



Joint Committee on Human Rights

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From Rt Hon Harriet Harman MP, Chair

Rt Hon Michael Fallon MP
Secretary of State for Defence
Ministry of Defence
Whitehall
London SW1A 2HB

13 October 2016

Dear Michael,

The Government's proposed derogation from the ECHR

I am writing to you about your joint announcement with the Prime Minister on 4 October that the Government propose to protect the Armed Forces from persistent legal claims by introducing a presumption to derogate from the European Convention on Human Rights in future overseas operations.

Derogating from the UK's international human rights obligations is a very serious matter. I am sure you will agree that Parliament has a very important role in scrutinising the reasons for any proposed derogation and the precise terms of the derogating measures, to satisfy itself that the proposed derogation is justified and the strict conditions for the exercise of this exceptional power are met. The need for such rigorous independent scrutiny is all the greater when the case for the derogation is promoted by the very Government department which is effectively seeking immunity from certain legal claims.-You will also be aware that certain rights in the Convention cannot be derogated from, including the right not to be subjected to torture or to inhuman or degrading treatment, or the right to life except in respect of deaths resulting from lawful acts of war. Parliament will therefore want to be satisfied that the scope of any proposed derogation does not go further than the ECHR permits.

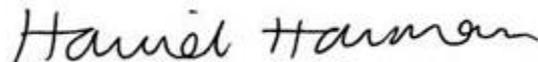
The last time the UK derogated from the ECHR, in the immediate aftermath of 9/11 in 2001, it was to enable the detention of foreign nationals who were suspected terrorists but could not be deported. That derogation was subsequently found by both the Judicial Committee of the House of Lords and the European Court of Human Rights to be incompatible with the Convention because, although both courts accepted that there was a public emergency threatening the life of the nation, the measures taken were disproportionate in that they discriminated unjustifiably between nationals and non-nationals (the threat from terrorism came from both). There was little parliamentary scrutiny of the 2001 derogation and therefore only a very limited opportunity for Parliament to explore such potential compatibility issues. It is important to ensure that this time any proposed derogation is properly scrutinised by Parliament, and that Parliament has the opportunity to reach its own considered assessment of whether the derogation is justified.

My Committee, as Parliament's specialist human rights committee, intends to help Parliament to make this assessment. The early provision of information and explanation is crucial to enable Parliament to arrive at a considered view. We would therefore be grateful if you could provide us with a detailed Memorandum setting out the reasons why a derogation from the ECHR is considered by the Government to be necessary, including the evidence which demonstrates the nature and extent of the problem to which derogation is the solution; why in the Government's view the substantive requirements of Article 15 ECHR are met; the wider implications of the derogation for the European system of human rights protection; and your plans to facilitate parliamentary scrutiny of the proposed derogation.

The Committee would be grateful if the memorandum could address the specific questions contained in the Annex to this letter, which arise from the Committee's first consideration of the issues raised by your announcement. These questions are intended to establish some basic factual and legal matters at the outset, to help the Committee begin its scrutiny of the proposed derogation. The Committee may write again with further specific questions as its consideration of the matter progresses, and may invite you, and possibly other Ministers, to give oral evidence on the subject in due course.

It would be helpful if we could receive your reply to these questions by **Friday 4 November 2016**. I would also be grateful if your officials could provide the Committee secretariat with a copy of your response in Word format, to aid publication. I look forward to hearing from you.

I am copying this letter to the Prime Minister, in view of your joint announcement, and to the Attorney General, Foreign Secretary and Secretary of State for Justice in view of their obvious interest in the subject matter.



Rt Hon Harriet Harman MP
Chair

Cc: Prime Minister
Attorney General
Foreign Secretary
Secretary of State for Justice

ANNEX

Reasons for derogating

Q1: What is the evidence relied on as demonstrating that “our legal system has been abused to level false charges against our troops on an industrial scale”?

Q2: Please provide as detailed a breakdown as possible of the civil claims which have been brought against the MoD arising out of military operations in Iraq and Afghanistan, including:

- The total number of claims arising from operations in Iraq and Afghanistan
- The total number of claims which have been settled by the MoD
- The total number of claims in which the claim has been upheld by a court
- The total number of claims which have been thrown out by a court on the ground that the claim is “vexatious”
- The total number of claims which have been dismissed (but not on the ground that the claim is vexatious)
- The total amount of compensation that has been paid out by the MoD
- The total amount of legal aid payments made in relation to such claims

Q3: Please provide as detailed a breakdown as possible of the cases which have been dealt with by the Service justice system arising out of military operations in Iraq and Afghanistan, including:

- The total number of cases
- The nature of the cases
- The outcomes

Q4: What is the evidence relied on as demonstrating that the extra-territorial applicability of the ECHR undermines the operational effectiveness of the Armed Forces?

Q5: Have any of the other 46 Member States of the Council of Europe derogated from the extra-territorial application of the ECHR in armed conflicts?

- If not, what is so particular about the situation of the UK?

Q6: Do the UK’s NATO allies which are members of the Council of Europe also consider there to be a problem that needs addressing?

- What discussions has the Government had within NATO about the issue?

Substantive requirements of Article 15 ECHR

Q7: Is a “presumption of derogation” compatible with the requirement that the State must be satisfied that the conditions in Article 15 ECHR are met in the particular circumstances existing at the time it seeks to take derogating measures?

(1) “War or other public emergency threatening the life of the nation”

Q8: What sorts of war/conflict is the presumed derogation intended to cover?

- International armed conflicts?
- Non-international armed conflicts?
- Any use of military force abroad on which Parliament has been consulted?
- Any “overseas operations” (to use the language of the Government’s announcement)?

Q9: In the Government’s view does Article 15 ECHR require there to be a war “threatening the life of the nation” for a derogation to be valid?

(2) “Strictly required by the exigencies of the situation”

Q10: What derogating measures does the Government envisage?

Q11: What alternatives to such derogating measures has the Government considered?

Q12: Why are the other measures being proposed by the Government (e.g. shorter time limits for future claims, tougher penalties for firms who bring vexatious claims and restrictions on “no win no fee deals”) not sufficient to meet the Government’s objective of protecting the armed forces against vexatious legal claims?

Q13: Will the effect of the derogation be that soldiers themselves (or their families) cannot rely on Convention rights in relation to conflicts abroad (e.g. in relation to the adequacy of their equipment or the adequacy of an investigation into a soldier’s death)?

- If so, why is that necessary in order to achieve the Government’s avowed objective?

(3) Consistency with other international obligations

Q14: What assessment has the Government made of whether the proposed derogating measures are consistent with the UK’s other obligations under international law?

- In particular, please explain why the proposed derogating measures will be consistent with the UK’s obligations under the International Covenant on Civil and Political Rights.

(4) Rights which cannot be derogated from

Q15: Please identify precisely which obligations under the Convention the Government intends to derogate from.

Q16: Of the total number of claims brought against the MoD arising out of Iraq and Afghanistan, please provide an approximate indication of the proportion based on

- Article 2 ECHR (the right to life)
- Article 3 ECHR (the right not to be subjected to torture or to inhuman or degrading treatment)
- Article 5 (the right to liberty)

Wider implications

Q17: What consideration has the Government given to the wider implications of its proposed derogation for the European system for the collective enforcement of the rights protected by the European Convention?

Q18: What discussions has the Government had with (a) the Secretary General of the Council of Europe and (b) the Council of Europe's Commissioner for Human Rights about its proposed derogation?

- If none, will the Government undertake to consult the Secretary General and the Commissioner and report back to Parliament on the result of those consultations in time to inform Parliament's scrutiny of the proposed derogation?

Parliamentary scrutiny of the proposed derogation

Q19: When and how will Parliament be consulted about the Government's proposal?

Q20: Will the proposed "presumption to derogate from the ECHR in future conflicts" be contained in legislation?

- If so, when is such legislation likely to be introduced?

Q21: Will the derogating measures themselves be contained in legislation?

- If so, when is such legislation likely to be introduced?

Q22: Will the Government undertake to lay in draft the designated derogation order required by the Human Rights Act, to give Parliament the opportunity to scrutinise and debate the proposed derogation before it comes into effect?

Judicial scrutiny of the derogation

Q23: Does the Government agree that the principle of subsidiarity requires that the validity of any derogation from the ECHR should be determined by UK courts before it is considered by the European Court of Human Rights?

Q24: In the Government's view does the legal framework already provide for such judicial scrutiny, or will it be necessary for the derogating measures to make such provision?

Lead responsibility in Government

Q25: What discussions have you had about the proposed derogation with the Attorney General, the Foreign Secretary and the Secretary of State for Justice?

- Given that the purpose of the proposed derogation is to protect the MoD from legal claims, would it be more appropriate for one of those Ministers to have lead responsibility for the proposed derogation?