



# 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.

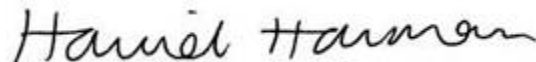
The last time the UK derogated from the ECHR, in the immediate aftermath of 9/11 in 2001, it was to enable the detention of foreign nationals who were suspected terrorists but could not be deported. That derogation was subsequently found by both the Judicial Committee of the House of Lords and the European 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?



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4.7.7

22 November 2016

*Dear Harriet*

### **PROPOSED UNITED KINGDOM DEROGATION FROM THE ECHR**

Thank you for your letter of 13 October and your questions on the Government's announced policy that there will in future be a presumption that the UK will derogate from the relevant articles of the European Convention on Human Rights (ECHR) in respect of military operations overseas in circumstances when it is appropriate to do so. I was grateful also for your willingness to extend the period for our response.

It is important to be clear at the outset about the nature of that policy. It was set out in a Written Ministerial Statement on 10 October 2016. That is the correct source therefore when considering the policy. It stated as follows:

"... 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".

As that passage makes clear, given the concerns about the impact of recent judicial developments particularly in the European Court of Human Rights (ECHR), the Government intends to derogate. However, that intention is deliberately and carefully conditioned:

- a. No decision has been taken about whether in the context of any particular military future operation it would or would not be appropriate to derogate.

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**Chair of the Joint Committee on Human Rights**  
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- b. Such a decision would only be taken if appropriate in all the circumstances.
- c. Such a decision would and could only be taken if legally justified, and from certain ECHR articles, in accordance with the applicable legal principles and structures that existed at that future time.

Many of the questions you have raised cannot therefore be answered (either fully or at all) at this time; and the Government will, for obvious reasons, be highly reluctant to engage in hypothetical debate, and taking positions whether policy or legal, in advance of a concrete issue arising in the particular circumstances.

You ask for “the reasons why a derogation from the ECHR is considered by the government to be necessary”. No such conclusion has been reached – as the WMS made entirely clear. 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. However, the purpose of our announcement was to make clear that we consider that it may well be right and proper to make use of the provision for derogation contained in Article 15 in future operations overseas.

The nature and basis for the Government’s concerns are well known. In summary and without seeking to provide a comprehensive statement, they are as follows:

- The framers of the ECHR did not intend that it should apply to overseas armed conflicts governed by International Humanitarian Law (IHL).
- The reach of the ECHR into this sphere has involved the recent discovery and assertion by the courts, and in particular the ECHR, of a jurisdictional reach of the ECHR both extraterritorially and into such overseas armed conflicts governed by IHL.
- The basis on which that reach is to operate and the principles which govern it have not been fully developed.
- However, some of the consequences of that case law have caused and continue to cause the gravest concerns in terms of their potential impact on fighting effectiveness, the proper conduct of military operations and the sheer litigation and procedural burden attached to that extension of jurisdictional reach.

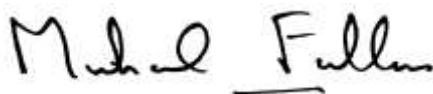
Some notable examples include (and it is fully recognised that the principles have not all been finally set) the following:

- Concerns about matters as basic as the power to detain insurgents in Afghanistan. A case currently before the English courts has led to judgments with the result that there would have been no power to detain (beyond a very short period) a person who was a local Taleban commander, detained after a fire-fight and subsequently discovered to have traces of improvised explosive devices on his person. That is a wholly unacceptable way in which to conduct military operations, protect British servicemen and accomplish the mission set up by the UN.



- The same case even raised serious questions about whether British servicemen had greater powers to use lethal force than a local Afghan citizen. Again, that cannot sensibly form the basis for the conduct of military operations.
- There is serious uncertainty about how IHL and ECHR interact in armed conflict. The IHL represents the bespoke and internationally agreed set of principles governing armed conflicts. Any uncertainty is damaging in a context in which clear rules are at a real premium.
- The Iraq and Afghan contexts have led to a flood of litigation – litigation about those detained; litigation about those killed; litigation about the existence, nature and extent of an obligation under the ECHR to investigate large numbers of deaths and other incidents. The litigation has involved thousands of claims being made and having to be defended and dealt with: involving claims for money and claims in public law seeking investigations or declarations.
- One way in which that flood of claims has had to be dealt with is the setting up of the Iraq Historic Allegations Team (IHAT). It has had to consider and investigate thousands of claims, sometimes many years after the event (the claims in many cases being collected by a local agent working with an English firm of solicitors). It is operating on the scale of a police force in its own right and has to be funded accordingly. Another way is the setting up of costly public inquiries – one of which (Al-Sweady) cost millions of pounds both in litigation and then in the public inquiry itself, only to conclude that the allegations were based on lies.

The Annex to this letter gives answers to your specific questions.

A handwritten signature in black ink that reads "Michael Fallon". The signature is written in a cursive style with a horizontal line under the name.

**THE RT HON SIR MICHAEL FALLON KCB MP**

**GOVERNMENT RESPONSE TO THE QUESTIONS POSED IN THE JOINT COMMITTEE ON HUMAN RIGHTS' LETTER DATED 13 OCTOBER 2016**

***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”?***

We have received nearly 1,200 civil compensation claims relating to the Iraq conflict and around 1,400 judicial review applications. Many of these claims have been unaccompanied by evidence. Furthermore, it is the view of the Government, based on the findings of the Al-Sweady public inquiry and other evidence, that a large number of these claims is likely to be exaggerated or spurious. We expect further that very few indeed will be the subject of any action as a result of the investigations of the Iraq Historic Allegations Team (IHAT).

***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 amount of compensation that has been paid out by the MoD***
- ***The total amount of legal aid payments made in relation to such claims***

MOD records indicate that the total number of common law compensation claims arising from operations in Iraq is 1,191 and that the corresponding figure for Afghanistan is 99, giving a total figure of 1,290. Of these, 324 Iraqi claims and 1 Afghan claim have been settled by the MOD. Virtually none of the other cases has yet been determined by the Courts as they are queued behind a small number of lead cases. The MOD has made compensation payments totalling £19.8 million in the cases that were settled. It should be noted that the vast majority of these payments were made as a result of an ECtHR finding that Iraqi claimants had been detained illegally, which has now been called in question by a subsequent judgment. The MOD has been told that it is not possible to state the total amount of legal aid payments made in respect of these claims.

**Q3 Please provide as detailed a breakdown as possible of the cases which have been dealt with by the Service Justice System, including i) total number of cases, ii) the nature of the cases, and iii) the outcomes.**

IHAT has received 3,388 allegations concerning UK Forces in Iraq, ranging from unlawful killing to common assault. Of these, 1,666 allegations have already been sifted out, mainly on the basis that they were duplicates or would not amount to an offence even if true. A further 690 (113 allegations of unlawful killing and 577 allegations of ill-treatment) have been closed, or are in the process of being closed. We expect the IHAT caseload to be down to about 60 investigations in July 2017 and for its work to be completed in 2019.

Operation NORTHMOOR investigates allegations against UK Forces in Afghanistan. It has received 646 allegations, ranging from common assault to unlawful killing. This includes 318 allegations of criminal behaviour, and 328 non-criminal allegations (such as cultural insensitivity). To date 89 cases have been discontinued or recommended for discontinuation by the investigators.

**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?**

It is not simply its extra-territorial application. It is that and its extension importing Articles designed for peacetime into the sphere of armed conflict. This approach has resulted in decisions that will have a significant impact upon the operational effectiveness of the Armed Forces, for example, their ability to detain those suspected of involvement in insurgent activity, including the manufacture of Improvised Explosive Devices that are used against our troops.

**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?**

No.

**Q6 Do the UK's NATO allies which are members of the Council of Europe also consider there to be a problem which needs addressing? What discussions has the government had within NATO about this issue?**

As far as we are aware, others in the Council of Europe have not faced legal challenges on the same scale that we have received here.

**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?**

Yes.

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

Article 15 may apply to any significant military operation capable of falling within the concepts used in that Article.

**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?**

Article 15 refers to a "war or other public emergency threatening the life of the nation". We are not aware of any definitive interpretation.

**Q10 What derogating measures does the Government envisage?**

This would depend entirely on the circumstances existing at the time at which the decision was being considered. Some ECHR Articles cannot be derogated from. The Articles which, to date, have caused particular concern are Articles 2 and 5.

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

The Government continues to work on a variety of measures, such as advancing arguments in litigation before the European Court of Human Rights that IHL should be better accommodated when judgments relate to combat situations; and working with international organisations to strengthen international commitment to IHL.

**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?**

The full set of measures which the Government will be proposing has not yet been announced. All of them will be beneficial. The question whether derogation is appropriate and justified in particular future circumstances will take into account the full set of measures in place at that time.

**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)?**

Derogating 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.")

***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.***

Article 4 of the International Covenant on Civil and Political Rights also permits States to derogate from certain rights, provided the conditions set out are met. If and when the UK does derogate, care will be taken to ensure that it is wholly consistent with our other international legal obligations as required by Article 15 of the ECHR.

***Q15 Please identify precisely which obligations under the Convention the government intends to derogate from.***

No decision has yet been taken to derogate.

***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 (the right to life), Article 3 (the right not to be subjected to torture or to inhuman and degrading treatment), and Article 5 (the right to liberty)?***

Many of the claims allege breaches of multiple Articles: the vast majority of the claims notified allege violations of Articles 2, 3 and 5.

***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?***

We have identified no such implications and would not expect any. The Convention explicitly provides for derogation subject to specific conditions.

***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?***

We have informed the Secretary General and the Commissioner for Human Rights of our policy.

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

The procedure is laid out in section 14 of the Human Rights Act. A designation order can be made by the Defence Secretary, which could come into force from the date made. A designation order under the Act must be subsequently approved by each House of Parliament within 40 days from that date if the derogation remains in force that long.

***Q20 Will the proposed “presumption to derogate from the ECHR in future conflicts” be contained in legislation?***

No.

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

Derogation is effected by notification to the Secretary-General of the Council of Europe, and the Human Rights Act already contains provision for Parliamentary approval of any derogation in effect for longer than forty days.

***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 legislation before it comes into effect?***

The procedure is set out in the Human Rights Act, which recognises that in emergency circumstances derogation may need to be made immediately and therefore requires Parliamentary approval if the derogation is to last longer than forty days. Everything will be done to facilitate early Parliamentary scrutiny if and when we do derogate.

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

The forum in which any challenge would take place would depend on the circumstances. As seen in the case of *A & others 2004 [UKHL 56]*, challenges have been brought in relation to previous UK derogations from the ECHR and determined by the UK courts.

***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?***

The current legal framework provides adequate and appropriate judicial scrutiny, and that there is no requirement to make any additional provision in the derogating measure.

***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 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?***

All relevant Ministers, including the Secretaries of State named, have been fully consulted (the Government does not by convention disclose whether the Attorney-General has been consulted). Responsibility for any given derogation to be made in future will remain with the Defence Secretary, who is in the best position to decide

whether the conditions which must be in place before a derogation is possible are satisfied in the circumstances of the particular military operation concerned.