

**The European Court of Human Rights: Implications for United States  
National Security**

Colonel Katherine Graef, USA

4 February 2014

Word Count: 3496

| Report Documentation Page                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                                    |                                     |                                          | Form Approved<br>OMB No. 0704-0188       |                                 |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------|-------------------------------------|------------------------------------------|------------------------------------------|---------------------------------|
| Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number. |                                    |                                     |                                          |                                          |                                 |
| 1. REPORT DATE<br><b>04 FEB 2014</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                    | 2. REPORT TYPE<br><b>N/A</b>        |                                          | 3. DATES COVERED<br><b>-</b>             |                                 |
| 4. TITLE AND SUBTITLE<br><b>The European Court of Human Rights: Implications for United States National Security</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                    |                                     |                                          | 5a. CONTRACT NUMBER                      |                                 |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                    |                                     |                                          | 5b. GRANT NUMBER                         |                                 |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                    |                                     |                                          | 5c. PROGRAM ELEMENT NUMBER               |                                 |
| 6. AUTHOR(S)<br><b>Colonel Katherine Graef</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                    |                                     |                                          | 5d. PROJECT NUMBER                       |                                 |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                    |                                     |                                          | 5e. TASK NUMBER                          |                                 |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                    |                                     |                                          | 5f. WORK UNIT NUMBER                     |                                 |
| 7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)<br><b>United States Naval War College 686 Cushing Road Newport, RI 02841</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                    |                                     |                                          | 8. PERFORMING ORGANIZATION REPORT NUMBER |                                 |
| 9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                    |                                     |                                          | 10. SPONSOR/MONITOR'S ACRONYM(S)         |                                 |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                    |                                     |                                          | 11. SPONSOR/MONITOR'S REPORT NUMBER(S)   |                                 |
| 12. DISTRIBUTION/AVAILABILITY STATEMENT<br><b>Approved for public release, distribution unlimited</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                    |                                     |                                          |                                          |                                 |
| 13. SUPPLEMENTARY NOTES<br><b>The original document contains color images.</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                    |                                     |                                          |                                          |                                 |
| 14. ABSTRACT                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                    |                                     |                                          |                                          |                                 |
| 15. SUBJECT TERMS                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                    |                                     |                                          |                                          |                                 |
| 16. SECURITY CLASSIFICATION OF:                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                    |                                     | 17. LIMITATION OF ABSTRACT<br><b>SAR</b> | 18. NUMBER OF PAGES<br><b>18</b>         | 19a. NAME OF RESPONSIBLE PERSON |
| a. REPORT<br><b>unclassified</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | b. ABSTRACT<br><b>unclassified</b> | c. THIS PAGE<br><b>unclassified</b> |                                          |                                          |                                 |

## Abstract

The United States' National Security Strategy (NSS) consistently emphasizes two concepts: the enduring importance of alliances and coalitions and the significance of U.S. support to international rule of law. In practical terms, however, these concepts can be deeply contradictory; while the NSS emphasizes partnerships and multi-lateral engagement, there is a widening gap between the U.S. and its traditional partners regarding international law. The United States, while consistently espousing support for the rule of law, has established a strong trend of abstaining from treaties and other instruments that it perceives will encroach on its sovereignty, including those related to national security that seem to be firmly in line with American values. While the U.S. must continue to guard its sovereignty, it must also acknowledge the link between its support of international rule of law and its legitimacy in the eyes of the world. The legacy strategy of avoiding international legal engagement, combined with evolving international legal norms, will complicate the U.S.'s ability to address global security concerns multilaterally. The U.S. must incorporate this changing legal landscape in determining its future strategy regarding international law or risk a reduction of American legitimacy and influence, which can impair achievement of national security goals.

”Our moral leadership is grounded principally in the power of our example — not through an effort to impose our system on other peoples...America must demonstrate through words and deeds the resilience of our values and Constitution. For if we compromise our values in pursuit of security, we will undermine both; if we fortify them, we will sustain a key source of our strength and leadership in the world — one that sets us apart from our enemies and our potential competitors.”<sup>1</sup>

## INTRODUCTION

The National Security Strategy of 2010 (NSS) makes clear that the United States’ adherence to its own values and democratic principles is inextricably linked to its national security. The same document, however, illustrates the complexity of this proposition. The NSS and a variety of other strategic documents<sup>2</sup> consistently emphasize two concepts: the enduring importance of alliances and coalitions<sup>3</sup> and the significance of U.S. support to international rule of law. In practical terms, however, these concepts can be deeply contradictory; while the NSS emphasizes partnerships and multi-lateral engagement, there is a widening gap between the U.S. and its traditional partners regarding international law.

The United States, while consistently espousing support for the rule of law, has established a strong trend of abstaining from treaties and other instruments that it perceives will encroach on its sovereignty. There are a wide variety of such treaties, from human rights (Additional Protocols I & II to the Geneva Convention) to climate change (Kyoto Protocols) to arms control (Comprehensive Nuclear Test-Ban Treaty), including those related to national security that seem to be firmly in line with American values. While the U.S. must continue to

---

<sup>1</sup> Barack Obama, *National Security Strategy*, (Washington D.C.: The White House, 2010), 10.

<sup>2</sup> Including the more recent (2012) Department of Defense strategic guidance document “Sustaining U.S. Global Leadership: Priorities for 21st Century Defense” as well as joint doctrine.

<sup>3</sup> An “alliance” is different than a “coalition” and, while the US is allies with several nations discussed in this paper, the paper will use the more inclusive term “coalition” for brevity and simplicity. According to JP 1-02, an alliance is defined as: “The relationship that results from a formal agreement (e.g., treaty) between two or more nations for broad, long-term objectives that further the common interests of the members.” A coalition is defined as: “An ad hoc arrangement between two or more nations for common action.” Source: U.S. Office of the Chairman of the Joint Chiefs of Staff, *Department of Defense Dictionary of Military and Associated Terms* Joint Publication (JP) 1-02 (Washington D.C.: CJCS, as amended through 15 Dec 13), 12 & 39.

guard its sovereignty, it must also acknowledge the link between its support of international rule of law and its legitimacy in the eyes of the world. The following cases represent emerging international legal norms that may strain traditionally strong alliances and partnerships enough to limit the U.S.'s ability to achieve its national security goals. The legacy strategy of avoiding international legal engagement, combined with evolving international legal norms, will complicate the U.S.'s ability to address global security concerns multilaterally. The U.S. must incorporate this changing legal landscape in determining its future strategy regarding international law or risk a reduction of American legitimacy and influence, which can impair achievement of national security goals.

International law is represented by a wide variety of institutions, but the European Court of Human Rights (ECtHR or the Court) is unique in that it has multilateral jurisdiction over 47 European nations.<sup>4</sup> Since 1959, the ECtHR's purpose has been to rule "on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights."<sup>5</sup> In 1998, with the adoption of Protocol No. 11, individuals were allowed to petition the court directly, but only after exhausting their case through domestic courts. This development is key to two cases of particular consequence to U.S. national security: *Al Jedda v. United Kingdom (UK)*, and *Smith and Others v. the Ministry of Defence (MoD)*. Before detailing these cases, however, it is useful to examine the context of the relationship between the U.S. and ECtHR member states.

---

<sup>4</sup> It is interesting to note that the ECtHR has jurisdiction over nations outside of the European Union, most notably Russia and Turkey. For the history and more information about the ECtHR, see: European Court of Human Rights, *50 Years of Activity, The European Court of Human Rights, Some Facts and Figures* (Strasbourg: European Court of Human Rights, 2010) [http://echr.coe.int/Documents/Facts\\_Figures\\_1959\\_2009\\_ENG.pdf](http://echr.coe.int/Documents/Facts_Figures_1959_2009_ENG.pdf).

<sup>5</sup> European Court of Human Rights, *The Court in Brief* (Strasbourg: European Court of Human Rights, accessed 16 Jan 14) [http://www.echr.coe.int/Documents/Court\\_in\\_brief\\_ENG.pdf](http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf).

## **THE UNITED STATES & THE EUROPEAN UNION -- THE INTERSECTION OF SECURITY AND INTERNATIONAL LAW**

The United States has expressed the strong preference to operate as part of a coalition if military intervention in foreign affairs is necessary.<sup>6</sup> Chart 1 shows the primary contributors to the last three major military coalitions. Of the thirteen partner nations on the chart, ten are subject to the jurisdiction of the ECtHR; as expected, this excludes Australia, Canada, and the United States. During operations in Iraq and Afghanistan, the U.S. and its partners worked through many challenges, including differences in international law (see Chart 2 for a comparison of treaty status and more details). Two examples of successful compromise involve rules of engagement (ROE) and land mines. These issues were particularly complex because the most prominent coalition partners have ratified Additional Protocols I and II of the Geneva Convention and the Ottawa Mine Ban Treaty, both of which greatly influence national caveats as well as behavior of coalition military personnel.

All nations enter into, or abstain from, coalitions for a variety of reasons. This is inherent, as is the necessity to compromise when forming coalitions. What may be changing, however, is not only the ability or willingness of future partners to overcome specific challenges at the tactical and operational level like ROE and land mines, but their ability and willingness to cooperate with the U.S. at the strategic level to address global security concerns. The following cases, combined with continued U.S. abstention from key security treaties, will impair cooperation between the U.S. and its traditional, and presumptively future,<sup>7</sup> European partners in

---

<sup>6</sup> “The foundation of United States, regional, and global security will remain America's relations with our allies, and our commitment to their security is unshakeable...Our ability to sustain these alliances, and to build coalitions of support toward common objectives...are a critical component of our global engagement and support our collective security.” (Obama, *National Security Strategy*, 41.)

<sup>7</sup> In addition to strong cultural and historical ties, it is in the US national interest to maintain close ties to its traditional European partners. The European Union represents the largest economy in the world and its collective defense budget is second only to the US. Its presence throughout the world is extensive, with over 66,000 troops and

two critical ways. *Al-Jedda v. UK* further widens the legal gap between the U.S. and ECtHR member states by significantly increasing individual state responsibility for conduct during operations, even when operating under a United Nation (UN) resolution. *Smith v. MoD* complicates coalition interoperability by extending European Convention of Human Rights (ECHR or the Convention) protection and the duty of care concept to Britain's own military forces. In order to preserve the option to form coalitions with ECtHR member states, the U.S. must incorporate the issues represented by these two cases when determining its future approach to international legal engagement.

### ***AL-JEDDA v. UNITED KINGDOM***

The *Al-Jedda v. UK* decision complicates the formation and conduct of coalitions between the U.S. and ECtHR member states because it raises the legal divide between these two entities to the strategic level. American abstention from Protocols I & II of the Geneva Convention, as well as a variety of other human rights treaties, results in significantly different international legal obligations by the U.S. and ECtHR member states. The *Al-Jedda* case codifies this legal gap because the Court's decision clarifies how states should consider competing international legal obligations thereby imposing significant responsibility, and therefore restriction, on the operational behavior of ECtHR member states, even when operating under a UN resolution. Since the U.S. is not under ECtHR jurisdiction, these restrictions do not apply to the United States.

---

approximately 57,000 diplomats. Source: Mark Leonard and Hans Kundnani, "Think Again: European Decline," *Foreign Policy*, May/June 2013, 1 (of NSDM Strategies 12-3).

The case of *Al-Jedda v. UK* addressed two core issues: the question of jurisdiction and the applicability of Article 5(1) ECHR (Right to Liberty and Security).<sup>8</sup> Al-Jedda, a dual British/Iraqi citizen, was detained by the UK in Iraq between October 2004 and December 2007.<sup>9</sup> In June 2005, Al-Jedda petitioned British courts for a review “of the lawfulness of his continued detention”<sup>10</sup>; domestic courts did not rule in his favor. As a result, Al-Jedda took his complaint to the ECtHR in June 2008. On 7 July 2011, the Court upheld his case and ordered the British government to “pay damages and costs.”<sup>11</sup>

The *Al-Jedda* case is significant because it established new precedent for jurisdiction and resolution of conflict between international legal responsibilities. Despite the UK’s claim that, because their forces were operating under UN resolution, its actions in Iraq were attributable to the UN rather than the ECtHR, the Court (by unanimous vote) rejected this view: “To the contrary, the Court found that in Iraq the UN ‘had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that the applicant’s detention was not, therefore, attributable to the United Nations.’”<sup>12</sup> This is important because it enabled the Court to consider the second issue of whether the UK infringed on the rights of Al-Jedda under Article 5(1) ECHR.

The UK claimed that it did not violate Al-Jedda’s Article 5(1) ECHR rights<sup>13</sup> because its obligation to UN Resolution 1151, specifically to “take all necessary measures to contribute to

---

<sup>8</sup> Laura Henderson, “With (Great) Power Comes (Great) Responsibility: A Move Toward Greater Responsibility for States Exercising Power Abroad,” *Merkourios* 28, no. 74 (2012): 52-53, HeinOnline (no accession # shown).

<sup>9</sup> Henderson, “With (Great) Power Comes (Great) Responsibility,” 51.

<sup>10</sup> Henderson, “With (Great) Power Comes (Great) Responsibility,” 51.

<sup>11</sup> Misa Zgonec-Rozej, “Al-Jedda v. United Kingdom. Application No. 27021/08. 50 ILM 950 (2011),” *The American Journal of International Law* 106 (2012): 832, HeinOnline (no accession # shown).

<sup>12</sup> Henderson, “With (Great) Power Comes (Great) Responsibility,” 53, quoting *Al-Jedda v. the United Kingdom* [GC] Appl No 27021/08 (ECtHR, 7 July 2011), (n 2). para 8.

<sup>13</sup> The full text of ECHR Article 5(1) states: 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:



the maintenance of security and stability in Iraq”<sup>14</sup> superseded its obligation to the Convention. The UK cited Article 103 of the UN Charter as justification. Article 103 states: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”<sup>15</sup> The Court again did not agree (by a 16-1 vote), essentially finding that there was no conflict of international law, therefore Article 103 did not apply, and the UK could be (and was) held responsible for violating Al-Jedda’s rights under Article 5(1) of the ECHR. Further, the court concluded:

there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights... it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under human rights law.<sup>16</sup>

This conclusion by the Court has particularly far-reaching implications for future cooperation between the U.S. and ECtHR member states. With *Al-Jedda*, the Court imposes on ECtHR member states a broader responsibility than the U.S. to safeguard human rights and holds those states responsible for human rights violations even when operating under a UN resolution

- 
- (a) the lawful detention of a person after conviction by a competent court;
  - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
  - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
  - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
  - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
  - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Source: European Court of Human Rights, *European Convention on Human Rights* (Strasbourg: European Court of Human Rights, accessed 17 Jan 14) [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>14</sup> Henderson, “With (Great) Power Comes (Great) Responsibility,” 52, quoting *Al-Jedda* (n 2), para 79 and para 13 of Security Council Resolution 1151.

<sup>15</sup> Charter of the United Nations, United Nations, accessed 17 Jan 14, <https://www.un.org/en/documents/charter/chapter16.shtml>.

<sup>16</sup> Henderson, “With (Great) Power Comes (Great) Responsibility,” 53, quoting *Al-Jedda* (n 2), para 102.

if that resolution does not explicitly relieve them of ECHR obligations. This will impair future strategic cooperation because the U.S.'s primary partners may be less likely to participate in foreign intervention that is not under "effective control" or "ultimate authority and control" of the UN (as was the case in the Balkans for example). If they do participate in an operation outside of UN control, ECtHR member states may be more risk averse when considering the nature and degree of their involvement. They may, for example, have extremely restrictive rules of engagement, may refuse to take, handle, or inter detainees, and/or may refuse basing or overflight permissions. These are all contributions upon which the U.S. has depended and will continue to depend to achieve its national security goals. While the U.S. will (and should) retain its ability to act unilaterally, this approach is not without risk, primarily because multilateral action is widely considered to be more legitimate; too much unilateral action may actually reduce U.S. influence in global affairs and therefore impair its ability to achieve its national security goals.

It is reasonable to assume that the U.S. will never fall under the jurisdiction of the ECtHR or even subjugate its citizens to the International Criminal Court (ICC).<sup>17</sup> Still, if the U.S. intends to partner with ECtHR member states in the future, it cannot ignore the legal issues presented by the *Al-Jedda* decision. In addition to its discrete consequences, *Al-Jedda* became one of many legal building blocks for another consequential decision two years later by the British Supreme Court in *Smith and Others v. The Ministry of Defence*. While *Al-Jedda* applied the Convention to

---

<sup>17</sup> This is, in fact, implicitly stated in the NSS: "Although the United States is not at present a party to the Rome Statute of the International Criminal Court (ICC), and will always protect U.S. personnel, we are engaging with State Parties to the Rome Statute on issues of concern and are supporting the ICC's prosecution of those cases that advance U.S. interests and values, consistent with the requirements of U.S. law." (Obama, *National Security Strategy*, 48.)

detainees under British control, *Smith* applied the Convention to the British military itself. Both have far-reaching implications for ECtHR member states and, by extension, the United States.

### ***SMITH AND OTHERS v. THE MINISTRY OF DEFENCE***

*Smith v. Ministry of Defence (MoD)* has significant implications for U.S. national security because it complicates the close historical relationship between the U.S. and the UK in unpredictable and potentially far-reaching ways. While the *Smith v. MoD* case was decided by the British Supreme Court, it drew on precedent in the cases of *Al-Jedda v. UK* and other ECtHR decisions and it is reasonable to assume that the decision by the British Supreme Court will serve as precedent for other ECtHR member states, as it is established practice for the Court to use domestic decisions to influence its logic and vice versa.

The *Smith* case involved two sets of claimants as a result of two separate incidents in Iraq in 2005 and 2006. The first set of claimants asserted that the MoD failed to provide adequate protection to its service members by the deployment and use of Snatch Land Rovers, vehicles designed to withstand small arms fire but not Improvised Explosive Devices (IEDs). The second set of claimants asserted the MoD “negligently failed to provide available technology to protect against the risk of friendly fire and failed to provide adequate vehicle recognition training.”<sup>18</sup> The case as a whole claimed the MoD violated Article 2 ECHR (Right to Life) of the soldiers who died and also failed to uphold its duty of care<sup>19</sup> responsibilities.<sup>20</sup> The MoD argued that, because both incidents occurred in combat and the victims were British troops, the Convention and duty of care responsibilities did not apply. Eventually, in June 2013, the British Supreme

---

<sup>18</sup> Thomas Tugendhat and Laura Croft, *The Fog of Law* (London: Policy Exchange, 2013), 29.

<sup>19</sup> “Duty of care” is defined as “a moral or legal obligation to ensure the safety or well-being of others” Source: Oxford Dictionaries, Oxford University Press, accessed 22 Jan 14, <http://www.oxforddictionaries.com/us/definition/english/duty-of-care>.

<sup>20</sup> Tugendhat and Croft, *The Fog of Law*, 29.

Court ruled 4-3 that the ECHR and duty of care concept did apply to British service members, even while operating on foreign soil outside of established military bases.<sup>21</sup>

The full implication of the *Smith* decision remain to be seen, but the UK has already experienced direct consequences. One of the most predictable has been a surge in legal action against the MoD, so much so that the MoD has almost doubled its legal claims budget in the last five years.<sup>22</sup> Some predict the ballooning of legal costs will force the MoD to compromise military procurement or other commitments.<sup>23</sup> Beyond these objective consequences, the *Smith* decision puts at risk the very culture of the UK military. Opponents of the decision fear that commanders at all levels will become risk averse, making decisions in the context of preventing legal action, with regard to human rights violations or duty of care or both, rather than mission accomplishment.<sup>24</sup> While the Law of Armed Conflict has long held commanders responsible for giving lawful orders, military commanders had the expectation of being judged by a panel of their peers by court martial if they were suspected of violating international law; only the most egregious violations would fall under the jurisdiction of the ICC. With the *Smith* decision, the way is open for British commanders at all levels to be judged by civilian courts and judges who most likely cannot appreciate the stress and chaos of combat.<sup>25</sup>

The U.S. military is not bound by the *Smith* decision, but its implications on future cooperation with the UK are obvious. The UK is arguably the U.S.'s closest ally with historically tight military and command integration, from the Supreme Allied Command structure in World

---

<sup>21</sup> Ibid., 30.

<sup>22</sup> Tugendhat and Croft, *The Fog of Law*, 35.

<sup>23</sup> Ibid, 36.

<sup>24</sup> Ibid., 32.

<sup>25</sup> Ibid., 18.

War II to the sharing of responsibility as occupying powers of Iraq under UN Resolution 1483.<sup>26</sup> The *Smith* decision endangers this tradition. Imagine the challenge of determining a theater strategic coalition command and control structure where the UK is bound not only by existing international law but by the extended application of the ECHR and duty of care; it is reasonable to conclude the UK will be much less likely to place its forces under U.S. command without such significant caveats that the unity of command principle would be compromised. At the tactical level, it is likely that a British commander would be reluctant to allow his or her troops to ride in an American vehicle or aircraft, or live on a joint base, if it did not meet duty of care standards (which are not — and cannot — be clearly defined; it is impossible to prove a commander could not have done more).<sup>27</sup> Similarly, a British commander may refuse to participate in detention operations of the kind that led to the *Al-Jedda* decision or perhaps even contribute intelligence that the U.S. may use for future targeting. The potential list of consequences is endless.

The *Smith* decision is new and the response of the British parliament is unclear. Parliament may strengthen or amend domestic law to address concerns raised in *Smith*. Given the pace of legal and legislative change, however, this is unlikely to happen quickly if at all. In any case, *Al-Jedda* and *Smith* are just two representative cases among many that are transforming international legal norms, especially for ECtHR member states. The U.S., while outside ECtHR

---

<sup>26</sup> The preamble to UN Resolution 1483 states:

*Noting* the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the “Authority”),

*Noting further* that other States that are not occupying powers are working now or in the future may work under the Authority,

*Welcoming further* the willingness of Member States to contribute to stability and security in Iraq by contributing personnel, equipment, and other resources under the Authority

Source: United Nations Security Council Resolution 1483, United Nations, 22 May 2003,

<http://www.uncc.ch/resolutio/res1483.pdf>.

<sup>27</sup> Tugendhat and Croft, *The Fog of Law*, 33.

jurisdiction, must address these emerging norms when devising its future approach to international law. If the U.S. maintains its current strategy of abstaining from international legal institutions, it will jeopardize its ability to form coalitions, therefore reducing its ability to confront global security concerns multilaterally, a key tenet of its national security strategy. Indeed, it can be argued this has already happened. Two months after the *Smith* decision, the UK Parliament defeated Prime Minister Cameron's attempt to secure initial Parliamentary approval for military action in Syria. In a stunning vote, Parliament refused his request 285-272, due in no small part to its strong desire for a UN resolution, which would confer "a clear legal basis in international law for taking collective military action."<sup>28</sup> Dame Tessa Jowell, MP, used the following reasoning in her argument for the opposition:

However, it is also clear that to go to war with Assad - that is what it will be - without the sanction of a UN Security Council resolution would set a terrible precedent. After the mission creep of the Libyan operation, it would amount to nothing less than a clear statement by the US and its allies that we were the arbiters of international right and wrong when we felt that right was on our side. What could we do or say if, at some point, the Russians or Chinese adopted a similar argument? What could we say if they attacked a country without a UN resolution because they claimed it was right and cited our action as a precedent? Legal rectitude may not amount to much, but it is all we have.<sup>29</sup>

While this Parliamentary action cannot necessarily be linked to the *Smith* decision, it does serve as a strong example of a staunch U.S. ally conforming to emerging international legal norms with novel and undesirable consequences for U.S. policy. And, in light of recent events in Ukraine and the Crimea, her comments seem eerily prescient.

On the surface, *Al-Jedda* and *Smith* would seem to provide ample justification for those who advocate continuing the legacy, sometimes dogmatic, U.S. strategy of avoiding

---

<sup>28</sup> Opposition Manuscript Amendment, UK House of Commons, 29 August 2013, [www.parliament.uk/documents/news/2013/manuscript-amendment-29aug13.pdf](http://www.parliament.uk/documents/news/2013/manuscript-amendment-29aug13.pdf).

<sup>29</sup> Syria and the Use of Chemical Weapons Debate Transcript, UK House of Commons, 29 August 2013, [www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130829/debtext/130829-0001.htm#1308298000001](http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130829/debtext/130829-0001.htm#1308298000001).

entanglement in international legal affairs. They might argue these decisions represent a dangerous affront to the sovereignty of ECtHR member states, potentially compromising their national security. The U.S., therefore, should continue to abstain from any and all international legal agreements lest its sovereignty erode as well. The UN Convention of the Law of the Sea (UNCLOS) provides a recent and representative example of this strategy. UNCLOS opponents cite two common reasons for resisting ratification of treaties: customary law and sovereignty. In a letter to the U.S. Senate Majority Leader, dated 16 July 2012, Senators Ayotte and Portman, both members of the Senate Armed Services Committee, stated: “At the same time, even treaty proponents recognize that these provisions primarily clarify rights that the United States already possesses under customary international law and has other means of asserting.”<sup>30</sup> The Senators concluded the letter: “On balance, we believe the treaty’s litigation exposure and impositions on U.S. sovereignty outweigh its potential benefits. For that reason, we cannot support the Law of the Sea treaty and would oppose its ratification.”<sup>31</sup> In other words, these two Senators contend it is not necessary nor in its national interest for the U.S. to subjugate its sovereignty for an outcome that already exists. Thirty-two other U.S. Senators agreed with them, defeating the ratification attempt. While abstention from UNCLOS may indeed maintain U.S. flexibility, it is also representative of how sovereignty does not necessarily translate to influence and power.

While the U.S. should absolutely guard against legal encroachment of the kind represented by *Al-Jedda* and *Smith*, it cannot afford to be dogmatic about avoiding all international legal engagement. There is wide agreement that the U.S.’s refusal to ratify UNCLOS is harming its national security and results in less flexibility for strategic decision-

---

<sup>30</sup> Rob Portman and Kelly Ayotte, Letter to the Honorable Harry Reid, 16 July 2012, [http://www.portman.senate.gov/public/index.cfm/files/serve?File\\_id=317ccc22-1649-4982-944f-ca1d97e14075](http://www.portman.senate.gov/public/index.cfm/files/serve?File_id=317ccc22-1649-4982-944f-ca1d97e14075).

<sup>31</sup> Ibid.

makers, not more.<sup>32</sup> In fact, few issues have attracted such diverse collective support as UNCLOS.<sup>33</sup> To address the customary law argument, UNCLOS advocates claim that customary law allows for differing interpretations. In this case, China in particular disagrees with U.S. interpretation of customary law, advancing its own to claim sovereignty in the South China Sea. While the U.S. routinely conducts Freedom of Navigation Operations to mitigate excessive territorial claims, in the South China Sea and elsewhere, it has no legal standing to bring formal complaints to international resolution bodies while China, as an UNCLOS signatory, does.<sup>34</sup> U.S. abstention also excludes American businesses from securing sole rights to underwater energy and minerals sources. As a result, UNCLOS signatories are taking advantage of rich maritime resources while U.S. companies are excluded. Regarding the question of sovereignty, a 1994 amendment to UNCLOS included a provision that the U.S. would hold the only permanent seat on the International Seabed Authority (ISA). The ISA makes decisions by consensus which would give the U.S. effective veto power over its decisions. Again, because it has not ratified UNCLOS, the U.S. has no influence in the ISA's discussions or decisions. UNCLOS demonstrates that there are ways to participate in international legal institutions while protecting sovereignty; it is common, in fact, to ratify treaties with caveats. These reasons, among many

---

<sup>32</sup> As a representative sample, see:

John B. Bellinger III, "Should the United States ratify the UN Law of the Sea?," *Council on Foreign Relations Blog*, 11 Nov 13, <http://www.cfr.org/treaties-and-agreements/should-united-states-ratify-un-law-sea/p31828>.

Stewart M. Patrick, "(Almost) Everyone Agrees: The U.S. Should Ratify the Law of the Sea Treaty," *The Atlantic*, 10 June 2012, <http://www.theatlantic.com/international/archive/2012/06/-almost-everyone-agrees-the-us-should-ratify-the-law-of-the-sea-treaty/258301/>.

Ernest Z. Bower and Gregory B. Poling, "Advancing the National Interests of the United States: Ratification of the Law of the Sea," *Center for Strategic and International Studies*, 25 May 2012, <http://csis.org/publication/advancing-national-interests-united-states-ratification-law-sea>.

<sup>33</sup> The last two Chairmen of the Joint Chiefs of Staff (at least), the U.S. Chamber of Commerce, Democratic and Republican Presidents, Democratic and Republican Secretaries of Defense, and all of the US military service chiefs fully support ratification of UNCLOS. The author has personally witnessed two four-star flag officers voice their support; the details of those comments are omitted due to the Naval War College academic non-attribution policy.

<sup>34</sup> Stewart M. Patrick, "(Almost) Everyone Agrees: The U.S. Should Ratify the Law of the Sea Treaty," *The Atlantic*, 10 June 2012, <http://www.theatlantic.com/international/archive/2012/06/-almost-everyone-agrees-the-us-should-ratify-the-law-of-the-sea-treaty/258301/>.



others, lead UNCLOS advocates to conclude that continued abstention reduces U.S. influence in regional and global affairs and harms U.S. national security.

## **CONCLUSION**

The United States prefers to confront global security concerns multilaterally and in accordance with international rule of law. Recent decisions by the ECtHR, however, widen the legal gap between the U.S. and its traditional partners, impairing the formation of future coalitions. While these decisions may seem to validate the legacy U.S. approach to international law, there is substantial and increasing risk to rigid abstention from any future international legal engagement. In the current international security environment, multilateral action and adherence to international legal norms confer legitimacy. Even though *Al-Jedda* and *Smith* represent increasing barriers to multilateral engagement, the U.S. must recognize that unilateral action and maintaining strict sovereignty may result in a loss of legitimacy and influence; UNCLOS is a timely and cautionary example. Simply put, the erosion of legitimacy caused by avoiding membership in international legal institutions may soon outweigh the benefits of strict sovereignty. Consequently, the U.S. must incorporate emerging international legal norms into its future national security strategy, balancing sovereignty with support to the rule of law in order to preserve its legitimacy and influence, thereby promoting the achievement of American national security goals.

**Chart 1: Recent Coalition Composition (Major Contributors)**

|                       | OEF (as of 29 Jan 07) [1] | OEF (as of 1 Jun 11) [2] | OEF (as of 1 Dec 13) [3] | OIF (Cumulative/Peak) [4] | Operation Odyssey Dawn / Unified Protector [7] |
|-----------------------|---------------------------|--------------------------|--------------------------|---------------------------|------------------------------------------------|
| <b>Australia</b>      | 500                       | 1,150                    | 1,045                    | 2,400 / 515               | N/A                                            |
| <b>Canada</b>         | 2,500                     | 2,922                    | 620                      | N/A                       | Air; Naval                                     |
| <b>France</b>         | 1,000                     | 3,935                    | 212                      | N/A                       | Air; Naval                                     |
| <b>Georgia</b>        | N/A                       | 937                      | 1,560                    | 10,000 / 1,850            | N/A                                            |
| <b>Germany</b>        | 3,000                     | 4,812                    | 3,084                    | N/A                       | Abstained; withdrew forces from operations     |
| <b>Italy</b>          | 1,950                     | 3,880                    | 2,822                    | 7,800 / 2,600             | Air; Naval; Basing                             |
| <b>Netherlands</b>    | 2,200                     | 192                      | 200                      | 7,564 / 1,345             | Embargo Enforcement                            |
| <b>Poland</b>         | 160                       | 2,560                    | 1,099                    | 13,900 / 2,400            | N/A                                            |
| <b>Romania</b>        | 750                       | 1,938                    | 1,018                    | 6,600 / 730               | N/A                                            |
| <b>Spain</b>          | 550                       | 1,552                    | 260                      | 4,100 / 1,300             | Air; Naval                                     |
| <b>Turkey</b>         | 800                       | 1,786                    | 1,035                    | N/A                       | Embargo Enforcement                            |
| <b>United Kingdom</b> | 5,200                     | 9,500                    | 7,953                    | 102,000 / 46,000          | Air; Naval                                     |
| <b>United States</b>  | 14,000                    | 90,000                   | 60,000                   | > 1.5M [5] / 157,800 [6]  | Air; Naval; Marine (Air)                       |

**References:**

[1] First available International Security Assistance Force (ISAF) "placemat"; Source: International Security Assistance Force, NATO, approved 2 January 2007, [http://www.nato.int/isaf/docu/epub/pdf/placemat\\_archive/isaf\\_placemat\\_070129.pdf](http://www.nato.int/isaf/docu/epub/pdf/placemat_archive/isaf_placemat_070129.pdf).

[2] ISAF "placemat" at peak troop level of 132,381; ISAF: Key Facts and Figures, NATO, 6 June 2011, [http://www.isaf.nato.int/images/stories/File/Placemats/Revised%2026%20June%202011%20Placemat%20\(Full\).pdf](http://www.isaf.nato.int/images/stories/File/Placemats/Revised%2026%20June%202011%20Placemat%20(Full).pdf).

[3] Most recent ISAF "placemat"; ISAF: Key Facts and Figures, NATO, 1 December 2013, <http://www.isaf.nato.int/images/stories/File/2013-12-01%20ISAF%20Placemat-final.pdf>.

[4] Stephen A. Carney, *Allied Participation in Operation Iraqi Freedom* (Washington D.C.: Center of Military History, 2011), appendix, [http://www.history.army.mil/html/books/059/59-3-1/CMH\\_59-3-1.pdf](http://www.history.army.mil/html/books/059/59-3-1/CMH_59-3-1.pdf).

[5] Jim Garamone, "Obama Praises U.S. Troops' Efforts as Iraq Winds Down," American Forces Press Service, 14 December 2011, <http://www.defense.gov/news/newsarticle.aspx?id=66478>.

[6] Reflects Iraq Boots on the Ground reports, not overall US OIF deployments; Amy Belasco, "Troop Levels in the Afghan and Iraq Wars, FY2001-FY2012: Cost and Other Potential Issues," Congressional Research Service, 2 July 2009, <http://www.fas.org/sqp/crs/natsec/R40682.pdf>.

[7] Operation Odyssey Dawn contributions listed as capabilities provided compiled from the sources listed below:

Jeremiah Gertler, "Operation Odyssey Dawn (Libya): Background and Issues for Congress," Congressional Research Service, 30 March 2011, <https://www.fas.org/sqp/crs/natsec/R41725.pdf>.  
Coalition Maritime Capability Slide, U.S. Department of Defense, 19 March 2011, [http://www.defense.gov/news/PAO\\_DJS\\_Slides\\_19Mar11\\_v3.pdf](http://www.defense.gov/news/PAO_DJS_Slides_19Mar11_v3.pdf).  
U.S. and Coalition Maritime Forces Laydown, U.S. Department of Defense, 24 March 2011, <http://www.defense.gov/news/d20110324pptslides.pdf>.  
Libya: Situation Update, U.S. Department of Defense, 28 March 2011, <http://www.defense.gov/news/d20110328slides1.pdf>.

NOTE: Belgium, Denmark, Greece, and Qatar pledged forces to Operations Odyssey Dawn and Unified Protector to various degrees, but there are differing reports on their actual involvement. In any case, primary coalition contributions came from Canada, France, Italy, the UK, and the US.

**Chart 2: Treaty Status**

| Treaty Title         | Additional Protocols I & II |                       | Ottawa Mine Ban |              | Rome Statute  |           | UNCLOS           |           |
|----------------------|-----------------------------|-----------------------|-----------------|--------------|---------------|-----------|------------------|-----------|
| Entry Into Force [1] | 8 June 1977                 |                       | 1 March 1999    |              | 1 July 2002   |           | 16 November 1994 |           |
| Dates S / R [2]      | Signed                      | Ratified [3]          | Signed [4]      | Ratified [5] | Signed        | Ratified  | Signed           | Ratified  |
| Australia            | 7 Dec 78                    | 21 Jun 91             | 3 Dec 97        | 14 Jan 99    | 9 Dec 98      | 1 Jul 02  | 10 Dec 82        | 5 Oct 94  |
| Canada               | 12 Dec 77                   | 20 Nov 90             | 3 Dec 97        | 3 Dec 97     | 18 Dec 98     | 7 Jul 00  | 10 Dec 82        | 7 Nov 03  |
| France               |                             | 11 Apr 01 / 24 Feb 84 | 3 Dec 97        | 23 Jul 98    | 18 Jul 98     | 9 Jun 00  | 10 Dec 82        | 11 Apr 96 |
| Georgia              |                             | 14 Sep 93             |                 |              | 18 Jul 98     | 5 Sep 03  |                  | 21 Mar 96 |
| Germany              | 23 Dec 77                   | 14 Feb 91             | 3 Dec 97        | 23 Jul 98    | 10 Dec 98     | 11 Dec 00 |                  | 14 Oct 94 |
| Italy                | 12 Dec 77                   | 27 Feb 86             | 3 Dec 97        | 23 Apr 99    | 18 Jul 98     | 26 Jul 99 | 7 Dec 84         | 13 Jan 95 |
| Netherlands          | 12 Dec 77                   | 26 Jun 87             | 3 Dec 97        | 12 Apr 99    | 18 Jul 98     | 17 Jul 01 | 10 Dec 82        | 24 Jun 96 |
| Poland               | 12 Dec 77                   | 23 Oct 91             | 4 Dec 97        | 27 Dec 12    | 9 Apr 99      | 12 Nov 01 | 10 Dec 82        | 13 Nov 98 |
| Romania              | 28 Mar 78                   | 21 Jun 90             | 3 Dec 97        | 30 Nov 00    | 7 Jul 99      | 11 Apr 02 | 10 Dec 82        | 17 Dec 96 |
| Spain                | 7 Nov 78                    | 21 Apr 89             | 3 Dec 97        | 19 Jan 99    | 18 Jul 98     | 24 Oct 00 | 4 Dec 84         | 15 Jan 97 |
| Turkey               |                             |                       |                 | 25 Sep 03    |               |           |                  |           |
| United Kingdom       | 12 Dec 77                   | 28 Jan 98             | 3 Dec 97        | 31 Jul 98    | 30 Nov 98     | 4 Oct 01  |                  | 25 Jul 97 |
| United States        |                             |                       |                 |              | 31 Dec 00 [6] |           |                  |           |

**References:**

[1] For Geneva Convention: Treaties and States Parties to Such Treaties, International Committee of the Red Cross, last modified 14 May 2012, [http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=470](http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470). For UN treaties: United Nations Treaty Collection, United Nations, accessed 13 Jan 14, <https://treaties.un.org/Pages/ParticipationStatus.aspx>.

[2] The chart reflects treaty status as shown on the ICRC and UN websites. It is important to note that most countries, including those on this chart, ratified these treaties with associated declarations, reservations, objections, or a combination of all three. The details of these nuances are beyond the scope of this paper, but do illustrate that it is common to ratify treaties with declarations, reservations, objections or all three. Ibid.

[3] The chart reflects treaty status dates as shown on the ICRC website. Additional Protocols I and II are separate, thus the different dates for signature and/or ratification. When there is one date, that nation signed or ratified both Protocols on the same date. Source: Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I), International Committee of the Red Cross, last modified 14 May 2012, [http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=470](http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470) and Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol II), International Committee of the Red Cross, last modified 14 May 2012, <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AA0C5BCBAB5C4A85C12563CD002D6D09&action=openDocument>.

[4] "Signed" is short for "Signature Subject to Ratification, Acceptance, or Approval" which is defined by the United Nations as "Where the signature is subject to ratification, acceptance or approval, the signature does not establish the consent to be bound. However, it is a means of authentication and expresses the willingness of the signatory state to continue the treaty-making process. The signature qualifies the signatory state to proceed to ratification, acceptance or approval. It also creates an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty." Source: United Nations Treaty Collection, United Nations, accessed 13 Jan 14, [https://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1\\_en.xml](https://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml).

[5] "Ratification defines the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act...The institution of ratification grants states the necessary time-frame to seek the required approval for the treaty on the domestic level and to enact the necessary legislation to give domestic effect to that treaty." Ibid.

[6] The note included with the United States' entry on the treaty status list is as follows: "In a communication received on 6 May 2002, the Government of the United States of America informed the Secretary-General of the following: 'This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.'" Source: United Nations Treaty Collection, United Nations, accessed 13 Jan 14, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XVIII-10&chapter=18&lang=en#11](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&lang=en#11).