis-à-vis* the ECHR regime and its institutional apparatus; this reflects the legitimacy challenges that the ECHR is currently facing.

Before explaining the structure of the analysis that follows, a few words are due on the delimitation of its scope. As is discussed below, ultimately the aim of the idea of (and the justification for) derogating from the ECHR when engaging in military activities overseas is that the UK can escape accountability (and the consequences that accountability entails, as these are perceived by the British government) regarding the extraterritorial application of the ECHR in situations that involve humanitarian law. Indeed, both of these issues, *i.e.* extraterritoriality[[10]](#footnote-10) and applicable law in the dilemma between international human rights law and international humanitarian law (IHL),[[11]](#footnote-11) are central in the argumentation of the UK government and amongst the reasons informing its wish to derogate. The study does not discuss any of these two questions from a theoretical perspective, as this is not necessary for the arguments that it makes.

As far as structure is concerned, the study starts by describing in Part II the state of affairs surrounding the UK’s intention to derogate from the ECHR. It will be shown that, although the initial statement by the DS has now been mitigated to some degree, it still leaves us with speculations that do not offer a solid basis for a legal assessment of the lawfulness of the intended derogation(s) in concrete terms. Part III identifies the main ends pursued through the UK’s policy and briefly discusses a number of reasons as to why derogating from the ECHR is not fit for purpose (*i.e.* it cannot satisfactorily serve the goals set by the British government). Part IV provides, in a critical fashion, the theoretical framework of abuse of rights (and partially bad faith) in terms of general international law and, primarily, ECHR law. Part V applies this framework in the context of the UK derogation(s) policy and examines whether derogating from the ECHR for the purposes and under the terms suggested by the British government may amount to an abuse of rights. Part VI concludes by linking the intended derogation with (British) scepticism *vis-à-vis* the ECHR regime and, more generally, institutions promoting European integration.

**II. The UK’s Intention to Derogate From the ECHR for Future Conflicts Overseas: What We Officially Know**

The study opened by quoting the then DS’ words when he first announced, in October 2016, the intention of the British government to derogate from the ECHR before embarking on military activities overseas. As already explained, this has generated a reaction by the Joint Committee on Human Rights of the UK Parliament. The Committee’s response came a few days after the DS’ statement, when its Chair, Member of Parliament (MP) Harriet Harman, wrote to the DS to request a detailed Memorandum explaining, *inter alia*, the necessity of derogating from the ECHR, the scope of the presumption of derogation, and its compatibility with the ECHR.[[12]](#footnote-12) It was the Committee’s preoccupation to enable the Parliament to exercise scrutiny ahead of any derogation that prompted it to request explanations from the government regarding its intended policy.[[13]](#footnote-13) This is particularly important because the last time that the UK derogated from the ECHR,[[14]](#footnote-14) that is in the aftermath of the terrorist attacks of 9/11 in 2001, ‘[t]here was little parliamentary scrutiny […] and therefore only a very limited opportunity for Parliament to explore […] potential compatibility issues.’[[15]](#footnote-15) Indeed, the GC of the ECtHR found that derogation unlawful as the measures taken – although they amounted to a response to a public emergency threatening the life of the nation[[16]](#footnote-16) – disproportionately discriminated between nationals and non-nationals.[[17]](#footnote-17)

Returning to the question of the parliamentary scrutiny of the proposed derogation(s) policy, in the annex accompanying her letter, the Chair of the Committee requested evidence concerning the reasons for derogating (*inter alia* regarding claims brought against the Ministry of Defence, and the argument that the extraterritorial reach of the ECHR undermines the UK’s military effectiveness), the compatibility of the proposed derogation(s) with the ECHR and other international human rights instruments that are binding for the UK, and the avenues for scrutiny within the UK’s national order.[[18]](#footnote-18)

In his response, the DS to some extent mitigated the impressions created by the political speech before the Conservative Party and explained that the right source of information concerning the nature of the policy at issue is not the speech in question, but rather the Written Ministerial Statement of the 10th of October.[[19]](#footnote-19) According to this Statement:

‘[..] before embarking on significant future military operations, this government intends derogating from the European Convention on Human Rights, where this is appropriate in the precise circumstances of the operation in question. Any derogation would need to be justified and could only be made from certain Articles of the Convention.

In the event of such a derogation, our Armed Forces will continue to operate to the highest standards and be subject to the rule of law. They remain at all times subject to UK Service Law, which incorporates the criminal law of England and Wales, and International Humanitarian Law (the law of armed conflict including the Geneva Conventions) wherever in the world they are serving. Therefore any credible allegations of criminal wrongdoing by members of the Armed Forces will continue to be investigated, and prosecuted within the Service Justice System.’[[20]](#footnote-20)

Whilst it is still the case that the UK government intends to derogate from the ECHR for future military operations, the limits that apply under ECHR law and the need to duly justify any derogation in the light of the precise circumstances of each occasion are also recognised. Thus, ‘[a] conclusion as to the necessity for a derogation would and could only be made having regard to the circumstances at the time of a future military operation.’[[21]](#footnote-21) As to the reasons underpinning the UK derogation(s) policy, these include *inter alia* the argument that the intention of the ECHR drafters was not to make the Convention applicable for overseas[[22]](#footnote-22) armed conflicts that are meant to be regulated by international humanitarian law and, more generally, concerns about the extraterritorial reach of the ECHR, the potential impact of the ECtHR’s case law on the effectiveness of military operations, and the ‘flood of litigation’ (associated with the entailed economic cost) to which operations in Afghanistan and Iraq have led.[[23]](#footnote-23) According to the answers provided by the DS to the questions raised by the Committee, the Ministry of Defence has spent £19.8 million in compensation; the vast majority of these payments being the result of an ECtHR finding that Iraqi claimants had been detained illegally.[[24]](#footnote-24) The answer also provides an account of the various types of claims received through different avenues regarding operations in Iraq and Afghanistan.[[25]](#footnote-25) Moreover, it is interesting that the DS argues that the idea of a presumption of derogation is compatible with Article 15 ECHR and the conditions that this sets for a derogation from the Convention,[[26]](#footnote-26) particularly given that ‘Article 15 may apply to any significant military operation capable of falling within the concepts used in that Article.’[[27]](#footnote-27) As to the nature of the derogation measures, the same depends upon the circumstances prevailing at the time of the derogation; however, (although Articles 2 and 5 ECHR have caused particular concern) the government has not yet decided which ECHR obligations it intends to derogate from as, ‘[n]o decision has yet been taken to derogate’.[[28]](#footnote-28)

Thus, the core message by the DS is that, indeed the UK government considers derogating from the ECHR, but it is also aware of the need to make decisions on an *ad hoc* basis in the light of the precise circumstances of each military operation.[[29]](#footnote-29) In her response to the DS, the Head of the Committee welcomed the acknowledgment by the government that it cannot derogate immediately and in advance of any future military operation since the specifics of each operation need to be known and evaluated as to whether they justify a derogation.[[30]](#footnote-30) However, her letter also notes that the government has refrained from providing a detailed Memorandum on its policy for the reason that it does not wish to engage in a hypothetical debate.[[31]](#footnote-31) The Head of the Committee requested a further Memorandum, ‘explaining in full what the Government considers to be the justification behind its intention to derogate’, and the Committee raised a number of questions to be addressed in the Memorandum.[[32]](#footnote-32) *Inter alia*, it requested evidence regarding certain factual elements underpinning the intention to derogate and the impact of the applicability of the ECHR to armed conflicts overseas.[[33]](#footnote-33)

The DS responded on 28 February 2016, providing a document entitled ‘Memorandum’.[[34]](#footnote-34) In the accompanying letter, he confirmed that ‘no decision has been taken as to whether in the context of any particular future military operation it would or would not be appropriate to derogate’ and reiterated that ‘a decision to derogate would only be taken if it is appropriate to do so, which requires consideration of the circumstances that exist at that future time.’[[35]](#footnote-35) Thus, given also that planning cannot be discussed in hypothetical terms,

‘[a]ny commitment as to the circumstances in which the Government may derogate is impossible as any such decision will depend on the precise circumstances of the operation prevailing at the time.’[[36]](#footnote-36)

The Memorandum reiterates that ‘[a]ny future decision to derogate […] would depend entirely on the circumstances surrounding the operation at issue meeting the requirements set out in article 15’[[37]](#footnote-37) ECHR and explains that

‘the sort of situation in which derogation would need to be considered is where the ECHR would or might not cover or permit the taking of a step which was considered necessary for the proper and effective conduct of a military operation.’[[38]](#footnote-38)

Furthermore, the Memorandum elaborates on the vexatious nature of the claims against the UK government[[39]](#footnote-39) and emphasizes the non-extraterritorial scope of the Convention and the applicability of humanitarian law. As to extraterritoriality, it refers explicitly to the regional character of the Convention,[[40]](#footnote-40) arguing that its ‘framers […] did not intend that it should apply to overseas armed conflicts which were already governed by International Humanitarian Law’.[[41]](#footnote-41) As to the latter, after explaining that ‘the UK’s position has always been that IHL regulates armed conflict’[[42]](#footnote-42) and that the ‘extension of the ECHR onto the battlefield creates a real potential difficulty’,[[43]](#footnote-43) the Memorandum refers to the relevant case law of the ECtHR,[[44]](#footnote-44) and particularly to *Hassan*[[45]](#footnote-45) (in which the Convention has been interpreted in the light of IHL), as to conclude that uncertainty remains ‘as to whether the Strasbourg Court would follow the Supreme Court’s reasoning [in *Mohammed and others v Ministry of Defence*[[46]](#footnote-46)] in extending the principle that IHL can modify the ECHR to other sources of international law and to non-international armed conflicts.’[[47]](#footnote-47)

After the general election of 8 June 2017, the Parliament was dissolved on 3 May 2017 and all Committees ceased to exist. As a result, the Committee did not follow up on the response that it received from the Ministry of Defence. Rather, it closed its inquiry, noting that it may, however, refer to the evidence that it has collected in the future.[[48]](#footnote-48)

The next section of the study employs the evidence collected by the UK Parliament as well as other sources as to evaluate the suitability of the proposed derogation(s) from the ECHR for the goals pursued by the government. To examine whether derogating from the ECHR can help the government in achieving its goals, Part III of the study first identifies these goals, prior to assessing the suitability of the proposed derogation(s) thereafter.

**III. Is the Presumption of Derogation Fit for Purpose?**

**III.A. The Goals Pursued**

The clarifications provided by the DS in his communications with the Committee soften the blow from his initial statement at the Conservative Party Conference,[[49]](#footnote-49) but they also draw a rather incongruous picture. On the one hand, the government insists on its envisioned policy to derogate from the ECHR for military activities overseas, with the Ministry of Defence being cognizant of the conditions set by Article 15 ECHR and the need to justify any derogation(s) in light of the particular circumstances of the situation calling for a derogation. On the other hand, the DS frames its policy in terms of a presumptive derogation. The study will return to this term in Part V, but, for the moment, it suffices to highlight the intended connotation. The impression given is that the government purposefully employs said terminology to enshrine a *contradictio in terminis*, *i.e.* a self-contradiction that permits its policy – which cannot be lawful unless it concerns a specific situation that, under strict conditions, justifies a derogation – to acquire a wider capacity by acting as an all-embracing ‘umbrella’ that can quasi-automatically cover *any* extraterritorial military operation. This widens the policy’s scope and paves the way for adding objectives that are foreign to Article 15 ECHR, which permits derogating from the Convention as a safeguard ‘[i]n time of war or other public emergency threatening the life of the nation’.[[50]](#footnote-50) It goes without saying that the objective pursued by Article 15 (*i.e.* protection from a threat) needs to always be present, as it amounts to one of the preconditions of lawfulness for derogations. By qualifying the derogation as presumptive, the Ministry of Defence can add, next to said objective, further objectives that are absent from both the text and the spirit of the Convention. Among those additional, ‘extra-Conventional’ aims that the derogation policy serves, the stuy highlights two. The first concerns the effectiveness of military operations. According to the government, what undermines effectiveness is the scrutiny exercised by the ECtHR, and what makes scrutiny possible are the extraterritorial effects produced by the ECHR and its application in armed conflict situations. The second concerns the existence of vexatious/spurious claims, the burden that they entail, and the associated multidimensional cost for the UK.

**III.B. The Policy’s Suitability**

Having identified the key goals arguably pursued by the policy, discussion now moves to its suitability.[[51]](#footnote-51) But, before that, the following clarification is necessary. The study does not examine whether the government is right to correlate the scrutiny exercised by the ECtHR with the effectiveness of military operations[[52]](#footnote-52) and the existence of vexatious/spurious claims.[[53]](#footnote-53) Whether said correlation is true has no major impact on the argument built below. The task undertaken in this Part of the study is to consider whether the presumption of derogation can actually untie the hands of the British army to engage in conduct enhancing the effectiveness of operations overseas with no regard to human rights protection considerations and help UK authorities put a break on spurious/vexatious claims. The study answers the question largely in the negative and enlists a number of reasons supporting the position that, essentially, the UK cannot effectively achieve these goals (the legitimacy of which is not assessed here) through derogations. Moreover, the study argues that the policy might produce uninvited legal side-effects, whereas a lawful derogation from the ECHR would only serve the intended goals to a limited extent. As it will be argued in Part V, this does not mean that it is impossible for the UK to lawfully derogate from the ECHR with regard to its military operations overseas. If the exigencies of Article 15 ECHR are met, the UK may derogate from the Convention; however, it will fail to fully achieve the results intended by its derogation(s) policy and the associated presumption to derogate.

Starting with the effectiveness of extraterritorial military operations that the UK government considers to be undermined by the application of the ECHR, the *first* argument supporting the thesis that the derogation(s) policy is not fit for purpose is that the ECtHR will continue to exercise scrutiny if the derogation is rejected. The derogation will come into play both at the national level and before the ECHR as a (preliminary) question conditioning the exercise of scrutiny.[[54]](#footnote-54) Only if the circumstances of a future derogation are such that genuinely justify it in conformity with the ECHR criteria (the way these are interpreted by the last word adjudicator in the ECHR system, namely the ECtHR), this (*i.e.* the derogation) will be able to produce effects, shield the government from claims and allow the military personnel to act in ways that offer optimal military results with no regard to their possible detrimental consequences for human rights. *Second*, as the DS openly admits,[[55]](#footnote-55) the UK will continue to be bound by other rules of international law, both customary and conventional, such as the International Covenant on Civil and Political Rights. If it derogates from such rules,[[56]](#footnote-56) the previous argument applies, namely that the lawfulness of the derogation will need to be assessed. Ultimately, the text of Article 15 ECHR is clear in that, amongst other preconditions that ought to be met, measures derogating from the Convention need to be consistent with the other obligations that the derogating state has under international law.[[57]](#footnote-57) Moving to the *third* argument, the DS recognises that ‘the vast majority of the claims notified allege violations of Article 2, 3 and 5’[[58]](#footnote-58) Yet, the text of the ECHR is explicit in that no derogation is allowed from Articles 3, 4(1), 7 and 2 ‘except in respect of death resulting from lawful acts of war’[[59]](#footnote-59) – which allows the opening of a parenthesis here to argue that this is an indication that, indeed, the ECHR has been designed to apply in times of war. As to the right to liberty under Article 5 ECHR, the effects of a lawful derogation will prove to be limited in the case of international armed conflicts as the ECtHR is already interpreting the Convention in the light of IHL.[[60]](#footnote-60) *Fourth,* Sari makes another very interesting point regarding the applicability of IHR law: by derogating from the ECHR, the UK undermines its own earlier argumentation before the Court in its capacity as a respondent (which has already produced some results[[61]](#footnote-61)) and, in particular, the argument that humanitarian law is *lex specialis*; thus applicable law.[[62]](#footnote-62) As to the *fifth* argument, *mutatis mutandis,* the UK undermines its earlier approach *vis-à-vis* extraterritoriality, and implicitly admits the ECHR’s applicability overseas.[[63]](#footnote-63) Derogating from the ECHR as a means to avoid the scrutiny of extraterritorial conduct is of no usefulness if (allegedly) the ECHR does not apply extraterritorially. Suffice it to remind here that the ECtHR expands rather exceptionally[[64]](#footnote-64) the application of the ECHR extraterritorially and that extraterritoriality is conditioned by the criterion of effective control (and its variations[[65]](#footnote-65)) that the Court has established with its case law.[[66]](#footnote-66)

Moving now to the positive impact that the derogation(s) policy could have on the problem of spurious/vexatious legal claims, this would only concern derogable rights. Yet, the litigation to which the Ministry of Defence refers mostly concerns non-derogable rights.[[67]](#footnote-67) Moreover, as is explained by the evidence that Oxford Pro Bono Publico submitted to the Committee, the legal order of the UK offers a number of avenues that can ‘prevent unfounded, weak or vexatious claims.’[[68]](#footnote-68) The UK national authorities will continue to deal with claims, a number of which may be spurious or vexatious; however, this does not justify derogating from the ECHR or limiting access to justice. More generally, one cannot remedy frivolous litigation, *i.e.* abuse of rights, by means of another abuse of rights – which, according to the argument built in the next two Parts of the study, is the term to characterise the UK’s policy for future derogation(s).[[69]](#footnote-69) Even if one were to agree with the UK government – when it raises the issue of the number of claims and the volume of compensation – that the rights and means offered by the ECHR and the Court’s case law have been abused by civil society, victims, and victim’s lawyers, the remedy of such an abuse cannot be another abuse. Besides, the phenomenon of vexatious claims is by no means exceptional; it happens in all legal systems with regard to various legal issues. Competent authorities are expected to duly consider claims and cases brought before them, discard spurious and vexatious claims, and deliver justice. A further argument is that one would be mistaken to think that the derogation(s) policy can protect military personnel from claims against them. The ECHR only binds states, and the ECtHR only reviews the conduct of states. Military personnel’s conduct becomes relevant and may lead to state responsibility when it is attributable to a state,[[70]](#footnote-70) an organ of which the army and its personnel are.[[71]](#footnote-71) State responsibility can also be engaged in cases of failure (*i.e.* negligence) to prevent, remedy and possibly punish an endangerment or an actual breach of human rights by a person (in our case, military personnel) whose conduct is not (directly[[72]](#footnote-72)) attributable to a state.[[73]](#footnote-73) Yet, both of these scenarios concern state liability. The effect that the derogation policy can produce is limited to impeding international state responsibility for conduct (consisting in acts or omissions) that would otherwise be incompatible with an international treaty, namely the ECHR.[[74]](#footnote-74) Military personnel’s liability under different legal bases of (for instance, civil or criminal) national law or international criminal law[[75]](#footnote-75) remains intact, as it is irrelevant to the intended derogation(s) from the ECHR. Finally, whilst the derogation offers no ‘immunity’ to military personnel, it also deprives them from the guarantees offered by the ECHR when they operate overseas and the UK (directly or indirectly[[76]](#footnote-76)) violates their human rights. The intended derogation will exclude from the protection of the ECHR (when this applies extraterritorially) not only foreigners affected by the UK military operations, but also its military personnel operating overseas.[[77]](#footnote-77)

Having dealt with the concerns and reservations regarding the suitability of the derogation(s) policy given the goals that the same pursues, the study now turns in Parts IV and V to one of the key side-effects that this policy can generate, namely that – given especially its presumptive spirit – it may lead to an abuse of rights. This corresponds to the principal argument advanced in this study. To build this argument, analysis mainly relies on the manifest misalignment between the aims pursued through the policy and the object and purpose of Article 15 ECHR. Amongst other points that it makes, Part V suggests that the real aims pursued through the intended derogation(s) are not to enable the UK to respond to an emergency that threatens it. This means that the British government may intend to employ Article 15 for a different purpose than the one for which the same has been created. This corresponds, *inter alia*, to the first definition given by the *Dictionnaire de Droit International Public* of the term *abus de droit*, *i.e.* abuse of rights.[[78]](#footnote-78) Part IV provides the theoretical framework that underpins analysis in Part V by discussing at a more abstract and theoretical level the concept of abuse of rights (and, parenthetically, its interconnection with good faith) in terms, first, of general international law and, second, of ECHR law. Part V employs the framework established in Part IV to assess the UK derogation(s) policy and to explore if/when this may amount to abuse of rights.

**IV. Abuse of Rights: The Theoretical Framework**

**IV.A. Abuse of Rights as a General Principle of International Law**

*Inter alia*, *abus de droit* exists when a state exercises a right – in our case, the right to derogate from the ECHR –, power or competence in a way or for a purpose that does not correspond to the objectives of this right, power or competence –for example, with an aim to escape an international obligation or to obtain an undue advantage.[[79]](#footnote-79) From his side, Kolb identifies four core elements in the concept of abusive exercise of rights under international law: intention to harm (*intention de nuire*), misuse of power (*détournement de pouvoir*), manifest disproportion in the balanced interests (*disproportion manifeste des intérêts*), and arbitrariness, unreasonableness, and fraud (*l’arbitraire, le déraisonnable, la fraude*).[[80]](#footnote-80) Arguably, not all of these elements need to always be present. The prohibition of abuse of rights corresponds to a general principle of (international) law,[[81]](#footnote-81) the content of which is abstract and flexible. Thus, to acquire an exact shape and content, it needs to be applied within the context of a concrete case. As is explained in more detail below, the UK policy suggests exercising a state right provided by the ECHR for reasons that are foreign to its object and purpose. It thus anticipates securing for itself impunity and the right to act free from its commitments under the ECHR in a way that goes against the teleology of the Convention and which is potentially harmful. This thereby supports the argument that, should the UK policy materialise (*i.e.* if the UK actually derogates) from the ECHR under its policy and for the purposes pursued by it, it will be in breach of the general principles of international law that prohibit abuse of rights and require states to act in good faith.[[82]](#footnote-82)

The *Dictionnaire* associates abuse of rights with illegitimacy, *dolus* and bad faith.[[83]](#footnote-83) Indeed, abuse of rights and good faith are conceptually very close and semantically intertwined. Yet, their exact interrelationship and interdependence is debated in scholarship. This leads to perplexity, with some authors using the two terms interchangeably, others denying the autonomous standing of abuse of rights, and others holding that it derives from good faith, with abuse of rights corresponding to something that a state shall abstain from doing in order to act *bona fide*.[[84]](#footnote-84) But the purpose of this brief parenthesis is not to delve into theoretical analysis on the connection between good faith and abuse of rights. Rather, the reference made to the general principle of good faith and its association with abuse of rights merely aims at showing that, beyond the latter, the UK may also be found acting in breach of the principle of good faith. *Inter alia*, this can be associated with Articles 26 (on the observation of treaties) and 31(1) (on the interpretation of treaties) of the 1969 Vienna Convention on the Law of Treaties (VCLT).[[85]](#footnote-85)

Returning to abuse of rights, the two questions that arise from the argument made here (namely that the UK policy may constitute a breach of the prohibition of abuse of rights) are: what amounts to a breach (leading to state responsibility), and what are the legal consequences of a breach? Starting with the latter question, it has been suggested that acts falling under the prohibition of abuse of rights should be legally void (*i.e.* null) as long as they are not executed. Accordingly, in line with this suggestion, such acts ought only to engage state responsibility (*i.e.* transform into wrongful conduct) if executed.[[86]](#footnote-86) As to the former question, damage is considered by some authors to be necessary for state responsibility (particularly regarding the duty to repair),[[87]](#footnote-87) whilst intention to harm may not be required for establishing wrongfulness.[[88]](#footnote-88) These (to some extent divergent) approaches reveal that abuse of rights as a general principle of international law remains obscure as to its particulars. The thesis defended in this study is that intention to abuse a right (*i.e.* not necessarily to harm) is inherent to the notion of abuse of rights, *i.e.* it is one of the ingredients of the prohibition of abuse of rights. This entails that, for a breach[[89]](#footnote-89) of the prohibition of abuse of rights (which – *i.e.* breach –, together with attribution, are the triggers of state responsibility[[90]](#footnote-90)) to occur, intention needs to be present. Consequently, state responsibility for abuse of rights may be said to be subjective in nature.[[91]](#footnote-91) Moreover, it should be reaffirmed that, in terms of general international law, the term “breach” of an international obligation means an act not in conformity with that obligation.[[92]](#footnote-92) Policy plans and the discussion of such plans before national institutions and between national authorities (like the correspondence between the DS and the Committee examined earlier) do not amount to an act of derogation. They may be used as evidence[[93]](#footnote-93) to reveal the true intention of the government (which, as already argued, shall be treated as a precondition for establishing a breach), but they do not amount to conduct breaching international law. Such a conduct requires execution of the derogation(s) policy, *i.e.* an actual derogation from the ECHR. Thus, conduct at the national level, such as the enactment of national legislation or, more generally, measures taken either domestically or internationally in implementation of a derogation from the ECHR can be in breach of both Article 15 ECHR and the general principle of international law that prohibits abuse of rights. The last question to consider regarding the breach of the prohibition of abuse of rights under general international law is whether state responsibility can be established without damage, *i.e.* whether the exercise of a right can be characterised as abusive if it is not harmful.[[94]](#footnote-94) This criterion (*i.e.* damage) is not a precondition for state responsibility under the International Law Commission’s norms; therefore, the only way that it can play a role is if it is part of the primary rule of the prohibition of the abuse of rights, that is, a precondition for its breach. As already explained, this issue is debatable in scholarship. A more sensible approach would be to treat damage, not as an element of the prohibition of abuse of rights – and a requirement consequently for establishing its breach –, but as associated with the right abused. In different words, damage could be seen as extraneous to the abuse *per se*. It may, however, occur when the abusive exercise of a given right leads to the breach of this right, *i.e.* of the right in relation to which abuse of rights applies;[[95]](#footnote-95) for, abuse of rights has no independent standing. It refers to and is intrinsically associated with another right under international law that may be impaired (possibly leading to a damage) as a result of the abuse.

**IV.B. Abuse of Rights within the ECHR**

The ECtHR could consider applying the criteria that have just been discussed if it decided to interpret the ECHR in the light of general international law.[[96]](#footnote-96) However, general international law’s role in that case would primarily be subsidiary, that is, intended to mainly complement the text of the ECHR. The reason is that the ECHR contains *leges speciales*, namely Articles 17 and 18. The following sections of this Part of the study give, first, a general overview of named ECHR Articles, to focus then on Article 18 -in particular on the test for its breach that the GC established relatively recently and the scenarios that this entails. In comparison with Article 17, Article 18 has been used less in the ECtHR case law, staying for several decades in a dormant state.[[97]](#footnote-97) Yet, important recent case law reveals the effects that it can produce and establishes the conditions that should apply for these effects to be generated.

**IV.B.1. An Overview of Articles 17 and 18 ECHR**

Article 17 ECHR explicitly prohibits abuse of rights and, in particular, engaging “in any activity or perform[ing] any act aimed at the destruction of any of the rights and freedoms […] or at their limitation to a greater extent than is provided for in the Convention.’[[98]](#footnote-98) The prohibition is addressed to both human rights victims and states. Its latter dimension, *i.e.* when the prohibition concerns states, aims at ensuring that national authorities will not restrict human rights for motivations and the pursuance of aims that are foreign to the ECHR.[[99]](#footnote-99) Article 17 may be pleaded against states, but also by states. Starting with the second scenario, a state can invoke Article 17 as a defence against abusive (often declared inadmissible[[100]](#footnote-100)) claims against it before the ECtHR. This may also be done in case of emergencies justifying a derogation from the ECHR under Article 15. In *Lawless (No 3)*, the Court found that, in accordance with Article 15, the respondent state was entitled to take measures derogating from its obligations under the Convention, but that it was wrong to argue that the applicant had abused his ECHR rights.[[101]](#footnote-101) The purpose of Article 17 “is to make it impossible […] to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention”.[[102]](#footnote-102) However, abuse of rights, “cannot be construed *a contrario* as depriving a physical person of the fundamental individual rights guaranteed by […] the Convention”;[[103]](#footnote-103) therefore, because the applicant in *Lawless (No 3)* had “not relied on the Convention *in order to* justify or perform acts contrary to” it, the Court refused to treat the complaint as abusive.[[104]](#footnote-104) Moving then to the scenario of Article 17 being pleaded against a state, as already argued, this is basically an allegation of bad faith. In the *Greek Case ,*having found the derogations of the respondent unlawful under Article 15, the European Commission on Human Rights (ECmHR), under the old system (*i.e.* before Protocol 11), refrained from examining the alleged breach of Articles 17 and 18 ECHR.[[105]](#footnote-105)

The reference made to the *Greek case* allows for noting that, when submitting a complaint, applicants may – and often do – rely on both Articles 17 and 18.[[106]](#footnote-106) As far as the latter provision is concerned, Article 18 ECHR prohibits restrictions permitted under the Convention to be applied for purposes other than for those for which they have been prescribed.[[107]](#footnote-107) Indeed, Article 18 may be seen as covering a particular instance of abuse of rights[[108]](#footnote-108) (which is central to the point made in this study regarding the intentions of the UK government), namely when a state relies on the Convention provisions that permit restricting the rights it enshrines for reasons that are not genuine, that is, for aims that do not correspond to the ones truly animating its conduct and to the goals it actually pursues.[[109]](#footnote-109) Like Article 17, Article 18 may be applied in relation to Article 15.[[110]](#footnote-110) In *De Becker*,the ECmHR employed Article 18 in a way that complemented Article 15(3) as to conclude that derogations cannot continue once an emergency is over.[[111]](#footnote-111)

This is not, however, where the commonalities between Articles 17 and 18 stop. In fact, they are also both seen as having no independent existence.[[112]](#footnote-112)As such, they must always be associated, that is to say, they must always be applied in conjunction with another provision of the Convention that allows restrictions to rights.[[113]](#footnote-113) Accordingly, breaches of Articles 17 and 18 need to relate to one of the rights guaranteed by the Convention. This confirms the point made earlier in this study regarding the inter-connection between the abusive exercise of a right and the right in respect of which abuse of rights is invoked, *i.e.* the fact that there cannot be abuse of rights unless there is a right within a given legal system with regard to which the prohibition of abuse applies -irrespectively, as it will be explained in more detail below, of whether the right with regard to which the abuse of rights applies has been breached or not. Within the ECHR environment, the prohibition of abuse concerns the rights protected by the Convention. This is what connects Articles 17 and 18 with the other provisions of the ECHR. This is also one reason why finding that states have abused the Convention rights has proven to be rather arduous in the past -especially before the GC judgment in *Merabishvili v. Georgia*,[[114]](#footnote-114) which provided guidance on Article 18 and is discussed in detail within the next section of the study. As Articles 17 and 18 need to be associated with another right in the Convention, the Court routinely starts by examining the legitimacy and lawfulness of the restrictions applied under that other right. If these are found to pursue a legitimate aim that satisfies the Convention’s exigencies and sufficiently justifies the restrictions at stake (i.e. the restrictions are found to be necessary in a democratic society in conformity with proportionality), they shall be declared lawful. As is explained below, abuse of rights can be found in the absence of a breach of the right with respect to which abuse of rights has been invoked.[[115]](#footnote-115) However, finding lawful a restriction to a right with regard to which a complaint of abuse of rights has been made has in the past led the Court to abstain from examining the associated allegations under Articles 17 and 18.[[116]](#footnote-116) In the opposite scenario, that is, if the state has not acted in conformity with a provision of the Convention that tolerates restrictions, these (*i.e.* the restrictions) will be found to be unlawful. From a practical point of view, it adds little to characterise an already established breach as an abuse of rights too. Again, the discussion that follows in the study on *Merabishvili* shows that such a characterisation is not impossible.[[117]](#footnote-117) Yet, establishing abuse of rights involves questioning the true intentions of the respondent state, which, on the one hand, might be difficult to prove[[118]](#footnote-118) and, on the other hand, brings the Court – which is an international adjudicatory institution whose powers and authority stem from state consent – in the rather unpleasant position of having to reason as to why it considers that the respondent state has, in essence, acted hypocritically (*i.e.* in bad faith). This presumably explains why the Court’s starting point before *Merabishvili* was the assumption that states act in good faith[[119]](#footnote-119) - which is a rebuttable presumption.[[120]](#footnote-120) This also explains why in the past – again before *Merabishvili* – the ECtHR has been satisfied with declaring the breach of the rights in relation to which a complaint of abuse of rights has been made and refrained from further examining allegations regarding Articles 17 and 18.[[121]](#footnote-121) In other words, the ECtHR has chosen in the past – and, indeed, it had good reasons to choose – to be “diplomatic” *vis-à-vis* states by self-restraining its powers.

**IV.B.2. The *Merabishvili* Test on Article 18**

In November 2018, the ECtHR’s GC delivered its seminal judgment in *Merabishvili v. Georgia* whereby it provided a fairly analytical guide on Article 18. Irrespective of the critique that follows in this study, admittedly, *Merabishvili* and the guidance that it offers favour legal certainty. The Court started with a detailed overview of previous case law[[122]](#footnote-122) on Article 18, recognised the need to clarify its case law,[[123]](#footnote-123) and then proceeded to offer guidance - by focusing especially on the questions of the plurality of purposes pursued by a restriction[[124]](#footnote-124) and on the proof to establish a breach of Article 18.[[125]](#footnote-125) The GC confirmed that Article 18 only applies in conjunction with another qualified Article of the ECHR, that is, in combination with non-absolute rights that are subject to restrictions.[[126]](#footnote-126) Furthermore, it explained that it understands Article 18 as complementing the restriction clauses contained in the ECHR.[[127]](#footnote-127)

But, if Article 18 has no independent standing and its role is complementary, what can its “added value” be? In that respect, the Court explicated that the absence of independence should not be understood as lack of autonomy. Accordingly,

‘Article 18 does not […] serve merely to clarify the scope of [the ECHR] restriction clauses. It also expressly prohibits the High Contracting Parties from restricting the rights and freedoms enshrined in the Convention for purposes not prescribed by the Convention itself, and to this extent it is autonomous’.[[128]](#footnote-128)

Thus, Article 18’s autonomy justifies a separate examination of the purpose of a restriction. By separate examination is meant scrutiny of the respondent’s conduct under Article 18 aside from the ordinary control of compatibility (that involves assessing their legitimacy and necessity) with the Convention of restrictions to ECHR rights in conjunction with which Article 18 has been invoked. However, autonomy is not unconditional. The Court holds that

‘[t]he mere fact that a restriction of a Convention right or freedom does not meet all the requirements of the clause that permits it does not necessarily raise an issue under Article 18. Separate examination of a complaint under that Article is only warranted if the claim that a restriction has been applied for a purpose not prescribed by the Convention appears to be a fundamental aspect of the case”.[[129]](#footnote-129)

This way, the ECtHR establishes a gravity threshold to be met before it proceeds with separately examining an allegation of breach of Article 18.[[130]](#footnote-130)

Next to the “fundamental aspect” threshold, a second criterion applies for “unlocking” Article 18.[[131]](#footnote-131) Said Article is assigned to a more concrete task, as it allows ‘a more objective assessment of the presence or absence of an ulterior purpose and thus of a misuse of power (“*détournement de pouvoir*” […]’.[[132]](#footnote-132) Accordingly, ulterior purpose is a decisive element for “activating” Article 18. By this term (*i.e.* “ulterior purpose”) it is meant that there is a “hidden agenda”, that is, a purpose not prescribed by the ECHR provision in conjunction with which Article 18 has been invoked which (*i.e.* the purpose) differs from the purpose proclaimed by the authorities.[[133]](#footnote-133) The “ulterior purpose” criterion is related to bad faith, but the two “are not necessarily equivalent in each case”.[[134]](#footnote-134) Therefore, the GC appears to concur with scholarship when it identifies a common space between bad faith and abuse of rights (under Article 18) -although, admittedly, it prefers employing the term “misuse of power” instead of “abuse of rights”.

Things are rather straightforward if the ulterior purpose is the sole purpose animating the conduct of national authorities leading to an ECHR right restriction, but a plurality of purposes may well exist. Thus, the Court’s GC explains:

‘[a] right or freedom is sometimes restricted solely for a purpose which is not prescribed by the Convention. But it is equally possible that a restriction is applied both for an ulterior purpose and a purpose prescribed by the Convention; in other words, that it pursues a plurality of purposes. The question in such situations is whether the prescribed purpose invariably expunges the ulterior one, whether the mere presence of an ulterior purpose contravenes Article 18, or whether there is some intermediary answer.’[[135]](#footnote-135)

In its answer to this set of questions the GC considers Article 18’s teleology, ‘which is to prohibit the misuse of power’,[[136]](#footnote-136) to hold that the existence of a purpose not falling within the restrictions allowed by the ECHR Article in combination with which Article 18 has been invoked does not lead *per se* to a breach of Article 18. For,

‘[t]here is a considerable difference between cases in which the prescribed purpose was the one that truly actuated the authorities, though they also wanted to gain some other advantage, and cases in which the prescribed purpose, while present, was in reality simply a cover enabling the authorities to attain an extraneous purpose, which was the overriding focus of their efforts.’[[137]](#footnote-137)

Thus, ‘the mere presence of a purpose which does not fall within the respective restriction clause cannot of itself give rise to a breach of Article 18.’[[138]](#footnote-138) *Mutatis mutandis*, finding that the purpose pursued by a restriction is prescribed by the Convention ‘does not necessarily rule out a breach of Article 18 either.’[[139]](#footnote-139) The decisive criterion in that respect is whether the ulterior purpose was predominant.[[140]](#footnote-140)

‘Which purpose is predominant in a given case depends on all the circumstances. In assessing that point, the Court will have regard to the nature and degree of reprehensibility of the alleged ulterior purpose, and bear in mind that the Convention was designed to maintain and promote the ideals and values of a democratic society governed by the rule of law.’[[141]](#footnote-141)

In other words, the autonomous nature and teleology of Article 18 require investigating the true key intentions of the national authorities. Outside of the question of the lawfulness of a restriction (which involves different questions, including the legitimacy and the necessity of the restriction), under Article 18 the Court will need to explore whether the justification of a restriction is *primarily* a pretext for notional authorities to pursue aims that are extraneous to the Convention. In other words, the ECtHR must consider whether national authorities are predominantly endeavouring to misuse/abuse the possibility provided by the ECHR to lawfully restrict the rights and freedoms it enshrines.

Consequently, not all ulterior purposes are able to breach Article 18 when a plurality of purposes exists. Should the Court find in a case wherein a plurality of purposes exist that a restriction also pursues an ulterior purpose, Article 18 will only be breached if the ulterior purpose is predominant.[[142]](#footnote-142) Conversely, if the predominant purpose that truly actuated the conduct of the respondent’s authorities is the prescribed one, no issue will arise under Article 18 –with no regard to whether national authorities pursued other objectives as well.[[143]](#footnote-143) Thus, the decisive criterion where the Court finds no breach of the provision in conjunction with which Article 18 has been invoked is the predominant rationale and objectives, that is to say, the principal and prevalent *intentions* behind the restriction of a Convention right.

The GC is setting a quality threshold that must to be met when plural purposes drive the respondent’s conduct. *Prima facie*, the “predominant purpose” criterion curtails, compromises, and possibly undermines Article 18’s autonomy. In a sense, non-predominant ulterior purposes are absorbed by the legitimate prescribed aims that justify a restriction. The thesis defended in this study is that, for Article 18 to be fully autonomous from the ECHR provision in conjunction with which it is invoked, each and every *mala fide* ulterior purpose (rather than predominant purposes only) should be sanctioned.[[144]](#footnote-144) *Mala fide* ulterior purposes complementing or running in parallel with a legitimate purpose prescribed by the ECHR should not be tolerated as “collateral benefits”. Otherwise, the Court will essentially be giving leeway to national authorities by permitting some degree of hypocrisy and insincerity by states, and condoning illegitimate political motivations that fall outside the spirit of the ECHR. To be in a position to validly criticise the Court’s test in cases of plurality of purposes, however, we shall first wait to see how it will interpret the term “predominant” and how high the threshold will be to meet this standard. This also depends on how proof operates in this framework.[[145]](#footnote-145)

Before spending a few words on the contribution of the GC’s judgment on the question of proof, a summary is attempted below by providing the following scheme that depicts the *Merabishvili* test on Article 18 and the autonomous effects that it produces. The Court openly admits that, ‘Article 18 of the Convention can only be breached after a significantly high threshold has been crossed’.[[146]](#footnote-146) The test is as follows:

* Is the claim that a restriction has been applied for a purpose that is not prescribed by the Convention a fundamental aspect of the case?
	+ No → No issue under Article 18.
	+ Yes → Does the restriction pursue an ulterior purpose?
		- No → No issue under Article 18.
		- Yes → Is the ulterior purpose the sole purpose or a plurality of purposes exists?
			* Sole purpose → Breach of Article 18.
			* Plurality of purposes → Is the ulterior purpose the predominant one?
				+ No → No issue under Article 18.
				+ Yes → Breach of Article 18 (irrespective of whether the ECHR provision in conjunction with which Article 18 has been invoked is found to be breached).

This test and the identification of the key criteria that shall apply for establishing a breach of Article 18 led the Court to revisit its approach on proof by focusing on the criteria of “ulterior purpose” and “predominant purpose” when a plurality of purposes co-exist.[[147]](#footnote-147) Thus, the Court now finds no reason to depart from its usual approach to proof -rather than applying special rules established in its earlier case law on Article 18.[[148]](#footnote-148) This also concerns the presumption applied by the Court in the past that national authorities act in good faith, which resulted in applicants having the burden of proof when they wished to rebut such presumption.[[149]](#footnote-149) Thus, ‘the burden of proof is not borne by one or the other party because the Court examines all material before it irrespective of its origin, and because it can, if necessary, obtain material of its own motion.’[[150]](#footnote-150) The parties spontaneously adduce evidence on which the Court relies,[[151]](#footnote-151) but it may also ask the parties to a dispute to provide evidentiary material *proprio motu*. [[152]](#footnote-152) The Court may also draw inferences from the respondent’s conduct in the proceedings before it, especially if the nature of the case is such that the respondent alone has access to information corroborating or refuting the allegations against it.[[153]](#footnote-153) Moreover, the applicable standard of proof is that of ‘beyond reasonable doubt’, which *inter alia* ‘is linked to the specificity of the facts, the nature of the allegation made, and the Convention right at stake.’[[154]](#footnote-154) The Court shall be free to assess the probative value of each item of evidence before it,[[155]](#footnote-155) therefore it will not restrict itself to direct proof and it will not apply a special standard of proof in relation to complaints under Article 18.[[156]](#footnote-156)

**IV.B.3. The Combination of Autonomy and Lack of Independence of Article 18 ECHR and the Scenarios it Gives**

The combination of autonomy (*i.e.* the idea of separate examination under Article 18 of the purpose of a restriction) and lack of independence (*i.e.* that Article 18 can only be invoked in conjunction with other Articles of the ECHR that provide for restrictions) leads to four different scenarios. The first two concern the case where the Court finds a breach of the provision of the ECHR with regard to which Article 18 has been invoked. This can be further analysed in the scenarios of breach and no breach of Article 18. The second set of scenarios is exactly the opposite, that is, when the Court finds no breach of the provision of the ECHR with regard to which Article 18 has been invoked. In similar terms, this scenario can be further analysed in scenarios of breach and no breach of Article 18. The following table portrays these scenarios.

|  |  |  |
| --- | --- | --- |
| *Scenarios* | *Provision of the ECHR in conjunction with which Article 18 has been invoked*  | *Article 18* |
| *1.* | Breach  | Breach  |
| *2.*  | Breach  | No breach |
| *3.*  | No breach | Breach  |
| *4.* | No breach | No breach |

These scenarios can be further divided into two broad categories: first, if the ulterior purpose is the sole purpose (allegedly) justifying a restriction, and second, if plural purposes exist. The first category invites us to apply the *Merabishvili* test without considering the “predominant purpose” criterion. The second involves said criterion.

Starting then with the first case, namely when a restriction pursues solely an ulterior purpose, scenario 1 is possible if the claim that a restriction has been applied for a purpose that is not prescribed by the Convention is a fundamental aspect of the case. In such a case, because an ulterior purpose exists which amounts to a fundamental aspect of the case, the Court shall find a breach of both the provision in connection with which Article 18 has been invoked and of Article 18.[[157]](#footnote-157) Obviously, when a right is restricted for a sole purpose and this purpose is found to be illegitimate, this may lead to a breach of both the restricted right (because the interference does not pursue a legitimate purpose) and of Article 18 (because of restricting the right in conjunction with which it was invoked for an ulterior purpose). In this case, the same flaw amounts to a breach of both Article 18 and of the right in conjunction with which it (*i.e.* Article 18) has been invoked, with the sole difference being that in regards to Article 18 the Court will need to establish that the restriction for a purpose not prescribed by the Convention amounts to an ulterior purpose and that this is a fundamental aspect of the case.[[158]](#footnote-158) In that respect, it is interesting to note that in *Merabishvili* the GC openly admits that respondents, ‘normally have a relatively easy task in persuading the Court that [an] interference pursue[s] a legitimate aim, even when the applicants cogently argue that it actually pursue[s] an unavowed ulterior purpose’.[[159]](#footnote-159) Indeed, in the past the Court tended to demonstrate flexibility and to apply the legitimacy test in a rather loose manner, with its real focus being on proportionality.[[160]](#footnote-160) At the same time, the presumption of good faith was rather difficult to rebut.[[161]](#footnote-161) As already mentioned, however, the presumption of good faith is no longer the standard approach, as proof in that respect operates now differently. Moreover, if the ulterior purpose is found to contravene Article 18, it is difficult to see how it could pass as a legitimate purpose lawfully justifying a restriction of the right in conjunction with which Article 18 has been invoked. Accordingly, the breach of Article 18 goes hand in hand with the breach of the provision in conjunction with which Article 18 has been invoked. Moving to scenario 2, such a scenario is possible if the sole purpose behind a restriction does not qualify as an ulterior purpose and/or it does not amount to a fundamental aspect of the case, that is, if the respondent has not abused the ECHR’s permissible restrictions. The Court may find a breach of a qualified right enshrined in the Convention in conjunction with which Article 18 has been invoked for other reasons (e.g. because a restriction failed to pass the test of necessity), without establishing Article 18’s breach. Not all breaches of a provision in regard to which Article 18 has been invoked involve ulterior purposes. This means that the purpose behind a restriction can be genuine and pursue legitimate aims in accordance with the grounds for restrictions provided by the Convention, whilst also failing to meet the exigencies of the ECHR in other respects. Scenario 3 seems to be unlikely to occur. If the purpose pursued by a restriction is found to be justified (because it is, *inter alia*, legitimate), this means that, in principle, it does not amount to an ulterior purpose -thus, no breach of Article 18 can be established. If the purpose is different from the one invoked by the respondent, it is another purpose, which automatically shifts analysis away from the framework discussed here (i.e. sole purpose pursued by a restriction) to that of plurality of purposes. Finally, scenario 4 is possible indeed. Finding no breach of the provision with respect to which Article 18 has been invoked means that the restriction at issue is lawful. This suggests that it is necessary/proportionate to the aims that it pursues, but also that these aims have been evaluated by the Court as legitimate, and more generally as being in conformity with the grounds for restrictions set out in the Convention.[[162]](#footnote-162) An otherwise lawful/justified restriction should not raise an issue of abuse of rights when the sole purpose behind a restriction is the one that has been found to justify a restriction of the right/freedom in conjunction with which Article 18 has been invoked.

Moving to the second case, namely when a plurality of purposes exist, as already explained, the key criterion is whether the ulterior purpose pursued by a restriction is predominant or not. In scenarios 3 and 4 the restriction does not breach the provision of the ECHR in conjunction with which Article 18 has been invoked as, outside of the ulterior purpose, the restriction also pursues purposes that are legitimate and necessary, thus lawful. If the ulterior purpose is predominant, Article 18 will be breached (scenario 3).[[163]](#footnote-163) In the opposite case, when the ulterior purpose is not predominant, no breach of Article 18 exists (scenario 4). Thus,

 ‘[t]he Court is […] of the view that a restriction can be compatible with the substantive Convention provision which authorises it because it pursues an aim permissible under that provision, but still infringe Article 18 because it was chiefly meant for another purpose that is not prescribed by the Convention; in other words, if that other purpose was predominant. Conversely, if the prescribed purpose was the main one, the restriction does not run counter to Article 18 even if it also pursues another purpose.’[[164]](#footnote-164)

This study has already criticised the “predominant purpose” criterion, thus, it shall abstain from repeating itself by explaining the reasons why said criterion undermines the effectiveness and autonomy of Article 18. Moving to scenarios 1 (if the ulterior purpose is predominant) and 2 (if the ulterior purpose is not predominant), the same logic applies, with the difference that the ECHR provision in conjunction with which Article 18 has been invoked is found to be breached because of not satisfying the other requirements that shall be met for a restriction to be lawful (e.g. proportionality).

Having concluded with this Part of the study examining abuse of rights at a theoretical level, first, in terms of general international law and, second, within the ECHR system, discussion now moves at applying the analytical framework established thus far in the context of the UK derogation(s) policy.

 **V. The Presumption to Derogate From the ECHR Before Embarking in Military Operations Overseas and Abuse of Rights**

The key point in this study is the manifest misalignment between the aims pursued through the UK derogation(s) policy and the object and purpose of Article 15 ECHR. Yet, this is not the only infirmity. As already discussed, the government has labelled its policy as a presumption of derogation. The study has already discussed in Part III the assumed rationale behind that labelling, namely the widening of the policy’s scope to cover all future military operations overseas, and the oxymoron of a wide-ranging, all-inclusive policy regarding future scenarios of derogation, the lawfulness of which can only be assessed specifically and on an *ad hoc* basis. What remains to be discussed here, regarding the presumptive nature of the intended derogation(s), is that this – *i.e.* the presumptive nature – is deprived of legal meaning, and it is also quite telling about the true *intentions* of the British government. Intentions correspond to one of the key legal ‘ingredients’ for establishing abuse of rights and bad faith.

Starting with the former aspect of the critique against the presumptive character of the policy (namely, that it is legally immaterial), indeed, from a legal perspective it remains unclear what is meant by the term presumption. The very idea of a presumption of derogation is irreconcilable with the logic and exigencies of a test assessing the precise conditions that may justify a derogation. Under Article 15, no prospective derogation can be accepted, the reason being that decisions regarding the permissibility of a derogation can only be made on a case by case basis, particularly considering the preconditions for a lawful derogation and, in particular, necessity. With this in mind, the idea of presumed derogations has to be rejected, as this turns into a ‘rule’ what is meant to be an exception – under strict conditions – from a rule. This is, unless one treats the term ‘presumption’ in merely political terms, *i.e.* as if it is deprived of any legal significance, in which case the choice of the term is revelatory of the true intentions of the government.

Moving then to the second aspect, namely the intentions of the government, these have been very eloquently summarised by the Ministry of Defence in the Memorandum it submitted to the Parliament:

‘the sort of situation in which derogation would need to be considered is where the ECHR would or might not cover or permit the taking of a step which was considered necessary for the proper and effective conduct of a military operation.’[[165]](#footnote-165)

The study has already reproduced this passage, but the repetition is necessary here as to highlight that *necessity* within the quote is not associated with emergency situations calling for a derogation, as Article 15 ECHR requires, but with the needs of military operations. These two types of necessity, *i.e.* the need to protect a nation from an emergency/threat and the need to promote effectiveness in military undertakings, may meet and even overlap when military action is a necessary means to protect a nation from a situation of the kind that is envisaged in Article 15. These two types of necessity do not, however, always converge. The latter, *i.e.* necessity associated with the effectiveness of military operations, is broader and concerns each and every type of military operation overseas. The policy is thus only incidentally covering permissible derogations in conformity with and for the purposes of Article 15. Ultimately, the presumption may be seen as aiming at granting a free hand to the UK government and army to operate overseas without scrutiny by the ECtHR. The head of the Parliamentary Committee has characterised this as ‘immunity from certain legal claims’,[[166]](#footnote-166) but this study would go one step further to employ the term ‘impunity’;[[167]](#footnote-167) for, this is what the UK government appears to be truly seeking. Outside of the goals pursued with the policy (as these have been discussed earlier in the study), the UK is requesting a *carte blanche* to operate overseas in quest of optimal military outputs without the accountability of the ECHR system.

To the extent that this hypothesis/reading of the inner causes of the UK policy may be correct, one cannot but conclude that these goals are not aligned with the object and purpose of Article 15 (as these are also reflected in its text). Alternatively, to use ECtHR’s terminology, the policy pursues ulterior purposes and a “hidden agenda”. That being explained, the main questions that need to be (further) explored are, first, whether a derogation under said policy can ever be lawful and, second, if – given that the policy arguably pursues ulterior aims that are not prescribed by the ECHR – the UK risks being found in breach of Articles 17 and primarily (given recent evolution and the *Merabishvili* test) 18 ECHR. Moreover, before concluding, the study also briefly addresses a third question, namely whether a self-inflicted emergency may lawfully justify derogating from human rights, and if this can amount to abuse of rights.

Starting with the first issue, an answer to this question has already been foreshadowed in this study when it was earlier observed that the aims intended by the UK’s policy may converge with the permissible grounds for derogation from the Convention under Article 15. For instance, this may be the case if the necessity to maximise the effectiveness of military operations (which is one of the main goals pursued through the derogation(s) policy) is a necessary means of reaction against or protection from a situation of emergency threatening the life of the nation (which is a prerequisite for lawfully derogating from the Convention). More generally, the Court will need to examine if the conditions set by Article 15 are met.[[168]](#footnote-168) If it answers in the affirmative, it will need to permit the requested derogation(s) to the extent that the same are justified by the special circumstances of each case.[[169]](#footnote-169) If, outside of the ulterior purposes and the drivers behind the UK’s policy discussed earlier, other genuine reasons apply that can duly and legitimately justify a derogation in conformity with Article 15 ECHR, such a derogation should be allowed. This means that there is nothing to exclude that in the future the UK might lawfully derogate from the ECHR in a situation of military operations overseas. In such a case – and for the particular conditions falling within the confines of that specific case –, the Court will have to declare the derogation lawful.

As to the second question, this has in essence been answered in the previous Part of the study, especially in the section discussing the scenarios that result from the combination of Article’s 18 autonomy and lack of independence. Abuse (or misuse, since this seems to be the Court’s preferable term when referring to Article 18) of rights will need to be invoked in conjunction with Article 15 ECHR or with another qualified right that is restricted because of a derogation. Arguably, to a great extent the intentions and the goals of the British government’s derogation(s) policy – as these have been refined earlier in the study – are not prescribed by the ECHR; thus, they differ from the reasons that may lawfully justify a restriction of Convention rights. This means that if they are the sole (set of) purpose(s) behind a future British derogation, the Court should find a breach of both Article 18 and the ECHR provision in conjunction with which this has been invoked (Article 15).[[170]](#footnote-170) To that end, the ECtHR will be expected to consider if the fact that a restriction has been applied for a purpose that is not prescribed by the Convention is a fundamental aspect of the case and if the restriction pursues an ulterior purpose -which is a question largely answered in the affirmative in this study for the reasons given earlier. Most probably, the Court will, however, be dealing with a situation involving a plurality of purposes allegedly justifying a derogation under Article 15. As already explained, some of these purposes may be genuine and legitimate, possibly (if the other requirements of Article 15 have been satisfied) leading to a lawful derogation. Another scenario is that, otherwise legitimate purposes, may fail to translate into a lawful derogation because of failing to meet other Article 15 requirements. In both cases (i.e. both if a derogation is found to be lawful – in which case the Court shall establish no breach of Article 15 – and if it is unlawful), the Court will also need to investigate if other (ulterior) purposes exist as well, that is, if a plurality of purposes co-exist. Following this, in accordance with its *Merabishvili* test, the ECtHR shall explore if the ulterior purpose is the predominant one. Evidently, this is a matter of proof. The obvious hurdle in the cases of Articles 17 and 18 is proving what the true intentions of a state have been and dissociating them from reasons that legitimately justify restrictions. However, in the case discussed here, the statements by the DS and the clarifications provided both officially (including the letters and the Memorandum addressed to the Parliament) and unofficially may serve as evidence to be taken into consideration by the ECHR. Besides, this is not uncommon in the ECHR system and in international law more generally.[[171]](#footnote-171) The changes introduced in *Merabishvili* regarding proof standards give more leeway and untie the Court’s hands. More generally, a case’s outcome will also depend upon the particular circumstances that surround it and particularly whether the derogation responds to a genuine emergency situation (that is, whether the derogation is authentic and unpretentious). In the case of a lawful derogation that pursues legitimate aims, Article 18 will only be breached if the ulterior purpose pursued by the derogation is the predominant one.

In spite of the reservations expressed in this study regarding the “predominant purpose” criterion and its potential to undermine Article 18’s autonomy and capacity to filter and sanction illegitimate and insincere objectives that states may pursue in bad faith, good reasons exist as to why applicants should invoke Articles 17 and 18 ECHR when challenging the compatibility with the Convention of a future derogation under the British policy discussed in this study. Moreover, the study does not overlook or underestimate how difficult (both legally and politically) it is to ascertain bad faith and treat a state fighting an emergency situation that threatens its existence as dishonest for conduct that essentially amounts to lawful/justified interferences with human rights. However, invoking Articles 17 and 18 might be worth it, as this may reinforce the claims made for breaches of Article 15 and any other Convention right affected by the derogation. When proportionality is applied to assess the lawfulness of a restriction (*i.e.* a limitation or a derogation), the Court will need to test the suitability and, primarily, the necessity of the restrictions. Outside of its autonomous role, argumentation on the basis of Articles 17 and 18 may inform that test of proportionality. This can help applicants to challenge the necessity argumentation of the respondent and to thereby increase their chances to successfully claim a breach of their rights under the Convention.[[172]](#footnote-172) The second reason to give in support of the argument that applicants should try their chances under Articles 17 and 18 is less utilitarian or strategic, and more value-oriented. Good faith is a fundamental principle of law. It serves the purposes of and is a precondition for trust, which is a value *per se* and a prerequisite for actors in the society to engage in relationships. Good faith is especially important in a human rights treaty because of the goals that such a treaty pursues and the values that such a treaty protects. This is a reason why the ECHR explicitly prohibits abuse of rights and why the Convention’s institutions can apply *ex officio* the provisions that prohibit abuse of rights.[[173]](#footnote-173) When a state acts in bad faith, this needs to be sanctioned and the state should bring the stigma associated with the breach of Articles 17 and 18. The abuse of human rights law may lead to violations of various human rights, and, as such, such conduct is also a distinctive violation of international law and of the ECHR. In a nutshell, it has the potential to lead to human rights violations, it undermines the faith to the system of human rights protection, and it goes against the overall teleology of the ECHR system. These are good reasons for applicants to invoke Articles 17 and 18, but also for the Court to interpret accordingly (by possibly setting a lower threshold or watering down) the criterion of “predominant purpose”.

The last question to address concerns an argument that the applicants may find it harder to fight if they challenge a future derogation by the UK. In his sharp and thought-provoking critique of the UK policy (albeit in the context of and for the purposes of an argument irrelevant to abuse of rights), Dzehtsiarou maintains that

‘[…] military operations abroad are typically undertaken voluntarily, irrespectively of how onerous they are. In simple terms, the U.K. when acting abroad decides to create a situation of emergency and then chooses to derogate from the European Convention on Human Rights due to this emergency. It is like setting a fire to your own house and then claiming insurance money for your situation. In real life it is called insurance fraud […]’.[[174]](#footnote-174)

The issue raised by Dzehtsiarou is that of a self-inflicted emergency, and whether this can justify derogating from human rights. The same argument had been advanced by the applicant states against Greece in the aforementioned *Greek case*.[[175]](#footnote-175) A dictator cannot invoke the state of emergency that s/he has caused as to lawfully exempt her/his regime from human rights commitments. Unfortunately, the ECmHR refrained from addressing this particular issue; having concluded that the respondent state’s conduct did not fall under Article 15 ECHR, it considered it unnecessary to examine the allegations under Articles 17 and 18 ECHR.[[176]](#footnote-176) In that respect, what is argued in this study is that the text of Article 15 does not exclude self-inflicted emergencies. More generally, it sets no restriction as to the causes of an emergency. There is a good reason behind that choice. Establishing causality in that type of complex, political and multidimensional situations can be a slippery-slope that courts should better avoid. For these reasons, the fact that the UK might be willingly put into a situation which requires it to derogate from the ECHR is not *per se* a reason precluding the lawfulness of a derogation.[[177]](#footnote-177) The rationale behind derogations is to allow states to protect themselves from emergencies threatening them; thus, states should be allowed to employ derogations in such situations irrespective of the reasons leading to an emergency or war. *Mutatis mutandis*, as long as a derogation is driven by genuine self-protection reasons, the self-inflicted nature of an emergency does not engender an abuse of the right to derogate from the ECHR *unless* it can be established that the very purpose (*i.e.* intention, *dolus*) of the self-inflicted emergency was to abuse that right (*i.e.* derogation under Article 15 ECHR), in which case the derogation will still be justified (*i.e.* lawfully permitted) but abuse of rights separately/autonomously sanctioned.

**VI. Some Concluding Thoughts**

The argument made in the study can be summarised in the following way. The aims pursued by the UK policy cannot be fully achieved through its derogation(s) policy. The policy at issue is not fit for the purposes that the UK appears to pursue. Quite the opposite, it may even “backfire” and generate unsought legal side-effects. Moreover, a derogation under that policy in breach of Article 15 ECHR might *also* amount to an abuse of rights under Articles 17 and 18 ECHR within both the normative environment of the Convention, and in the general principles of international law that prohibit acting in bad faith and abusing the law. The UK might find a place next to Azerbaijan,[[178]](#footnote-178) Georgia,[[179]](#footnote-179) Moldova,[[180]](#footnote-180) Russia,[[181]](#footnote-181) Turkey[[182]](#footnote-182) and Ukraine[[183]](#footnote-183) who have been condemned by the Court (admittedly, in entirely different contexts) for violations of Article 18 ECHR. This, however, does not mean that in the future there might not be cases of British military operations overseas lawfully justifying a derogation from the ECHR, which may – in spite of their lawfulness under Article 15 – still be abusive if they predominantly pursue *mala fide* goals that are foreign to the rationale behind the restrictions permitted by the Convention.

The ambition of this last, conclusive Part of the study, however, exceeds this concise account of the main arguments it contains. A last, this time largely ‘extra-legal’, point needs to be made. One must zoom-out from the specific policy discussed in this study and see the big picture as to realise that the intention of the UK to derogate from the ECHR as a means to avoid the scrutiny of the ECHR for its military operations overseas is not an isolated phenomenon. This should not be ‘read’ in separation from the broader legitimacy crisis that the ECHR system is currently experiencing with respect to how far this has gone, and how much it has evolved since its inception. The UK policy can be read as reflecting scepticism *vis-à-vis* an instrument designed to serve (*inter alia*) the purposes of regional integration through human rights.[[184]](#footnote-184) It may also be perceived as a symptom of the same broader phenomenon that causes the UK – and other national legal orders – to refuse to comply with the judgments of the ECtHR[[185]](#footnote-185) and question its authority to set standards of human rights protection, pushing it (the Court) towards more consensual reasoning[[186]](#footnote-186) and self-restraint.[[187]](#footnote-187) Seen from the perspective of the ECHR system, the UK’s presumption of derogation goes against the duty of sincere collaboration established by Article 3 of the Council of Europe’s Statute[[188]](#footnote-188) and gives a wrong message to all other states, namely that human rights protection can be *à la carte* and states may be both inside and outside the system, *i.e.* to benefit from it, but only when they wish and under the terms that they wish.[[189]](#footnote-189) The intended policy thus reveals a logic of double standards.[[190]](#footnote-190) Human rights are good for home, but not when a state acts overseas. It undermines international rule of law (in the sense that the subjects of that legal order need to abide by its rules) and marks a return to state voluntarism, sovereignty and the ‘nationalisation’ (as opposed to the internationalisation) of human rights protection. Finally, maybe a parallel can be drawn between the presumption to derogate from the Convention (and, more generally, the discussion in the UK about a possible withdrawal from the ECHR) and Brexit.[[191]](#footnote-191) Indeed, an interesting question that political scientists may wish to explore is whether the British policy discussed in this study shares the same roots with Brexit and the route of isolation, disengagement, and distancing from Europe (its institutions, the aims they pursue and the values they promote) that the UK is taking.

1. \* Senior Lecturer in Law, University of Liverpool School of Law and Social Justice. The author is thankful to S. Salomon, K. Istrefi, K. Dzehtsiarou, D. Kagiaros, R. Grozdanova, J.A. Hofbauer and P.A. Janig for their comments on previous versions of the study. He is also thankful to G. Oberleitner who acted as discussant in the conference leading to this special journal issue. The usual disclaimer applies regarding errors. The study was completed in August 2017. It was partially updated in December 2018 to include important recent case law. [↑](#footnote-ref-1)
2. Rt Hon Michael Fallon MP, Secretary of State for Defence, speech at the Conservative Party Conference, 04 October 2016, available at <http://press.conservatives.com/post/151334557375/fallon-our-armed-forces-delivering-security-and> accessed 19 July 2017. [↑](#footnote-ref-2)
3. Which is often portrayed in the UK as a folk devil. As Cohen has shown, folk devils are associated with moral panics, *i.e.* exaggerated over-reaction to a perceived problem. Stanley Cohen, *Folk Devils and Moral Panics* (Routledge 2011). [↑](#footnote-ref-3)
4. On the practice of the ECHR institutions on derogations, see the ECtHR, ‘Factsheet – Derogation in Time of Emergency’ (July 2017), available at <www.echr.coe.int/Documents/FS\_Derogation\_ENG.pdf> accessed 25 August 2017. Regarding British derogations, see *Greece v UK* App no 176/56(ECmHR, 26 September 1958, report); *Ireland v UK* App no 5310/71 (ECtHR, 18 January 1978); *Brogan and others v UK* App nos 11209/84, 11234/84, 11266/84, 11386/85 (ECtHR, 29 November 1988); *Brannigan and McBride v UK* App nos 14553/89, 14554/89 (ECtHR, 25 May 1993); *Marshall v UK* App no 41571/98 (ECtHR, 10 July 2001, admissibility); *A. and others v UK* App no 3455/05 (ECtHR, 19 February 2009). See also the thorough discussion of the *Brannigan and McBride* case by Susan Marks, ‘Civil Liberties at the Margin: The UK Derogation and the European Court of Human Rights’ (1995) 15 Oxford Journal of Legal Studies 69. [↑](#footnote-ref-4)
5. On the role of this parliamentary committee, see Joint Select Committee, ‘Role – Joint Committee on Human Rights’, available at <www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/role/> accessed 19 July 2017. [↑](#footnote-ref-5)
6. See Joint Committee on Human Rights, ‘ECHR: Committee launches inquiry into Government’s proposed derogation’ (2016-17), available at <www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2015/echr-derogation-launch-16-17/> accessed 10 October 2017. [↑](#footnote-ref-6)
7. But, see *infra* notes 8 and 109.The authors speak briefly of good faith and Article 18 ECHR in the context of the broader arguments that they build. [↑](#footnote-ref-7)
8. See the announcement of the Ministry of Defence stating that, ‘[t]he Government will protect [British] Armed Forces from persistent legal claims by introducing a presumption to derogate from the [… ECHR] in future conflicts’, Ministry of Defence, ‘Government to protect Armed Forces from persistent legal claims in future overseas operations’ (04 October 2016), available at <www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations> accessed 19 July 2017. [↑](#footnote-ref-8)
9. The author is thankful for this point to Gerd Oberleitner. See also Fiona de Londras, ‘The Government’s Proposed Derogation from the ECHR’ *Parliament written evidence*, March 2017 (DRO0013), at para 17 and summary, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-governments-proposed-derogation-from-the-echr/written/49575.html> accessed 19 July 2017. De Londras argues in para 18 of her evidence that the British derogation ‘should be motivated by a good faith desire to ensure that military operations can be undertaken and the war or emergency brought to an end, rather than to evade accountability for human rights violations’. [↑](#footnote-ref-9)
10. The literature on extraterritoriality and human rights protection, especially regarding the ECHR regime, is vast. The author of this study has written on this issue, criticising the approach of the ECtHR: Vassilis P. Tzevelekos, ‘Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility’ (2016) 36(1) MJIL 129. [↑](#footnote-ref-10)
11. The literature is also vast on this topic. For a concise overview, see Christian Tomuschat, ‘Human Rights and International Humanitarian Law’ (2010) 21(1) EJIL 15. See also Alexander Orakhelashvili, ‘The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?’ (2008) 19(1) EJIL 161. The ECtHR has repeatedly dealt with this issue. On the approach of the ECtHR *vis-à-vis* IHL and how this has evolved, see the critical overview by the Vice President of the ECtHR, Judge Linos Alexandre Sicilianos, ‘L’Articulation entre droit international humanitaire et droits de l’homme dans la jurisprudence de la Cour européenne des droits de l’homme’ (2017) 27(1) Revue Suisse de Droit International et Européen 3. See also *infra* notes 59, 60 and 176. [↑](#footnote-ref-11)
12. Letter from the Chair of the Committee, Harriet Harman MP, to Michael Fallon DS (13 October 2016), available at <www.parliament.uk/documents/joint-committees/human-rights/correspondence/2016-17/HH\_to\_MF\_re\_derogation.pdf> accessed 19 July 2017. [↑](#footnote-ref-12)
13. *Ibid.* [↑](#footnote-ref-13)
14. *A. and others*, *supra* note 3. [↑](#footnote-ref-14)
15. Letter from Harman MP to Fallon DS, *supra* note 11. [↑](#footnote-ref-15)
16. *A. and others*, *supra* note 3, at para 181. [↑](#footnote-ref-16)
17. *Ibid.*, at para 190. [↑](#footnote-ref-17)
18. Annex to the Letter from Harman MP to Fallon DS, *supra* note 11. [↑](#footnote-ref-18)
19. Letter from Michael Fallon DS to the Chair of the Committee, Harriet Harman MP (22 November 2016), available at <www.parliament.uk/documents/joint-committees/human-rights/correspondence/2016-17/HH\_to\_MF\_re\_derogation.pdf> accessed 19 July 2017. [↑](#footnote-ref-19)
20. *Ibid.* [↑](#footnote-ref-20)
21. *Ibid.* [↑](#footnote-ref-21)
22. *Cf*. Marko Milanovic, ‘The Government’s Proposed Derogation from the ECHR’, *Parliament written statement* March 2017 (DRO0004), available at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-governments-proposed-derogation-from-the-echr/written/48963.html> accessed 19 July 2017. According to Milanovic, ‘nobody has an idea what the framers of the ECHR specifically intended with regard to overseas armed conflicts’ (para 6). [↑](#footnote-ref-22)
23. Letter from Fallon DS to Harman MP, *supra* note 18. [↑](#footnote-ref-23)
24. Annex to letter from Fallon DS to Harman MP, *supra* note 18, Q. 2. See *Al-Jedda v UK* App no 27021/08 (ECtHR, 7 July 2011). [↑](#footnote-ref-24)
25. Annex to letter from Fallon DS to Harman MP, *supra* note 18, Q. 1-3. [↑](#footnote-ref-25)
26. *Ibid.*, Q. 7. [↑](#footnote-ref-26)
27. *Ibid.*, Q. 8. [↑](#footnote-ref-27)
28. *Ibid.*, Q. 10 and 15. [↑](#footnote-ref-28)
29. Letter from the Chair of the Committee, Harriet Harman MP, to Michael Fallon DS (14 December 2016), available at <www.parliament.uk/documents/joint-committees/human-rights/correspondence/2016-17/161214\_Letter\_from\_Rt\_Hon\_Harriet\_Harman\_to\_SoS\_Defence.pdf> accessed 19 July 2017. [↑](#footnote-ref-29)
30. *Ibid.* [↑](#footnote-ref-30)
31. *Ibid.* [↑](#footnote-ref-31)
32. *Ibid.* [↑](#footnote-ref-32)
33. *Ibid.* [↑](#footnote-ref-33)
34. Letter from Michael Fallon DS to the Chair of the Committee, Harriet Harman MP (28 February 2017) available at <www.parliament.uk/documents/joint-committees/human-rights/correspondence/2016-17/170301\_SoS\_to\_Chair\_re\_Derogation.pdf> accessed 19 July 2017. [↑](#footnote-ref-34)
35. *Ibid.* [↑](#footnote-ref-35)
36. *Ibid.* [↑](#footnote-ref-36)
37. Government Memorandum to the Joint Committee on Human Rights, accompanying the letter from Fallon DS to Harman MP, *supra* note 33, at para 7. [↑](#footnote-ref-37)
38. *Ibid.*, at para 5. [↑](#footnote-ref-38)
39. *Ibid.*, at para 13. [↑](#footnote-ref-39)
40. *Ibid.*, at para 2. But see also *supra* note 21. [↑](#footnote-ref-40)
41. Government Memorandum, *supra* note 36, at para 1. [↑](#footnote-ref-41)
42. *Ibid.*, at para 4. [↑](#footnote-ref-42)
43. *Ibid.* [↑](#footnote-ref-43)
44. *Ibid.*, especially at paras 15 and 16. [↑](#footnote-ref-44)
45. *Hassan v UK* App no 29750/09 (ECtHR, 16 September 2014). [↑](#footnote-ref-45)
46. *Mohammed and others v Ministry of Defence* [2017] UKSC 1 and [2017] UKSC 2. See also references made to that case in the Government Memorandum, *supra* note 36 at paras 2, 15 and 17. [↑](#footnote-ref-46)
47. Government Memorandum, *supra* note 36, at para 17. [↑](#footnote-ref-47)
48. See Joint Committee on Human Rights, ‘The Government’s proposed derogation from the ECHR inquiry’ (2016-2017), available at <www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2015/government-proposed-echr-derogation-16-17/> accessed 19 July 2017. [↑](#footnote-ref-48)
49. See, *supra* note 1. [↑](#footnote-ref-49)
50. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended, adopted 04 November 1950, entered into force 03 September 1953) ETS 5, Article 15. [↑](#footnote-ref-50)
51. The same question is raised and thoroughly examined by Tom Ruys and Cedric De Koker, ‘The Government’s Proposed Derogation from the ECHR’ *Parliament written evidence,* March 2017 (DRO0009), available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-governments-proposed-derogation-from-the-echr/written/49471.html> accessed 19 July 2017. [↑](#footnote-ref-51)
52. See, for instance, Annex to letter from Fallon DS to Harman MP, *supra* note 23, at Q. 4. See also the case law discussed by the AIRE Centre, ‘The Government’s Proposed Derogation from the ECHR’ *Parliament written evidence,* March 2017 (DRO0026), at paras 9-26, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-governments-proposed-derogation-from-the-echr/written/68879.html> accessed 19 July 2017. [↑](#footnote-ref-52)
53. See Law Society, ‘The Government’s Proposed Derogation from the ECHR’ *Parliament written evidence,* March 2017 (DRO0016), at paras 1-16 and point 3 in the summary, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-governments-proposed-derogation-from-the-echr/written/49617.html> accessed 19 July 2017; Bingham Centre for the Rule of Law, ‘The Government’s Proposed Derogation from the ECHR’ *Parliament written* evidence, March 2017 (DRO0011), at paras 4-9, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-governments-proposed-derogation-from-the-echr/written/49515.html> accessed 19 July 2017; Lutz Oette, Elizabeth Stubbins Bates, ‘The Government’s Proposed Derogation from the ECHR’ *Parliament written evidence,* March 2017 (DRO0006), at paras 1-5, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-governments-proposed-derogation-from-the-echr/written/49415.html> accessed 19 July 2017. [↑](#footnote-ref-53)
54. On the role of the ECtHR in that respect and in the specific context of the UK derogation policy, see de Londras, *supra* note 8, at para 17 and summary. [↑](#footnote-ref-54)
55. Annex to letter from Fallon DS to Harman MP, *supra* note 23, at Q. 14. See also Conall Mallory, ‘The Government’s Proposed Derogation from the ECHR’ *Parliament written* evidence, April 2017 (DRO0025), at para 7, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-governments-proposed-derogation-from-the-echr/written/68855.html> accessed 19 July 2017. [↑](#footnote-ref-55)
56. Annex to letter from Fallon DS to Harman MP, *supra* note 23, at Q. 14. See International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 4, which allows derogations and sets the conditions that should apply for a lawful exercise of that right. [↑](#footnote-ref-56)
57. In practice, though, the requirement that derogations must be compatible with other international obligations binding ECHR contracting states has been given relatively small weight. See *Brannigan and McBride*, *supra* note 3, at paras 67-73. The Court interpreted loosely the requirement of Article 4(1) ICCPR (*supra* note 55) that a public emergency must be ‘officially proclaimed’. This specific requirement in Article 15 is seen as reinforcing Article 53 ECHR (*supra* note 49), which reads: ‘Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.’ [↑](#footnote-ref-57)
58. Annex to letter from Fallon DS to Harman MP, *supra* note 23, at Q. 16. In that respect, see also Amos who characterises the derogation policy as misleading because ‘[w]hilst the UK remains a Contracting State to the ECHR, it is not lawful to derogate from Articles 2 and 3 and thereby prevent this type of claim.’ Merris Amos, ‘The Government’s Proposed Derogations from the ECHR’ *Parliament written evidence,* March 2017 (DRO0005), available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-governments-proposed-derogation-from-the-echr/written/49310.html> accessed 19 July 2017. [↑](#footnote-ref-58)
59. ECHR, *supra* note 49, Article 15(2). According to Article 4(3) of Protocol 7 (*supra* note 49), no derogation is allowed from the right not to be tried or punished twice. Derogations are also prohibited by Article 2 of Protocol 13 (*supra* note 49) that abolishes the death penalty in all circumstances. For relevant case law on non-derogable rights under the ECHR see the *Factsheet* on derogations, *supra* note 3, at 11-14. See also Milanovic, *supra* note 21, at paras 23 and mainly 24, who gives a wider list of non-derogable rights. [↑](#footnote-ref-59)
60. In *Hassan*, *supra* note 44, the Court interpreted Article 5 ECHR in the light of international law, based (mainly) on Articles 31(3)(b) (subsequent state practice) and 31(3)(c) (relevant rules of international law) of the 1969 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331, VCLT). The ECtHR observed that the practice of states has not been to derogate from the ECHR or the ICCPR in times of war in order to detain people under IHL (para 101). In that respect, see the critical analysis by Ka Lok Yip, ‘The Weakest Link: From Non-Derogation to Non-Existence of Human Rights’ (2017) 17 HRLR 770. As to the interpretation of the ECHR in accordance with other rules of international law, the Court referred to the case law of the International Court of Justice (ICJ) as to hold that human rights and IHL co-exist in war time (para 102). Thus, in situations of armed conflict the ECHR continues to apply, ‘albeit interpreted against the background of the provisions of international humanitarian law.’ (para 104). This led the Court to read Article 5 ECHR in a way that accommodates IHL; therefore, ‘in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, […] Article 5 [can] be interpreted as permitting the exercise of such broad powers.’ (para 104). The Court examined the allegations of the applicant in the light of IHL and concluded that the UK had not breached the Convention. However, see the reservations expressed in the Government Memorandum, *supra* note 36, at para 17 (especially regarding its wish that IHL ‘can modify the ECHR to other sources of international law and to non-international armed conflicts’). See also Alan Greene, ‘The Government’s Proposed Derogation from the ECHR’ *Parliament written evidence* March 2017 (DRO0008), especially Part 2.B, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-governments-proposed-derogation-from-the-echr/written/49456.html]> accessed 19 July 2017; and Raphael Comte, ‘The Government’s Proposed Derogation from the ECHR’ *Parliament written evidence,* March 2017 (DRO0003) at para 15, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-governments-proposed-derogation-from-the-echr/written/48807.html> accessed 19 July 2017. [↑](#footnote-ref-60)
61. See discussion *supra* note 59 on *Hassan*. The British government requested the Court to treat IHL as *lex specialis* and suggested different effects this could have on the applicability and interpretation of the ECHR (*Hassan*, *supra* note 44, at paras 87-90). The Court did not employ the ‘*lex specialis*’ language in its reasoning and refrained from treating the ECHR and IHL as conflicting. This way, it abstained from establishing normative priorities. As already explained (*supra* note 59), the Court declared both the ECHR and IHL applicable and treated them as complementary, enriching the text of the Convention with the provisions of IHL. This gives the impression that the Court did not favour the interpretation suggested by the respondent state. Yet, in essence, it did favour it. Within the context of *Hassan*, both conflict of obligations (with IHL applying as *lex specialis* instead of the Convention) and harmonious interpretation/systemic integration lead in essence tothe prioritisation of IHL by bypassing the ECHR. The comments made here do not intend to criticise the output of the case, but the way in which the Court ‘labelled’ its reasoning. Usually, if no conflict of obligations exists, the systemic integration method of interpretation enhances human rights protection. See in that respect Vassilis P. Tzevelekos, ‘The Use of Article 31(3)(c) of the VCLT in the Case-Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of the Teleology of Human Rights? Between Evolution and Systemic Integration’, (2010) 31 MJIL 621, at 647-670. In *Hassan*, systemic integration does not enhance human rights protection. Instead of employing neutral language, the Court could have used conflict resolution tools, such as *lex specialis*, to justify the outcome it opted for in *Hassan*. *Mutatis mutandis*, the Court would need to explain why ‘Article 5 will be interpreted and applied in the light of the relevant provisions of international humanitarian law only where this is specifically pleaded by the respondent State.’ (*Hassan*, *supra* note 44, at para 107). The Court would be expected to interpret the Convention in the light of relevant rules of international law (especially when a conflict of obligations exists) on its own initiative. It is not difficult to guess that the Court attempts here to justify why it had abstained in the past to treat IHL in the way it does in *Hassan*. This is a rather artless attempt (see also *Hassan*, *supra* note 44, at para 99) to explain why it is in essence departing from previous case law – presumably under the (political) pressure exercised by the contracting states. Rather than trying to convince in regards to the continuity of case law, honesty is the best strategy in such cases. Arguably, this part of the reasoning in *Hassan* is damaging both the Court’s legitimacy and the tools of interpretation (such as systemic integration) it employs. Finally, if the Court considers that, by applying IHL, the respondent ‘intends to modify the commitments which it has undertaken by ratifying the Convention’ (*Hassan*, *supra* note 44, at para 107), it (*i.e.* the Court) will have to prohibit it. As this study argues in Part V, the UK intends through its derogation(s) policy to modify its obligations under the ECHR and escape accountability. Should this materialise, it may amount to abuse of rights. This is something the ECtHR can and should sanction. Finally, see also *Marguš v Croatia* App no 4455/10, (ECtHR, 27 May 2014), where the GC of the Court applied the systemic integration method to resort to IHL and interpret the ECHR in its light. [↑](#footnote-ref-61)
62. Aurel Sari, ‘The UK’s New Derogation Policy for Armed Conflicts: Making a Success of the European Convention on Human Rights?’ (*Just Security*, 05 October 2016) available at

<www.justsecurity.org/33370/uks-derogation-policy-armed-conflicts-making-success-european-convention-human-rights/> accessed 19 July 2017. [↑](#footnote-ref-62)
63. *Ibid.* Sari further elaborates his arguments regarding IHL and extraterritoriality in his written evidence to the Joint Committee on Human Rights of the UK Parliament, see Aurel Sari, ‘The Government’s Proposed Derogation from the ECHR’ *Parliament written evidence,* April 2017 (DRO0019) at paras 4-10, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-governments-proposed-derogation-from-the-echr/written/49672.html> accessed 19 July 2017. See also the case law to which Sari refers. [↑](#footnote-ref-63)
64. In the sense that territoriality is the principle and extraterritoriality the exception. See, for instance, *Banković and others v Belgium and others States* App no 52207/99 (ECtHR, 12 December 2001, admissibility), at para 59. See the objections raised by the author of this study in Tzevelekos, *supra* note 9, at 135-151. [↑](#footnote-ref-64)
65. Tzevelekos, *supra* note 9, at 141. [↑](#footnote-ref-65)
66. *Ibid.*, at 135-151. [↑](#footnote-ref-66)
67. Stuart Wallace, ‘The Government’s Proposed Derogation from the ECHR’ *Parliament written* evidence, March 2017 (DRO0012), executive summary, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-governments-proposed-derogation-from-the-echr/written/49521.html> accessed 19 July 2017. [↑](#footnote-ref-67)
68. Oxford Pro Bono Publico, ‘The Government’s Proposed Derogation from the ECHR’ *Parliament written evidence,* March 2017 (DRO0012), summary and paras 10 and following, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-governments-proposed-derogation-from-the-echr/written/49605.html> accessed 19 July 2017. [↑](#footnote-ref-68)
69. See Katja Ziegler, ‘The Government’s Proposed Derogation from the ECHR’ *Parliament written evidence,* April 2017 (DRO0027), first point of the executive summary and paras 1-2, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-governments-proposed-derogation-from-the-echr/written/68916.html> accessed 19 July 2017; Ed Bates, ‘The Government’s Proposed Derogation from the ECHR’ *Parliament written evidence*, March 2017 (DRO0017), at para 1.2, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-governments-proposed-derogation-from-the-echr/written/49620.html> accessed 19 July 2017. Although abuse of rights is not amongst the arguments employed, see also Open Society Justice Initiative, ‘The Government’s Proposed Derogation from the ECHR’ *Parliament written evidence*, April 2017 (DRO0022), available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-governments-proposed-derogation-from-the-echr/written/49744.html> accessed 19 July 2017. The evidence submitted suggests that ‘a presumptive intent to derogate for the purpose of limiting the effect of litigation is incompatible with the Article 15 requirement that such measures must be required by the situation and consistent with international law.’ [↑](#footnote-ref-69)
70. International Law Commission (ILC), ‘Report of the International Law Commission on the Work of its 53rd Session’ (23 April-01 June 2001 and 02 July-10 August 2001) UN Doc A/56/10, Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), Article 2. [↑](#footnote-ref-70)
71. *Ibid.*, Article 4. [↑](#footnote-ref-71)
72. As opposed to indirectly attributable conduct because of failure to demonstrate due diligence. See Jean Salmon (ed.), *Dictionnaire de Droit International Public* (Bruylant 2001) 996, defining indirect responsibility as ‘incurred by a subject of law because of the conduct of another subject of law’ [translated from French]. This means that the state is held accountable for its own fault/failure to address a human rights violation under its jurisdiction that is not (directly) attributable to (i.e. has not been directly caused by) its organs. See also, Jan Arno Hessbruegge, ‘The Historical Development of the Doctrines of Attribution and Due Diligence in International Law’ (2003-2004) 36 New York University Journal of International Law and Politics 265, at 268-269. [↑](#footnote-ref-72)
73. This refers to the positive effect of human rights obligations associated with the principle of due diligence. [↑](#footnote-ref-73)
74. See Kanstantsin Dzehtsiarou, ‘Different Human Rights at Home and Abroad: Immunity for British Soldiers during Overseas Operations’ (*Just Security*, 05 October 2016) available at <www.justsecurity.org/33377/human-rights-home-abroad-immunity-british-soldier-overseas-operations/> accessed 19 July 2017. Dzehtsiarou argues that the derogation can protect the government, not its soldiers. [↑](#footnote-ref-74)
75. See Jane M. Rooney, ‘Extraterritorial Derogation from the European Convention on Human Rights in the United Kingdom’ (2016) 6 EHRLR 656, at 659. [↑](#footnote-ref-75)
76. See *supra* note 71. [↑](#footnote-ref-76)
77. See the examples given by the Bingham Centre for the Rule of Law, ‘The Government’s Proposed Derogation from the ECHR’ *Parliament written* evidence, March 2017 (DRO0011), at paras 7-9, available at

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-governments-proposed-derogation-from-the-echr/written/49515.html> accessed 19 July 2017. See Liberty, ‘The Government’s Proposed Derogation from the ECHR’ *Parliament written evidence,* March 2017 (DRO0018), at paras 16-18, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-governments-proposed-derogation-from-the-echr/written/49642.html> accessed 19 July 2017. *Cf*., Annex to letter from Fallon DS to Harman MP, *supra* note 18, at Q. 13. The Ministry of Defence argues that ‘[d]erogating from the ECHR will not affect the rights of our Armed Forces in matters such as ensuring Article 6 compliant trials within the Service Justice System. There may be some impact upon the type of investigation needed in relation to Article 2, should the UK derogate from that Article in the future (although some form of investigation would be needed to decide whether the death was indeed a “lawful act of war.”)’. [↑](#footnote-ref-77)
78. *Dictionnaire de Droit International Public*, *supra* note 71, at 3-4. [↑](#footnote-ref-78)
79. *Ibid.*, translated from French. See also, Alexandre Kiss, ‘Abuse of Rights’ *Max Planck Encyclopedia of Public International Law* (last updated December 2006), at paras 1 and 5, available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1371?rskey=TRlUg5&result=1&prd=EPIL> accessed 31 July 2017. The literature on abuse of rights is abundant; for the international law dimension of the concept see the monograph by Alexandre C. Kiss, *L’abus de droit en droit international* (LGDJ 1952) and Robert Kolb, *La bonne foie en droit international public. Contribution à l’étude des principes généraux de droit* (PUF 2000) 439-486, and especially 442-450 on the foundations of the prohibition of abuse of rights in positive international law and the very detailed discussion of the various positions adopted within scholarship in that respect. For an overview in English, see Michael Byers, ‘Abuse of Rights: An Old Principle, a New Age’ (2002) 47 Mc Gill Law Journal 389, particularly at 397-404 on how the principle has been applied in international law and 404-410 providing a literature review, starting with Politis, who devoted to *abus de droit* his course at the Hague Academy of International Law in 1925. Nicolas Politis, ‘Le problème des limitations de la souveraineté et la théorie de l’abus des droits dans les rapports internationaux’ (1925) 6 Recueil des cours de l’Académie de la Haye1. [↑](#footnote-ref-79)
80. Kolb, *supra* note 78, at 464-469. [↑](#footnote-ref-80)
81. The parenthesis in the main text implies that abuse of rights is a general principle of law that appears in various legal systems, including international law. On the origins of the concept in Greek antiquity and in Roman Law, see Kolb, *supra* note 78, at 429-434. On the origins of the principle and its foundations in (mainly civil law) national legal systems, see Byers, *supra* note 78, at 391-397. Because abuse of rights stems from and reflects the practice of states within their national legal order, it can be qualified as a ‘normative principle’. On this concept (*i.e*. normative principle), see Marti Koskenniemi, ‘General Principles: Reflexions on Constructivist Thinking in International Law’ in Marti Koskenniemi (ed) *Sources of International Law* (Routledge 2000) 364-365. Such principles are often, ‘extrapolated from domestic legal discourse by means of analogical and comparative reasoning.’ Matthias Goldmann, ‘Principles in International Law as Rational Reconstructions. A Taxonomy’ (2013) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2442027> accessed 22 September 2017. On the foundations of the prohibition of abuse of rights in positive international law, see. Kolb, *supra* note 78, at 442-450. [↑](#footnote-ref-81)
82. On good faith, see Kolb, *supra* note 78, and Kolb, *Good Faith in International Law* (Hart 2017). See also Steven Reinhold, ‘Good Faith in International Law’ (2013) 2 UCL Journal of Law and Jurisprudence 40. See also Helmut P. Aust, *Complicity and the Law of State Responsibility* (CUP 2011) 77, who associates abuse of rights with arbitrariness and rule of law. [↑](#footnote-ref-82)
83. *Dictionnaire de Droit International Public*, *supra* note 71, at 4. To give an example coming from another regime of international law on the association between good faith and abuse of rights, see Eric De Brabandere, ‘“Good Faith”, “Abuse of Process” and the Initiation of Investment Treaty Claims’ (2012) 3 Journal of International Dispute Settlement 609, at 612-613. [↑](#footnote-ref-83)
84. Kolb, *supra* note 78, at 439-442. See also Reinhold, *supra* note 81, at 49-50. See also *infra* note 107, giving examples of association of good faith with Article 18 ECHR. [↑](#footnote-ref-84)
85. Article 26 VCLT (*supra* note 59) refers to the principle of *pacta sunt servanda* (which is also the title of the provision) and reads: ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’ Article 31(1) requires that ‘[a] treaty shall be interpreted in good faith […]’. [↑](#footnote-ref-85)
86. Kolb, *supra* note 78, at 469-470. See also Kiss, *L’abus de droit*, *supra* note 78, at 183. [↑](#footnote-ref-86)
87. Kolb, *supra* note 78, at 469-470. See also Kiss, ‘Abuse of Rights’, *supra* note 78, at para 31 and Kiss, *L’abus de droit*, *supra* note 78, at 180. [↑](#footnote-ref-87)
88. Kiss, ‘Abuse of Rights’, *supra* note 78, at para 32. [↑](#footnote-ref-88)
89. ARSIWA, *supra* note 69, Article 12. [↑](#footnote-ref-89)
90. *Ibid.*, Article 2. [↑](#footnote-ref-90)
91. See the ILC commentaries for Article 2 (ARSIWA, *supra* note 69, also available at <http://legal.un.org/ilc/texts/instruments/english/commentaries/9\_6\_2001.pdf> accessed 25 August 2017), at 34-36. ‘Whether there has been a breach of a rule may depend on the intention or knowledge of relevant State organs or agents and in that sense may be “subjective”’ (at 34). Subjective mental elements, such as intention or knowledge, only come into play when the primary rule requires them. In that case, intention or knowledge are assessed as a precondition for establishing the breach of a rule, which is a precondition of wrongfulness. [↑](#footnote-ref-91)
92. ARSIWA, *supra* note 69, Article 12. [↑](#footnote-ref-92)
93. For instance, see *Application of the Interim Accord of 13 September 1995* (*the former Yugoslav Republic of Macedonia v Greece*) [2011] ICJ Rep 2011, at paras 73-83, and particularly at paras 75-76 and 81. In the ECHR regime, see for instance *Rasul Jafarov v Azerbaijan* App no 69981/14 (ECtHR, 17 March 2016), at para 160. [↑](#footnote-ref-93)
94. Outside of its theoretical value, this question is also important for the purposes of the discussion that follows as to whether the UK could be found to have abused the rights under the ECHR in case of a lawful derogation from it. See parts IV and V of the study. [↑](#footnote-ref-94)
95. In our case, the abused right would be the right to derogate from the Convention that may lead to breaches (and the associated damage) of various human rights protected in the ECHR. [↑](#footnote-ref-95)
96. See, for instance, *supra* note 59. See also, Tzevelekos, *supra* note 60. [↑](#footnote-ref-96)
97. *Khodorkovskiy and Lebedev v Russia* App nos 11082/06 and 13772/05 (ECtHR, 25 July 2013), at para 898. [↑](#footnote-ref-97)
98. ECHR, *supra* note 49, Article 17. For an overview of the ECtHR case law on Article 17, see Paulien de Morree, *Rights and Wrongs under the ECHR. The Prohibition of Abuse of Rights in Article 17 of the European Convention on Human Rights* (Intersentia 2016) 23-66. [↑](#footnote-ref-98)
99. Yutaka Arai, ‘Prohibition of Abuse of the Rights and Freedoms Set Forth in the Convention and of Their Limitation to a Greater Extent Than is Provided for in the Convention (Article 17)’ in Peter van Dijk *et al.* (eds) *Theory and Practice of the European Convention on Human Rights* (4th ed. Intersentia 2006) 1084. [↑](#footnote-ref-99)
100. ECHR, *supra* note 49, Article 35(3)(a). See, for instance, *Pavel Ivanov v Russia* App no 35222/04 (ECtHR, 20 February 2007, admissibility). [↑](#footnote-ref-100)
101. *Lawless v Ireland (No 3)* App no 332/57 (ECtHR, 1 July 1961),at para 7 (‘[t]he law’ part of the judgment). [↑](#footnote-ref-101)
102. *Ibid.* [↑](#footnote-ref-102)
103. *Ibid.* [↑](#footnote-ref-103)
104. *Ibid.* (emphasis added to highlight implied intention). [↑](#footnote-ref-104)
105. *The Greek Case* (*Denmark, Norway, Sweden and The Netherlands v Greece*) App nos 3321/67, 3322/67, 3323/67, 3344/67 (ECmHR (Sub-Commission), 04 October 1969, report), at para 150; *The Greek Case* (*Denmark, Norway, Sweden and The Netherlands v Greece*) App nos 3321/67, 3322/67, 3323/67, 3344/67 (ECmHR, 05 November 1969, report), at para 225. [↑](#footnote-ref-105)
106. *E.g.* *Engel and others v The Netherlands* App nos 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 (ECtHR, 8 June 1976), at para 104, *Özkan v Turkey* App no 54190/08 (ECtHR, 06 November 2018), at para 6. The two provisions overlap. See the concurring opinion of Judge Serghides in *Merabishvili v Georgia* App no 72508/13, (ECtHR (GC), 28 November 2017), at para 22 of the opinion and Paulien de Morree, *supra* note 97, at 69. [↑](#footnote-ref-106)
107. ECHR, *supra* note 49, Article 18. [↑](#footnote-ref-107)
108. See also, the case law of the Court that associates Article 18 with good faith. For instance, *Tchankotadze v Georgia* App no 15256/05 (ECtHR, 21 June 2016), at para 113 and *Rasul Jafarov*, *supra* note 92, at paras 153 and 157. States are presumed to act in good faith, but this presumption can be rebutted, thereby leading to a breach of Article 18 (but see *infra* notes 117-119, 147 and 148). See also, *Ilgar Mammadov v Azerbaijan* App no 15172/13 (ECtHR, 22 May 2014), where the Court explains that the fact that the respondent state has been unable to demonstrate that its authorities acted in good faith does not necessarily lead to a breach of Article 18, unless it can be proven that state actions, ‘were actually driven by improper reasons’ (para 141). [↑](#footnote-ref-108)
109. See, for instance, *Cebotari v Moldova* App no 35615/06 (ECtHR, 13 November 2007), at para 53, where the Court found a breach of Article 18 because, ‘the restriction on the applicant's right to liberty was applied for a purpose other than the one prescribed in Article 5 § 1(c).’ See also, *Merabishvili v Georgia* App no 72508/13 (ECtHR, 14 June 2016), at para 106. [↑](#footnote-ref-109)
110. See also, Dimitrios Kagiaros, ‘Drawing the Battle Lines: The Ongoing Standoff Between the UK Government and the ECHR’ (*European Futures*, 12 October 2016) available at <www.europeanfutures.ed.ac.uk/article-4151> accessed 18 August 2017. As Kagiaros explains, ‘if the sole justification behind the derogation is to evade legal accountability for unlawful action, then Article 18 ECHR, which forbids limitations on rights for reasons other than ones prescribed in the Convention, would be a further hurdle for the UK to overcome, for the derogation to be lawful.’ [↑](#footnote-ref-110)
111. *De Becker v Belgium* App no 214/56 (ECmHR, 22 January 1960, report), at para 271. [↑](#footnote-ref-111)
112. On the term “independent” see *Merabishvili* (GC), *supra* note 105, at paras 287-289. [↑](#footnote-ref-112)
113. Arai, *supra* note 98, at 1084, 1088-89 and Yutaka Arai, ‘Prohibition of Misuse of Power in Restricting the Rights and Freedoms (Article 18)’ in Peter van Dijk *et al.* (eds) *Theory and Practice of the European Convention on Human Rights* (4th ed. Intersentia 2006), 1093-1095. Yet, case law is clearer in that respect in cases invoking Article 18.See, for instance, *Merabishvili* (GC), *supra* note 105, at paras 287-289 and 304; *Gusinskiy v Russia*, ECtHR, App no 70276/01, 19 May 2004, at para 73. For Article 17, see *Şimşek and others v Turkey* App nos 35072/97, 37194/97 (ECtHR, 26 July 2005), at para 132. For an invocation of both Articles 17 and 18 in conjunction with another right guaranteed by the Convention, see *Terra Woningen B.V. v the Netherlands* App no 20641/92 (ECtHR, 17 December 1996), at para 40. [↑](#footnote-ref-113)
114. *Merabishvili* (GC), *supra* note 105, at paras 264-317. [↑](#footnote-ref-114)
115. *Ibid.*, at paras 265, 288 and 304-305. See also *Gusinskiy*, *supra* note 112, at para 73 and *Cebotari*, *supra* note 108, at para 49. [↑](#footnote-ref-115)
116. See, for instance, *Handyside v UK* App no 5493/72 (ECtHR, 7 December 1976), at para 64; *Engel*, *supra* note 105, at para 104; and *Refah Partisi (the Welfare Party) and others v Turkey* App nos 41340/98, 41342/98, 41343/98, 41344/98 (ECtHR, 13 February 2003), at para 137. Yet, if no violation of the right invoked in conjunction with Articles 17 and 18 has been found, this does not necessarily imply no breach of said two Articles. See *Gusinskiy*, *supra* note 112, at para 73, where the Court explains that, ‘[t]here may, however, be a violation of Article 18 in connection with another Article, although there is no violation of that Article taken alone.’ See also *Cebotari*, *supra* note 108, at para 49 and *Merabishvili*, *supra* note 108, at para 100. See also the discussion that follows in this Part of the study - especially the section on the GC’s *Merabishvili* test. [↑](#footnote-ref-116)
117. *Merabishvili* (GC), *supra* note 105, at para 303. [↑](#footnote-ref-117)
118. See, for instance, *Handyside v UK* App no 5493/72 (ECmHR, 30 September 1975, report), at para 175, where the Commission refers to the lack of evidence supporting a breach of Article 18. See also more recent case law, such as *Tchankotadze*, *supra* note 107, at paras 113-116. As the Court explains, ‘the whole structure of the Convention rests on the general assumption that public authorities in the member States act in good faith. Indeed, any public policy or individual measure may have a “hidden agenda”, and the presumption of good faith is rebuttable in theory. However, it is difficult to overcome this assumption in practice. Indeed, an applicant alleging that his rights and freedoms were limited for an improper reason must convincingly show that the real aim of the authorities was not the same as that proclaimed or which could be reasonably inferred from the context. A mere suspicion that the authorities used their powers for some other purpose than those defined in the Convention is not sufficient to prove that Article 18 was breached […]. When an allegation under Article 18 of the Convention is made, the Court applies a very exacting standard of proof.’ (para 113). In the past, the Court has required ‘incontrovertible and direct proof’, *Khodorkovskiy v Russia* App no 5829/04 (ECtHR, 31 May 2011), at para 260. The burden of proof for allegations of abuse of rights remained with the applicant, *Khodorkovskiy*, note 117, at para 256. See also, *Merabishvili*, *supra* note 108, at para 100, *Rasul Jafarov*, *supra* note 92, at para 154, and especially *Merabishvili* (GC), *supra* note 105, at paras 270-281 (discussing earlier case law) and 309-317 (giving an overview of the standards of proof required in the practice of the ECtHR for a breach of Article 18 to be established). See below the discussion on the changes brought to proof by the GC judgment in *Merabishvili* (especially *infra* notes 146-155). [↑](#footnote-ref-118)
119. *E.g.*, *Khodorkovskiy and Lebedev*, *supra* note 96, at para 899. [↑](#footnote-ref-119)
120. See, for instance, *Merabishvili* (GC), *supra* note 105, at para 260; *Khodorkovskiy*, *supra* note 117, at para 255. See also n. 117, 148 and 149. [↑](#footnote-ref-120)
121. See, for instance, *Sporrong and Lönnroth v Sweden* App nos 7151/75, 7152/75 (ECtHR, 23 September 1982), at para 76 and *Bozano v France* App no 9990/82 (ECtHR, 18 December 1986), at para 61, where the Court explained that because it ‘has already noted, in connection with Article 5 § 1 […] taken alone, that the deportation procedure *was abused in the instant case for objects and purposes other than its normal ones* […]it [is not] necessary to examine the same issue under Article 18’ (emphasis added). [↑](#footnote-ref-121)
122. *Merabishvili* (GC), *supra* note 105, at paras 264-281. [↑](#footnote-ref-122)
123. *Ibid.*, at paras 282-286. [↑](#footnote-ref-123)
124. *Ibid.*, at paras 292-308. [↑](#footnote-ref-124)
125. *Ibid.*, at paras 309-317. [↑](#footnote-ref-125)
126. *Ibid.*, at paras 265, 271, 287 and 290. [↑](#footnote-ref-126)
127. *Ibid.*, at para 283. [↑](#footnote-ref-127)
128. *Ibid.*, at para 288. [↑](#footnote-ref-128)
129. *Ibid.*, at para 291. See also ECtHR, *Mammadli v Azerbaijan* App no 47145/14 (ECtHR, 19 April 2018), at para 97. [↑](#footnote-ref-129)
130. *E.g.*, *Selahattin Demirtaş v Turkey* App no 14305/17 (ECtHR, 20 November 2018), at para 244. But see *Navalnyy v Russia* App nos 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14 (ECtHR, 15 November 2018), at para 164, where the separate examination of an allegation under Article 18 (thus, in a sense, also said Article’s autonomy) appears to also depend upon the criterion of whether the complaint has already been examined when assessing the allegations concerning the ECHR Article in conjunction with which Article 18 was invoked. [↑](#footnote-ref-130)
131. *Navalnyy*, *supra* note 129, at para 166. [↑](#footnote-ref-131)
132. *Merabishvili* (GC), *supra* note 105, at paras 283 and 293. [↑](#footnote-ref-132)
133. *E.g.*, *Khodorkovskiy*, *supra* note 117, at para 255 and *Lutsenko v Ukraine* App no 6492/11 (ECtHR, 03 July 2012), at para 106. [↑](#footnote-ref-133)
134. *Merabishvili* (GC), *supra* note 105, para 283. [↑](#footnote-ref-134)
135. *Ibid.*, at para 292. [↑](#footnote-ref-135)
136. *Ibid.*, at para 303. [↑](#footnote-ref-136)
137. *Ibid.*, at para 303. [↑](#footnote-ref-137)
138. *Ibid.*, at para 303. [↑](#footnote-ref-138)
139. *Ibid.*, at para 304. [↑](#footnote-ref-139)
140. *Ibid.*, at para 305. [↑](#footnote-ref-140)
141. *Ibid.*, at para 307. [↑](#footnote-ref-141)
142. *Ibid.*, at para 318. [↑](#footnote-ref-142)
143. *Ibid.*, at para 305. [↑](#footnote-ref-143)
144. See the very interesting comments made in that respect by Judges Yudkivska, Tsotsoria and Vehabović in their joint concurring opinion in *Merabishvili* (GC), *supra* note 105, at paras 14-21 and particularly para 16 of the opinion. See also, the concurring opinion of Judge Serghides in the same judgment who argues that no method of interpretation can support the “predominant purpose” criterion and that ‘rule of law is to be maintained at all times and by all authorities’ (para 15 of the opinion). [↑](#footnote-ref-144)
145. *E.g.* *Selahattin Demirtaş*, *supra* note 129, at paras 268-274. [↑](#footnote-ref-145)
146. *Ibid.*, at para 260. [↑](#footnote-ref-146)
147. *Merabishvili* (GC), *supra* note 105, at para 309. [↑](#footnote-ref-147)
148. *Ibid.*, at para 310. See also n. 117 and 119. [↑](#footnote-ref-148)
149. *Merabishvili* (GC), *supra* note 105, at para 310, referring to paras 275 and 278, where the GC discusses, *inter alia*, *Khodorkovskiy* (*supra* note 117, at paras 255-256). See also n. 117 and 119. [↑](#footnote-ref-149)
150. *Merabishvili* (GC), *supra* note 105, at para 311. [↑](#footnote-ref-150)
151. *Ibid.*, at para 312. [↑](#footnote-ref-151)
152. *Ibid.*, at para 312. [↑](#footnote-ref-152)
153. *Ibid.*, at para 313. [↑](#footnote-ref-153)
154. *Ibid.*, at para 314. [↑](#footnote-ref-154)
155. *Ibid.*, at para 315. [↑](#footnote-ref-155)
156. *Ibid.*, at para 316. [↑](#footnote-ref-156)
157. *E.g.*, *Lutsenko*, *supra* note 132, at paras 63-65, 67-72; *Tymoshenko v Ukraine* App no 49872/11 (ECtHR, 30 April 2013), at para 269-271. [↑](#footnote-ref-157)
158. See *Mammadli*, *supra* note 128, at paras 96-105 and *Rashad Hasanov and others v Azerbaijan* App nos 48653/13, 52464/13, 65597/13 and 70019/13 (ECtHR, 07 June 2018), at paras 119-127. See also, *Aliyev v Azerbaijan* App nos 68762/14 and 71200/14 (ECtHR, 20 September 2018), at paras 206-216, where the Court reaches the same conclusion without explicitly assessing the “fundamental aspect” criterion. [↑](#footnote-ref-158)
159. *Merabishvili* (GC), *supra* note 105, at para 295. [↑](#footnote-ref-159)
160. *Ibid.*, at paras 294-302. [↑](#footnote-ref-160)
161. *E.g.*, *Khodorkovskiy and Lebedev*, *supra* note 96, at paras 899-909. [↑](#footnote-ref-161)
162. The legitimate aims and grounds set out in the ECHR restriction clauses are exhaustive, but also broadly defined and interpreted with flexibility. *Merabishvili* (GC), *supra* note 105, at paras 294 and 302. [↑](#footnote-ref-162)
163. *Selahattin Demirtaş*, *supra* note 129, at paras 259 and 269-274. [↑](#footnote-ref-163)
164. *Merabishvili* (GC), *supra* note 105, at para 305. [↑](#footnote-ref-164)
165. Government Memorandum, *supra* note 36, at para 5. [↑](#footnote-ref-165)
166. Letter from Harman MP to Fallon DS, *supra* note 11. [↑](#footnote-ref-166)
167. As a matter of fact, the UK policy bears a resemblance to the Turkish reservation that the ECtHR declared invalid in *Loizidou v Turkey* App no 15318/89 (ECtHR, 23 March 1995, preliminary objections). According to Article 19(c) VCLT (*supra* note 59), reservations that are incompatible with the object and a purpose of a treaty are not allowed. But see also, ILC, ‘Guide to Practice on Reservations to Treaties’ (26 April-03 June and 04 July -12 August 2011) UN GAOR 66th Session, Supplement No 10 UN Doc A/66/10 (2011), at para 4.5.3. Both the UK (with its derogation(s) policy discussed in the study) and Turkey (with its reservation that the ECtHR declared invalid in *Loizidou*) wish to escape scrutiny for conduct outside their territory. The UK cannot issue a reservation at this late stage. Article 57 ECHR (*supra* note 49) makes it clear that reservations are only allowed when signing the ECHR or depositing an instrument of ratification. This might offer an explanation as to why the UK government wishes now to establish a presumption of derogation. [↑](#footnote-ref-167)
168. The confines of this study are an impediment to a thorough discussion of Article 15. Suffice it here to refer to the very comprehensive *Factsheet* of the Court on Article 15, *supra* note 3, and briefly remind that the scope of derogation is limited.See also, European Court of Human Rights, ‘Guide on Article 15 of the European Convention on Human Rights. Derogation in Time of Emergency’ (updated on 30 April 2017) available at <www.echr.coe.int/Documents/Guide\_Art\_15\_ENG.pdf> accessed 18 August 2017. The conditions that should cumulatively be met for a derogation to be lawful are strict and aim at guaranteeing the exceptional nature of Article 15. Among these conditions, one finds an element that is common to both limitations to human rights and derogations from them, namely that they are both allowed to the extent justified by the exigencies of the specific situation calling for the limitation/derogation. Whilst the reasons justifying a limitation or a derogation may differ (with the former offering a wider spectrum of justifications), both limitations and derogations are subjected to a test of necessity in the light of the particular circumstances that prevail in each different case. See, for instance, *Brannigan and McBride*, *supra* note 3, at paras 41-60. [↑](#footnote-ref-168)
169. For the purposes of that review it might even consider whether a lawful derogation can lead to future abuses. See *Brannigan and McBride*, *supra* note 3, at paras 61-65. [↑](#footnote-ref-169)
170. See *supra* note 157. [↑](#footnote-ref-170)
171. See *supra* note 92. [↑](#footnote-ref-171)
172. The opposite is possible too. For instance, see *Tymoshenko*, *supra* note 156, at para 299. Analysis in the context of Article 5 informs the reasoning of the Court regarding Article 18. See also See also *Lehideux and Isorni v France* App no 24662/94, (ECtHR, 23 September 1998), at paras 38 and 58, where abuse of rights under Article 17 ECHR was invoked as a defence by the respondent state. [↑](#footnote-ref-172)
173. The Court could examine this question *ex officio*, *i.e*. on its own initiative. See *Handyside*, *supra* note 115, at para 37. See also *Sisojeva and others v Latvia* App no 60654/00 (ECtHR, 15 January 2007), at paras 127-129, where the Court explains that the lack of supporting evidence prevents it from examining Article 18 of its own motion. [↑](#footnote-ref-173)
174. Dzehtsiarou, *supra* note 73. [↑](#footnote-ref-174)
175. *Greek case*, *supra* note 104, at para 149 in the Sub-Commission’s report and para 224 in the Commission’s report. [↑](#footnote-ref-175)
176. *Ibid.*, at paras 150 and 225 respectively. [↑](#footnote-ref-176)
177. In similar terms and for the same reasons, although there is nothing to preclude that a lawful derogation from the ECHR may generate other value-add benefits beyond the object and purpose of the rule permitting the derogation, such benefits are irrelevant to the lawfulness of a derogation; they cannot justify it and should not be among the reasons behind a decision to derogate or a decision to authorise it or declare it lawful. The example that can be given in that respect is that of the benefit that some authors think a derogation from the ECHR during armed conflict could have for the broader system of international law and the normative clarity that will be achieved by the separation of IHL from human rights law. See Françoise Hampson, Noam Lubell and Darragh Murray, *Parliament written evidence,* March 2017(DRO0010), at paras 3 and 14-26 available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-governments-proposed-derogation-from-the-echr/written/49507.html> accessed 19 July 2017 and Milanovic, *supra* note 21, at para 2 and references to the scholarship of that author made therein. [↑](#footnote-ref-177)
178. *Ilgar Mammadov*, *supra* note 107; *Rasul Jafarov*, *supra* note 92; *Mammadli*, *supra* note 128; *Rashad Hasanov and others supra* note 157; *Aliyev supra* note 157. [↑](#footnote-ref-178)
179. *Merabishvili* (GC), *supra* note 105. [↑](#footnote-ref-179)
180. *Cebotari*, *supra* note 108. [↑](#footnote-ref-180)
181. *Gusinskiy*, *supra* note 112; *Navalnyy*, *supra* note 129. [↑](#footnote-ref-181)
182. *Selahattin Demirtaş*, *supra* note 129. [↑](#footnote-ref-182)
183. *Lutsenko*, *supra* note 132; *Tymoshenko*, *supra* note 156. [↑](#footnote-ref-183)
184. See the preamble of the ECHR (*supra* note 49), reading: ‘Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms’. See also the Statute of the Council of Europe (adopted 05 May 1949, entered into force 03 August 1949, ETS 001). Its preamble refers to the need for closer unity between European states. Article 1(a) reads: ‘The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.’ But see also the narratives of Bates (exploring the evolution of the ECHR system from a pact against totalitarianism into a European Bill of rights) and Duranti (who explains the origins of the ECHR as laying in the varied objectives pursued by its conservative founding fathers in the ways these perceived totalitarianism beyond fascism and communism). Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010) and Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (OUP 2017). [↑](#footnote-ref-184)
185. See, for instance, Ed Bates, ‘The Continued Failure to Implement Hirst v UK’ (*EJIL: Talk!*, 15 December 2015) available at <www.ejiltalk.org/the-continued-failure-to-implement-hirst-v-uk/> accessed 19 July 2017 and Maxim Timofeyev, ‘Money Makes the Court Go Round: The Russian Constitutional Court’s Yukos Judgment’ (*Verfassungsblog on Matters of Constitutional Law*, 26 January 2017) available at <http://verfassungsblog.de/money-makes-the-court-go-round-the-russian-constitutional-courts-yukos-judgment/> accessed 19 July 2017. Regarding the UK, see also the note by Andreas von Staden arguing that the measures taken in compliance with the ECHR prisoner voting case law is rather insufficient, ‘Minimalist Compliance in the UK Prisoner Voting Rights Cases’ (*ECHR Blog*, 16 November 2018) available at <http://echrblog.blogspot.com/2018/11/guest-blog-minimalist-compliance-in-uk.html?utm\_source=feedburner&utm\_medium=email&utm\_campaign=Feed%3A+blogspot%2FKCGaBs+%28ECHR+BLOG%29> accessed 10 December 2018. [↑](#footnote-ref-185)
186. See Amos, who finds a correlation between the European consensus method of interpretation in cases against the UK and British scepticism *vis-à-vis* the ECtHR. Merris Amos, ‘Can European Consensus Encourage Acceptance of the European Convention on Human Rights in the United Kingdom?’ in Panos Kapotas and Vassilis P. Tzevelekos (eds) *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond* (CUP 2019). [↑](#footnote-ref-186)
187. See, for instance, the importance given to margin of appreciation (a method of interpretation whereby the ECtHR grants discretion to national authorities) in the Brighton declaration, at paras 11 and 12, and especially 12(b). European Court of Human Rights, ‘High Level Conference on the Future of the European Court of Human Rights’ (19-20 April 2012) available at <www.echr.coe.int/Documents/2012\_Brighton\_FinalDeclaration\_ENG.pdf> accessed 19 July 2017. See also Article 1 of Protocol 15 to the ECHR, which has not yet entered into force. [↑](#footnote-ref-187)
188. Article 3 of the Statute of the Council of Europe (*supra* note 183) reads: “Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and *collaborate sincerely and effectively in the realisation of the aim of the Council* as specified in Chapter I [of the Statute]” (emphasis added). [↑](#footnote-ref-188)
189. See also Greene, *supra* note 59, last part of the written evidence, titled ‘The Legitimacy of the ECtHR and Derogations’. [↑](#footnote-ref-189)
190. For a similar argument regarding extraterritoriality, among others, see Tzevelekos, *supra* note 9, at 142. [↑](#footnote-ref-190)
191. See, for instance the talk on Brexit by Theresa May where she suggests that the UK should withdraw from the ECHR: ‘Theresa May’s speech on Brexit’ (25 April 2016), available at <www.conservativehome.com/parliament/2016/04/theresa-mays-speech-on-brexit-full-text.html> accessed 19 July 2017. [↑](#footnote-ref-191)