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Rt Hon Sir Lindsay HOYLE MP
Speaker of the House of Commons of the United Kingdom

Strasbourg, 30 October 2020

Dear Speaker, dear Members of the House of Commons,

As Council of Europe Commissioner for Human Rights, my mandate is to contribute to the effective observance of human rights in and by all 47 member states of the Council of Europe, including the United Kingdom. An important part of my work is to engage in dialogue with governments and parliaments of member states, and help them address possible human rights issues in their laws and practices. In this instance, I am writing regarding Overseas Operations (Service Personnel and Veterans) Bill, which will soon be subject to the report stage and subsequently a third reading and vote in your House. As numerous others have already noted, the bill raises questions as regards the fight against impunity for serious human rights violations and access to justice for victims. These concerns relate to a number of international human rights obligations to which the United Kingdom is bound, including standards set in the European Convention on Human Rights (hereinafter, "the Convention").

A key concern is the introduction of a presumption against prosecution, which arises five years after the commission by a service member abroad of an alleged human rights violation. This presumption would run counter to several obligations under the Convention. Under Articles 2 and 3 of the Convention, states have a duty to secure the right to life and the prohibition of torture and ill-treatment by putting in place effective criminal law provisions, backed up by measures for the prevention, suppression and punishment of breaches of such provisions. Although the bill does not completely prohibit prosecution after five years, the requirements to be met for prosecution to take place (the 'triple lock') are particularly onerous, and as such this five-year period may act as a *de facto* statute of limitations for serious human rights violations of this kind. Furthermore, while the bill addresses prosecution, and not investigation, the two matters are clearly connected. For investigations to be effective, they must be capable of leading to the identification, prosecution and punishment of those responsible. Investigations into overseas operations often take considerable time. It is very likely that, by the time these investigations have been completed, the five-year period set out in the bill will have elapsed. Given the vastly reduced chances of prosecution after this period, this may mean that many investigations are unable to meet the requirement, under the Convention, of being capable of leading to the punishment of those responsible.

The introduction of a presumption against prosecution in the manner proposed in the bill will significantly interfere with the fight against impunity for serious human rights violations. While the government acknowledges that certain violations are so heinous that they should never be subject to a presumption against prosecution, in particular sexual violence, the formulation of the bill leaves a number of serious human rights violations, as well as international crimes, such as unlawful killings, war crimes, crimes against humanity and torture, open to such impunity. Combating impunity for such violations occurring under their jurisdiction, whether at home or abroad, is a key obligation for any government and one that the UK government frequently reiterates as part of its own global human rights agenda. Its importance has also been reiterated in the Guidelines on eradicating impunity for serious human rights violations, adopted by the Committee of Ministers of the Council of Europe in 2011.

In this respect, I must note that the removal of a number of safeguards against impunity through this bill follows repeated failures of successive governments to ensure accountability and combat impunity for documented violations of international human rights law occurring in overseas operations. This includes, in particular, the refusal to launch a judge-led inquiry into renditions and detainee mistreatment post 9/11, for which I and many others have called.

I am also concerned about the provisions that would limit the possibility for domestic courts to extend the time limit for filing personal injury claims or claims under the Human Rights Act, and set a hard deadline for such claims, regardless of whether a longer time frame would be necessary to ensure victims are able to exercise their right to an effective remedy. This will likely undermine victims' rights to prompt and adequate reparations.

As regards the introduction of duty to consider derogating from the Convention each time there is a significant overseas operation, important questions remain. These include whether situations occurring abroad, far away from the territory of the United Kingdom, can in fact meet the requirements for derogation under Article 15 of the Convention. Furthermore, by legislating for such a duty, the government is transforming the question of derogation, which should be exceptional, into a normal feature of the preparation of all overseas operations. While there is no duty to derogate as such, the bill sends a signal that, *prima facie*, the United Kingdom's human rights obligations form an impediment to any such operation, rather than an integral part of the framework which overseas personnel should seek to uphold in all their actions. In this respect, the duty to consider derogation may serve as a future incentive to avoid scrutiny and accountability for serious human rights violations.

I have taken note of the government's stated objective of ensuring, through this bill, that service personnel are not put in distressing situations following unfounded allegations of wrongdoing. While any avenue for access to justice may be open to abuse, and there have been well-publicised examples of this in the United Kingdom, this should not result in cutting off access to justice for victims generally. In many member states, including the United Kingdom, issues of unfounded claims have eventually been dealt with effectively by the national courts. It is important that they are equipped to do so, including by ensuring adequate resources, without compromising access to justice generally. Furthermore, many others have noted that problems that have arisen for service personnel in this regard have mainly resulted from the way that investigations were carried out, rather than from prosecutions. As such, the logical focus would be on improving the effectiveness of investigations, rather than legislating for restrictions on the ability to prosecute, which does not only fail to address the government's stated concerns, but also does serious damage to human rights protections.

The discourse around the bill has focused on 'vexatious claims' and has sometimes characterised such claims as 'lawfare'. This must not draw away much-needed attention from holding perpetrators to account and achieving justice for victims of serious human rights violations. At times, it has been implied that having recourse to judicial mechanisms, which is an integral part of the rule of law, amounts to a hostile act against service personnel or the United Kingdom as a whole. This strikes me not only as inappropriate, but also as intimidating to potential claimants and the legal professionals who assist them. While the issue at hand is one that triggers deep emotions, it is of the utmost importance that the way it is discussed acknowledges the legitimacy of bringing complaints or claims in cases where people consider that their human rights have been violated, as well as their right to receive legal assistance.

The various proposals in the bill discussed above give cause for grave concern about their compliance with international human rights standards. They would also have the likely side-effect that victims will be forced to turn to international bodies for access to justice more frequently, as effective enforcement of the United Kingdom's human rights obligations at the national level would be significantly diminished.

For the reasons set out above, I call on all Members of the House of Commons, in their consideration of the bill, to reject any measures that would undermine the fight against impunity for serious human rights violations or the right of victims to reparations.

I would be grateful if you could ensure that all Members of the House receive a copy of this letter.

Sincerely,



Dunja Mijatović