



SECRETARY OF STATE
MINISTRY OF DEFENCE
FLOOR 5, ZONE D, MAIN BUILDING
WHITEHALL LONDON SW1A 2HB

Telephone 020 7218 9000
Fax: 020 721 87140
E-mail: defencesecretary-group@mod.gov.uk

4.7.4

21 January 2021

Dear Madam Prosecutor,

I am writing in response to the final report of your preliminary examination into the alleged misconduct of UK forces in Iraq, and specifically to clarify references to the Overseas Operations (Service Personnel and Veterans) Bill.

The UK Government welcomes your decision to close the preliminary examination of the allegations of abuse by UK Service personnel in Iraq and your confirmation that you will not seek authorisation to investigate. This outcome appropriately reflects the UK's efforts and determination to ensure that where allegations have been made of our Armed Forces personnel having committed criminal offences, these have been thoroughly investigated. In your report, you make reference (paragraphs 460-479) to the work we are doing to introduce a better legal framework for dealing with criminal and civil allegations during overseas operations, through the introduction of the Overseas Operations (Service Personnel and Veterans) Bill. As the 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, I consider it important to clarify the following:

All the measures within the Bill are compliant with our international legal obligations.

The UK Government remains committed to upholding and strengthening the rule of law, and to maintaining the UK's leading role in the promotion and protection of human rights and democracy.

The criminal measures (in Part 1 of the Bill) will not create a risk of impunity.

The statutory presumption measure is consistent with the UK's historic commitment to international criminal justice and the rule of law, and the UK's obligations under the Rome Statute. As we affirmed in the Rome Statute, the most serious crimes of concern to the international community as a whole must not go unpunished and their effective prosecution must be ensured by taking measures at the national level. It remains the UK's position that it is the duty of every State to exercise its

criminal jurisdiction over those responsible for international crimes. As such, the statutory presumption measure will have no bearing on the ability or willingness of independent investigators or prosecutors in the UK to investigate or prosecute alleged crimes within the jurisdiction of the ICC. It does not create, or come close to creating, 'de facto immunity' for serving or former Service personnel in respect of serious crimes. Rather, it creates a rebuttable presumption that leaves a prosecutor with full discretion to prosecute where they consider it would be appropriate to do so. As I have indicated, it is not a legislative bar to investigations or prosecutions, such as a statute of limitations or amnesty.¹

The measures in the Bill do not incentivise delays.

We recognise the difficulties and length of time that it can take for investigations of allegations in relation to events occurring during military operations to be completed, particularly when allegations arise some years later. It is, however, to the benefit of both alleged victims and alleged offenders that the investigation of allegations is conducted as expeditiously as possible, so that decisions on whether or not to prosecute are made without delay in the interest of all parties knowing the outcome of these proceedings. As I explain below, we will take all necessary steps to try to ensure that any future incidents are reported and appropriately investigated at the time. This will benefit victims and reduce the risk for our personnel from historical investigations – and particularly re-investigations – into their conduct.

It is not the UK Government's position that all claims are vexatious.

As you know, 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. As 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. However, it is widely accepted that a number of the cases brought by Public Interest Lawyers on behalf of Iraqi nationals were baseless. The introduction of time limits on civil compensation claims and claims under the Human Rights Act is not intended to prevent meritorious claims.

¹ See also the analysis by John Larkin QC, former Attorney General for Northern Ireland, who rejects, “..any suggestion that the Bill would create immunity or impunity or a lock on prosecutions for relevant offences,” and concludes that, “While one might question the Bill in many ways, it is badly mistaken to portray as “impunity” the Bill’s attempt to make limited provision for the future peace of mind of those from whom we ask so much.” <https://policyexchange.org.uk/publication/overseas-operations-bill/>

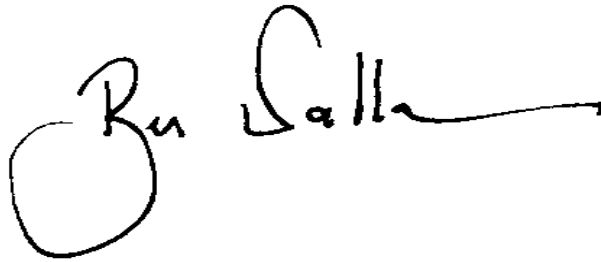
We accept that where the actions of our personnel have fallen below the highest standards, both they and we must be held to account. However, it is in the interests of both claimants and defendants for this to be done within a reasonable timeframe; and timely claims will help to reduce the risk that memories have faded or evidence has gone stale. In *Stubbings v UK (1996)*, a judgment that has been repeatedly confirmed, the European Court of Human Rights upheld an absolute six-year limitation period, importantly and noted the need in civil litigation for limitation periods because they ensure legal certainty and finality, the avoidance of stale claims, and prevent injustice where adjudicating upon events in the distant past involves unreliable and incomplete evidence because of the passage of time. We therefore consider six years to be a reasonable timeframe for claimants to gather the necessary evidence to bring a claim.

You may be aware that, to complement the Bill, I announced on 13 October 2020 a review of the conduct of investigations relating to overseas operations and the prosecutorial process, to be led by Sir Richard Henriques. Sir Richard is a retired High Court judge with a vast amount of criminal experience, who sat regularly in the Court Martial Appeal Court, and has carried out reviews previously, including for the Crown Prosecution Service and the Metropolitan Police. This review will help to provide greater certainty for Service personnel being investigated and for potential victims while ensuring that allegations are addressed without undue delay. One of the focuses of the review (the terms of reference for which are enclosed) is on setting the context for the future so that we can be sure that, for any complex and serious allegations of wrongdoing against any of our forces that may occur on overseas operations, the most up to date and future-proof framework, skills, and processes are in place. Particular attention will be paid to how the Armed Forces will facilitate timely consideration of serious and credible allegations of criminal misconduct and, where appropriate, their swift and effective investigation. Sir Richard's review therefore builds on the review of the Service Justice System by His Honour Shaun Lyons and Sir Jon Murphy, and on the work to implement their recommendations.

Your report also references the recent report on the Overseas Operations Bill by the Joint Committee on Human Rights. You may therefore be interested to note that the Government has responded to the Committee on its report's conclusions and recommendations, and the Committee has now published this response.

In conclusion, I would be happy for my officials to provide you with a more detailed oral brief on the proposals contained within the Overseas Operations Bill, if you would find this useful.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Ben Wallace". The signature is written in a cursive style with a large, circular initial "B" and a long, horizontal flourish at the end.

THE RT HON BEN WALLACE MP