Cour
Pénale
Internationale

International
Criminal
Court

Le Bureau du Procureur
The Office of the Prosecutor

Rt Hon Ben Wallace MP
Secretary Of State
Ministry Of Defence
Floor 5, Zone D, Main Building
Whitehall London SW1A 2HB

Ref.: OTP2021/003417

Date: 3 March 2021

Dear Mr Wallace,

I am writing further to your letter of 21 January 2021, sent in response to our final report on the preliminary examination into the situation in Iraq/UK. Your letter states that you wish specifically to clarify references to the Overseas Operations (Service Personnel and Veterans) Bill in our report. You observe that since our report refers to commentary from third parties, both in respect of the UK Government's intent in introducing this piece of legislation, and in terms of what the measures in the Bill will actually do, you consider it important to set out several clarifications. I have thereafter obtained confirmation that I may make your letter public.

I welcome the UK Government's reaffirmation of its commitment to upholding and strengthening the rule of law. In this respect, your letter states that the Bill does not create 'de facto immunity' for serving or former Service personnel in respect of serious crimes, nor a legislative bar to investigations or prosecutions, such as a statute of limitations or amnesty, but rather a rebuttable presumption that leaves a prosecutor with full discretion to prosecute where they consider it would be appropriate to do so.

I note that your clarifications on this matter are consistent with the position previously conveyed by the UK Government to our Office on 24 June 2020, which we cited in our report. Nonetheless, I fear that some scope for uncertainty still remains as to the extent and execution of the UK's duty in the light of the wording of the proposed legislation. As we observed in our report, the inclusion of a section on 'excluded offences' suggests that the legislation, were it to come into force, would have the potential to impact the ordinary course of criminal inquiries into certain categories of conduct. Accordingly, we continue to be of the view that the UK Government's assurance, previously conveyed

to the Office, that "all allegations of serious offences, including those within the jurisdiction of the Court, will be investigated and, where appropriate, prosecuted" would be clearer if all crimes within the jurisdiction of the Court were set out in the exceptions section of the draft legislation.

In this regard, I appreciate your clarification that the statutory presumption in the Bill should not be equated with a statute of limitations. We have also had the opportunity to read the response of the UK Government to the report of the Joint Committee on Human Rights on the Bill, which sets out the Government's view that the statutory presumption would fall outside the scope of article 17 of the ICC Statute. Nonetheless, I feel duty bound to emphasise that were the effect of applying a statutory presumption be to impede further investigations and prosecution of crimes allegedly committed by British service members in Iraq – because such allegations would not overcome the statutory presumption – the result would be to render such cases admissible before the ICC, as a result of State inaction or alternatively State unwillingness or inability to proceed genuinely under articles 17(1)(a)-(c). In this regard, we remain committed to monitoring the development of the Bill and its impact, to the extent it may warrant the Office revisiting its prior assessment in the light of new facts or evidence.

I further note your Government's important commitment to avoid, and not incentivise delays, and to ensure that any future incidents are reported and appropriately investigated at the time - thereby also reducing the need for historic investigations. As you are aware, our report echoed the view of the High Court in *Al Skeini*, as well as the European Court of Human Rights, that the initial investigative responsibility of the RMP had not been discharged satisfactorily at the time of the events, which itself necessitated the initiation of historical investigations by IHAT and SPLI. As we noted, these initial failings contributed not only to frustrating genuine RMP investigations, but necessarily impacted on the quality of later IHAT and SPLI inquiries.[1]

While I again very much welcome your commitment on the issue of timely investigations, I do feel it important to reiterate our concern if the proposed legislation were to be applied retrospectively to ongoing allegations being considered by SPLI, which as we understand concern some of the most serious allegations that have been the subject of the historical investigations process. In our previous correspondence with the UK authorities on this matter we were provided the assurance, made by the Director of Service Prosecutions, "that all prosecutorial decisions that are within the scope of the Iraq preliminary examination will have been taken before the Bill becomes law. Therefore, UK processes will be completed before the Bill becomes law. Given this, the Bill will have no impact on any of those cases currently with the SPLI and/or SPA."[2] I note that this projection is based on the anticipation that no conflict will arise in practice, according to working assessment of the Director of Service

[1] Situation in Iraq/UK - Final Report, 9 December 2020, paras. 443-447.
[2] *Ibid*., para. 475.

Prosecutions. Nonetheless, the Office has yet to receive clarification on the UK Government's position on the important matter of whether the legislation could indeed take retroactive effect with respect to any SPLI and/or SPA cases that remained pending upon its adoption.

As you know, our concern extends also to the possible application of the proposed legislation to new allegations arising from the UK's military deployment in Iraq, and the possible impact this may have on the ability and/or willingness of the UK authorities to investigate and/or prosecute relevant crimes. In our view, this concern is not merely hypothetical, but goes to the heart of the complementarity framework envisaged in the Rome Statute.

With respect to the final point raised in your letter, I welcome your important clarification that "[i]t is not the UK Government's position that all claims are vexatious". For the reasons set out in our report, there is considerable reason to treat with caution the suggestion that the allegations which have been the subject of criminal or civil proceedings in the UK resulted from vexatious claims, or to characterise one of the main solicitor firms involved, Public Interest Lawyers ('PIL'), and its former principal Phil Shiner, as vexatious litigants. Indeed, your letter provides a more accurate reflection of the situation when you observe that, "we have settled many of the civil claims made by Iraqi nationals against the MOD and we fully engaged with the courts to deal with those cases" and that "[a]s the Officer Commanding Service Police Legacy Investigations briefed your Office in February 2020, the vast majority of the allegations (71 out of 82) in those investigations that were still ongoing had originated from cases brought by Public Interest Lawyers".

Having said this, I note your subsequent observation that, nonetheless, "it is widely accepted that a number of the cases brought by Public Interest Lawyers on behalf of Iraqi nationals were baseless". I believe it is in the common interest to clarify the Office's position in this regard since, notwithstanding your important clarification above, the perceived problem of vexatious or baseless claims appears to dominate much of the public discourse, which has in turn informed the debate over and justifications for the Bill.

As stated in our report, we found a reasonable basis to believe that, in the incidents which formed the basis of our findings, Iraqi detainees were subjected to forms of abuse with varying levels of severity that would amount to torture, cruel treatment or outrages against personal dignity, and in some cases wilful killing, and the rape of one person and the commission of sexual violence against others. That the various allegations investigated by IHAT and SPLI did not result in prosecutions by the SPA does not mean that these claims were all vexatious. At most, it means either that IHAT or SPLI were not satisfied that there was sufficient credible evidence to refer the cases to the SPA, or that the SPA was not confident that those cases which were referred had a realistic prospect of conviction in a criminal trial. As IHAT noted to the Office, a significant and recurrent weakness in the cases that it investigated was the dearth of forensic evidence and

inconsistencies in witness testimony given the historical nature of the investigations, years after the events. This was also due – at least in part – to the inadequacies of the initial investigations conducted by the British army in theatre. This is a recurrent feature of historical criminal investigations. At the same time, the dearth of criminal prosecutions contrasts with the large number of civil claims resolved either before the High Court, where evidence has been challenged and tested, or through out-of-court settlement. These have involved claims with respect to hundreds of victims alleged to have suffered conditions of detention and practices amounting to inhuman or degrading treatment. Other public inquiries, commissioned reviews and policy mechanisms within the MoD have concluded that practices which occurred during the early rotations of Operation TELIC in particular fell below the required standards of conduct. This in turn led to several rounds of amendment to policy and practice, some of which were revised following further judicial review, and some of which are ongoing. Thus, to characterise these various processes as arising from, or somehow impacted by, a body of vexatious and baseless claims would appear to mischaracterise the events, as well as to misjudge the distinct question of whether, years after the events, there is sufficient evidence to convict in criminal cases.

Our own preliminary examination analysed in great detail the issue of vexatious allegations and concluded that it had been considerably exaggerated as part of the discourse justifying the proposed legislation.[3] As you are well aware, the issue arose after the findings in the Al Sweady Inquiry which found that the six core Iraqi complainants (all represented by PIL) had engaged in "deliberate lies, reckless speculation and ingrained hostility", and expressed concerns over how PIL and another firm of solicitors, Leigh Day, had handled the allegations. As we noted in our report, although the Al Sweady Inquiry found the most serious allegations of torture and unlawful killing involving the six claimants in that case to be baseless, it nonetheless upheld as proven other lesser allegations of ill-treatment. Given its prescribed mandate, the Al Sweady Inquiry did not judge other Iraqi claimants and the underlying facts attached to their complaints. As you observe, numerous other claims have been accepted by UK courts, the Baha Mousa Inquiry, the various IFIs, and a significant volume of compensation awards at the civil law standard have been settled out of court by the MoD. Moreover, official UK bodies and inquiries, including those of the MoD (such as the SIWG), have accepted as proven that various prohibited acts complained of (such as the use of the five techniques) occurred as a matter of practice at least during the early period of Operation TELIC.

Nonetheless, the discourse concerning vexatious claims was given further credence by the subsequent decision of the Solicitors Disciplinary Tribunal following the findings of the Al Sweady Inquiry, which, in a two-day summary hearing with unrepresented respondents, found Phil Shiner guilty of 12 allegations of professional misconduct. What is less reported, however, is the outcome in parallel proceedings brought before a different Solicitors Disciplinary Tribunal against the law firm Leigh Day and its solicitors Martyn

[3] *Ibid*., paras. 313-350, 472-474.

Day, Sapna Malik and Anna Crowther, who together with PIL had been referred to the Solicitor Regulatory Authority following the Al Sweady Inquiry. This is relevant because both disciplinary tribunals dealt with substantially the same subject matter, namely: the tripartite relationship between PIL, Leigh Day and their intermediaries. In that hearing, which heard evidence over a six-week period in contested proceedings, the Solicitors Disciplinary Tribunal came to the opposite conclusion and found the allegations against Leigh Day and its solicitors not proven. The Tribunal in that case even went so far as to explain why it had reached such a different outcome to its sister tribunal in the PIL disciplinary proceedings by noting, *inter alia*, that the earlier disciplinary proceedings did not have the benefit of evidence from the respondents in the case before it, nor the advantage of hearing some of the arguments put forward on behalf of those respondents. As you will be aware, this finding was later upheld on appeal. Notably, the High Court examined a number of events and practices central to the disciplinary proceedings - involving Phil Shiner and Martyn Day and their common intermediary - and concluded that they were not improper, comported with permitted practice at the time, and appeared justified.[4]

Notwithstanding this differential outcome in the two sets of disciplinary proceedings concerning substantially the same factual allegations, the disciplinary findings against Phil Shiner/PIL appear to have reinforced a perception, shared by the UK authorities, some Members of Parliament and some segments of the media, that either some or all claims concerning the conduct of British forces in Iraq were vexatious and amounted to harassment of current and former service personnel. This in turn precipitated, beyond the early closure of IHAT, the introduction of the Overseas Operations (Service Personnel and Veterans) Bill to combat the perceived problem of 'vexatious litigation'.

In this respect, as we stated in our report, the continuing perception that the entire body of claims, involving hundreds of claimants, were baseless or spurious considerably exaggerates or misstates the findings of the Al Sweady Inquiry and disciplinary findings against Phil Shiner/PIL. I am heartened that your letter dissociates itself from such a blanket assertion. But I do believe some ambiguity is left by your observation that a number of such cases were baseless.

Allow me to conclude with the following observations, offered in the spirit of partnership and vigilance that characterises all our interactions with States. I believe we would all lose, victims, the Court and ICC States Parties, were the UK to forfeit what it has described as its leading role, by conditioning its duty to investigate and prosecute serious violations of international humanitarian law, crimes against humanity and genocide on a statutory presumption against prosecution after five years. In terms of its stated objective, the perceived culture of vexatious litigation that the Bill purportedly seeks to curtail does not match the findings of our years long preliminary examination. Moreover, the existing mechanisms within the UK appear adequate to guard against the threat of

---

[4] *Ibid.*, paras. 320-321.

baseless claims: the risks arising from historical investigation being rather the paucity of investigations leading to referrals for prosecution and the absence to date of any prosecutions arising from the work of IHAT/SPLI and the SPA. However, to the extent such legislation is adopted, I consider it is my duty to urge your Government to ensure that the exemption clause extends to all crimes within the jurisdiction of the Court, lest in a future investigation by the Office the ICC find the UK unwilling and/or unable to investigate and prosecute relevant offences as a result of the operation of the proposed statutory presumption against prosecution.

I hope our report has helped to contribute its share in clarifying the Office's position with respect to these important matters. We also take note of the forward-looking review the UK Government has commissioned on the conduct of investigations relating to overseas operations and the prosecutorial process. I thank you again for your time and consideration in making the clarifications you set out, and I emphasise my Office's readiness to continue to play its role as it seeks to discharge the mandate placed upon it by ICC States Parties.

Yours sincerely,

Fatou Bensouda
Prosecutor