



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

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Date: 7 April 2021

Dear Mr Wallace,

I am writing further to your letter of 24 March 2021, concerning a communication the Ministry of Defence has received from solicitors acting for Mr Robert Campbell, a former Major in the UK Army. You observe that Mr Campbell was the subject of allegations domestically in the UK in relation to the death of Sayeed Shabram, who drowned in the Shatt al-Arab river near Basra on 23 May 2003. You note that although Mr Campbell is not specifically named in our report, the findings we have set out with respect to the incident in question have given rise to concerns by Mr Campbell, which you share, effectively linking him to the possible commission of war crimes. You state that while the UK Government acknowledges that war crimes were committed by UK Forces in Iraq, the Office's reporting on this specific incident constitutes an injustice that warrants correction given the outcome of Iraq Fatality Investigation ("IFI") carried out by Court of Appeal judge, Baroness Hallett.

I confirm that we have received a number of communications from Mr Campbell, to which we have responded in attempts to explain the nature of our findings and to clarify the misapprehensions that have arisen and evidentially continue to persist. I am happy to take up the opportunity to set these out below. You should feel at liberty to convey the below to Mr Campbell's solicitors.

I believe the concerns expressed arise from a misunderstanding as to the nature and scope of our findings.

As you are aware, the purpose of a preliminary examination is to determine whether the opening of an investigation by the International Criminal Court ("ICC" or the "Court") is warranted. To reach conclusions on a preliminary examination, the Office must consider issues of subject-matter jurisdiction, admissibility (in terms of complementarity and gravity) and the interests of justice. It

should be stressed that the assessments made for this purpose are of a threshold-setting nature: they are not, and cannot be, conclusive as to questions of individual innocence or guilt. It goes without saying that all persons suspected of crimes within the jurisdiction of the Court are presumed innocent until proven guilty before the Court at trial. The purpose of a preliminary examination is to answer the antecedent question of whether there is a reasonable basis for the Office to proceed with an investigation at all. In the context of the Iraq/UK report, this process may be summarised as a three-step inquiry, answered in sequence: Are there allegations warranting potential investigation by the ICC? Have domestic investigations into these allegations been carried out? Is there a basis to question their genuineness?

Turning to the first question, at paragraph 78 of our report, we set out our findings that there was a reasonable basis to believe that the crime of wilful killing occurred in a number of incidents, including that of Sayeed Shabram. What this means is that this is an allegation that in principle would warrant criminal investigation, in the context of the Office's wider inquiry into the treatment of persons in UK custody or control. We note that this is the same approach that was taken by IHAT: that the allegation concerning the death of Sayeed Shabram warranted investigation.

In this respect, as Chambers of the Court have emphasised, incidents identified at the article 15 stage as meeting the reasonable basis standard should be considered as examples of potential criminality within the situation, in light of the threshold requirement of determining whether subject-matter jurisdiction is established. This is a preliminary procedural step to opening an investigation (when all other relevant conditions are met) based on the information available at the preliminary examination stage. It is not a finding of guilt or a final determination of the facts, which could only be made after a fully-fledged investigation.

In the next section of the Office's report, at paragraphs 222-226, we provided an overview of the UK's investigations into these allegations. Our report recalled the different steps taken domestically, including with respect to the death of Sayeed Shabram. The Office summarised the outcome of IHAT's investigation, which concluded that the allegation warranted referral for prosecution to the Service Prosecuting Authority ("SPA") on the basis of manslaughter. We noted the subsequent decision of the SPA to decline prosecution on the basis that there was not a realistic prospect of conviction in the case. We noted that this decision was taken on the assessment that the new evidence gathered by IHAT was insufficiently reliable to overcome the original conflict in the evidence between the 2003 Iraqi witnesses on the crucial issue of whether Mr Shabram was pushed or jumped into the water. As you note in your letter, we further cited to the findings of the IFI inquiry into the circumstances of Mr Shabram's death, initiated by Sir George Newman and completed by Baroness Hallett. We quoted directly and at some length from the IFI reports and the IFI's conclusions at paragraphs 225-226 of our report.

The next section of the Office's report – Section 10 (on 'Unwillingness Genuinely to Proceed'), from paragraph 280 onwards - goes on to examine whether there is a reason to call into question the different findings of the competent UK authorities where investigations and/or prosecutions had been discontinued. Namely, the section examines whether there was a basis to conclude that these investigations and/or prosecutions had not been conducted genuinely, in the sense of an intention to shield persons from criminal responsibility. In this respect, as you know, our Office is not bound by the findings of domestic bodies, whether they be inquiries undertaken against a criminal law standard, such as those carried out by IHAT/SPLI or the SPA, or broader judicial inquiries such as those undertaken by the IFI. The very purpose of the admissibility provisions in article 17 of the ICC Statute is to enable the Court to examine whether relevant criminal proceedings, to the extent they address the same categories of persons and conduct, may have been vitiated by a lack of genuineness.

As you are aware, the Office's findings on the issue of genuineness were quite critical of a number of aspects of the UK process and examined various factors. Ultimately, however, the Office decided there was no basis at this time to open an ICC investigation. In particular, our report concluded that, in the context of either article 18 or article 19 proceedings before the ICC, and specifically with respect to the allegations on which the Office had made subject-matter assessments, there was not sufficient evidence, upon which the Office could rely, to demonstrate that the investigations or prosecutions that were undertaken by the competent UK authorities had not been conducted genuinely, regarding any intent to shield persons from criminal responsibility.

Accordingly, the result of the three-step inquiry outlined above led the Office to the conclusion that the decisions taken by the competent UK authorities with respect to the allegations cited in our report, including with respect to the death of Mr Shabram, based on the information available at this time, could not be characterised as having been vitiated by unwillingness to carry them genuinely. Specifically, the report states that the Office was not satisfied that it could demonstrate in proceedings before the Court that the investigative actions taken and/or the prosecutorial decisions made by the competent authorities were vitiated by a lack of willingness to genuinely investigate or prosecute.

To alter our report to state that the reasonable basis standard was not met with respect to this incident would be to suggest that the incident involving the drowning of Mr Shabram did not in fact warrant investigation. This would entirely misstate the nature of our findings. It would also be incongruent with how both IHAT and the IFI treated the allegation, which they proceeded to investigate under their separate mandates. That the ultimate conclusion of the SPA and Baroness Hallett was that the allegation could not be proven does not alter the fact that an investigation into the alleged commission of war crimes by members of the UK armed forces at the time was warranted.

We have set out the matters above in full to Mr Campbell, as well as in response to media inquiries. Nonetheless, it is clear that misunderstandings persist. We hope that the explanations set out above, which we had hoped should have been clear from a reading of our report, have addressed the matter to your satisfaction. In view of your expressed desire for a right of reply, I am also happy to publish our correspondence on the Court's website on the page dedicated to our final report.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Fatou Bensouda', written over a horizontal line.

Fatou Bensouda  
Prosecutor