In the matter of an investigation into the death of Mr Muhammad Salim

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PUBLIC STATEMENT OF THE INSPECTOR, SIR GEORGE NEWMAN

14 OCTOBER 2015

In this statement, I wish to concentrate on two particular topics. Firstly, the progress of the investigation into the death of Mr Salim, and secondly, some important points in connection with the respective roles being performed by the IHAT and the IFI. First, my considerations in connection with the respective roles of the IHAT and the IFI.

On a fair reading of the judgments delivered by the Divisional Court, it appears the Court envisaged that the IHAT's processes of identifying cases for investigation by the IFI would not be too complex and could be performed by employing a relatively short timeframe. That said, it was not the Court's role to consider the facts of individual cases and the extent of the material which either the IHAT or the IFI would be obliged to consider. What is clear from the judgments is that the request for an overarching inquiry was rejected because it was impractical, was liable to take years, and would be very expensive. The purpose and ingenuity of the IHAT and the IFI procedures which were devised by the Court were driven by the need to achieve results more speedily and at very substantially less cost than had proved to be the case through statutory public inquiries. My experience of the progress of the new procedures suggests that attention could now be given to certain details of the current manner in which the Court's order is being implemented. I propose to do so under the following headings:

1) The IHAT's current process for considering whether a case should be the subject of a criminal prosecution;

2) Disclosure obligations;
3) The availability in Iraq of legal advice and assistance to the deceased's family and the availability of legal guidance to witnesses in Iraq;

4) The availability of legal advice and assistance to soldiers;

5) The availability of medical assistance to soldiers;

6) The availability of undertakings or assurances to soldiers giving evidence from the Attorney General ('AG'), Director of Public Prosecutions ('DPP') and Director of Service Prosecutions ('DSP'). Further, the availability of similar assurances from the International Criminal Court ('ICC') at The Hague.

7) Some short points about the impact on the timetable for disposal which the procedural needs of the IFI are likely to occasion.

The current procedure

The IHAT was established by the Secretary of State in 2010 to support Service Police investigations. As such, it operates within the rubric of the Armed Forces Act 2006 ('AFA'), however it does not have a statutory basis independent of the Royal Navy Police.

The IHAT is answerable to the Provost Marshal of the Navy. The duties of the Commanding Officer, Provost Marshal and service policemen to report and investigate 'Schedule 2 Offences' are set out in ss.113-118 of the AFA. The AFA Explanatory Note provides, in respect of Schedule 2 Offences, as follows:

> *"Section 113 requires a [Commanding Officer] to notify a service police force when he becomes aware that a serious offence has or may have been committed by a person under his command. Section 116 requires a service policeman who considers there is sufficient evidence to charge a person with a serious offence, or an offence prescribed by regulations made by the Secretary of State under section 128, to refer the case to the Director of Public Prosecutions. Schedule 2 lists those serious offences to which section 113 and section 116 apply. They include serious disciplinary offences, such as mutiny and desertion, and serious criminal offences, such as murder, manslaughter and certain sexual offences."*

The procedure being followed by the IHAT is that where a Schedule 2 Offence may have been committed, the IHAT has a duty to consult with the DSP at the Service Prosecuting Authority ('SPA') as to whether the case meets the 'evidential sufficiency test' under s.116(4)(a) AFA, namely, 'is there sufficient evidence to charge a person with a serious offence?'. This duty to consult arises regardless of whether the case is then referred to the DSP. Where the IHAT concludes, having consulted with the DSP, that the evidential sufficiency test has not been met, the case is then passed to the MOD, which will consider whether to pass the case to the IFI. Where the IHAT concludes that the evidential sufficiency test has been met, the case must be referred to the DSP under s.116(2) AFA. The DSP then applies a two-stage test to decide whether to direct that charges must be brought, the two-stages being:

1) Is there a realistic prospect of conviction? ; if so

2) Is a prosecution required in the public interest?

If the two-stage test is met, the case proceeds to Court Martial trial. If the two-stage test is not met the DSP directs that charges should not be brought, and the case passes to the MOD and then onto the IFI, according to the decision of the MOD.

In my view, these provisions should be understood and applied in the context of the exceptional circumstances in which the obligation to consider investigations and inquiries has arisen. The circumstances are exceptional because:

1) The IHAT, the SPA and the DSP are having to process innumerable cases. I am not aware of the total but I believe that it could run into hundreds.

2) The allegations which make up the cases, in many instances, are comprised in a few lines amounting to a short summary. For example, the cases communicated to the Divisional Court were communicated in a schedule in the *Al-Skeini* proceedings. The allegations relate to events taking place in 2003. At that time, the provisions governing the investigation and consideration of the conduct of soldiers, where the death of a civilian resulted, fell to be considered by the Commanding Officers. The quality and intensity of the process of these determinations by Commanding Officers has obviously varied, but at least, despite failings which caused the government to pass the AFA, the

process had the advantage of taking place locally, with access to local witnesses and shortly after the event. Desirable as it may be for the SPA to give close attention to these historic allegations, in accordance with the new provisions contained within the AFA, I believe some regard has to be paid to the practical difficulties and the likely time which it will take if attempts are made to subject and consider these investigations as though they occurred recently, where the advantages and processes of the AFA have not been followed in the overseas territory.

3) The IFI is not a statutory body. It was set up to play its role in the resolution of these allegations by following terms of reference which have to be compliant with the United Kingdom's obligations under the European Convention on Human Rights. A balanced view of the number of the cases likely to be prosecuted and the number of cases to be investigated by the IFI points to the desirability that the IFI Article 2 obligations are seen as the dominant objective underlying the order of the Divisional Court.

4) I am drawing attention to the above exceptional circumstances for consideration by the relevant parties and the Court because it seems to me reasonable to assume that the majority of cases will not give rise to prosecution. That will be for a variety of reasons, but a reason to be considered common to every case will be that the events took place 12 years ago and local witnesses will be very difficult to locate and question. If and when witnesses are located, the arrangements to take their evidence are expensive and complicated. For example, I am informed that the IHAT currently deploys over 100 people annually to interview witnesses in a third country.

5) If no prosecution follows, the death cases will come to the IFI. I set out my views about the IFI process which had to be adopted and gave explanations for my conclusions in my report in the cases of *Said* and *Abdullah*. In short, the IFI cannot fulfil its ECHR obligations by reviewing the facts as they appear from the evidence in the papers. Compliance requires a rigorous fact finding exercise which excludes a review on the papers alone. The IFI too must, as necessary, contact witnesses, assess evidence, and probably hold video contact hearings.

6) It follows that the process currently adopted by the IHAT and the SPA gives rise to the likelihood of a substantial degree of duplication of effort and time and it is impacting

on the rate at which the IFI is becoming involved. My conclusion is that there is room for an adjustment in the balance between the fulfilment of the Article 2 investigation by the IFI and the IHAT's investigation. The adjustment cannot be at the expense of the IHAT and the SPA being relieved of making an assessment about whether there should be a prosecution but an adjustment of the intensity of the assessment which should take place taking account of the exceptional circumstances to which I have already referred. In the circumstances which have arisen, the respective roles of the IHAT and the IFI can be seen as complementary. Thus I should emphasise that an important additional factor can be taken into account. Following the findings of the IFI it will be open to the SPA to conclude that a prosecution should be brought, notwithstanding an earlier decision not to proceed. See by way of parallel s.10 of the Code for Crown Prosecutors, and in particular that which is set out at 10(2)(a) and (d).[1] It is clear that in every case there will be a real possibility of fresh evidence becoming available in the course of an IFI investigation. There should be no particular concerns on the part of the SPA and the DSP that a first decision not to prosecute can be the subject of a successful challenge where a second opportunity for the same question to be considered can be raised in the light of the findings of fact made by the IFI investigation.

If these conclusions are considered by the Court to have merit then I recognise that it would be desirable for some guidance to be given to the IHAT and the SPA as to the proper way to make the initial decision on prosecution. It might be said that a consideration of the material available on the papers is likely to be susceptible to a clear conclusion. But it is probably more appropriate for the Court with the assistance of counsel to formulate the necessary guidance.

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[1] S.10 of the Code for Crown Prosecutors provides: *"10.1 People should be able to rely on decisions taken by the CPS. Normally, if the CPS tells a suspect or defendant that there will not be a prosecution, or that the prosecution has stopped, the case will not start again. But occasionally there are reasons why the CPS will overturn a decision not to prosecute or to deal with the case by way of an out-of-court disposal or when it will restart the prosecution, particularly if the case is serious. 10.2 These reasons include: a) cases where a new look at the original decision shows that it was wrong and, in order to maintain confidence in the criminal justice system, a prosecution should be brought despite the earlier decision;…(d) cases involving a death in which a review following the findings of an inquest concludes that a prosecution should be brought, notwithstanding any earlier decision not to prosecute."*

Disclosure obligations

I reported in my last statement that these had given rise to difficulties and delay. I am happy to say that there has been progress. In recent weeks I have prepared a Disclosure Protocol, stipulating for time limits in which disclosure must be made by PIL to the IHAT and by the IHAT and PIL to the IFI. It has been submitted to the IHAT and PIL for consideration and signature and I am optimistic that it will be agreed. It should greatly increase the efficiency with which the IHAT can carry out its obligations and the IFI can fulfil its inquiries.

The availability in Iraq of legal advice and assistance to the deceased family and the availability of legal guidance to witnesses in Iraq

I am pleased to report that the Basra law firm QC Law, under the senior partner Zainab Al-Qurnawi, has agreed to provide its services for the purposes of the investigation into Mr Salim's death. Contact has already been made with some of the witnesses. I am also pleased to record that PIL have accepted my request to contact their clients in the case of *Salim* and to encourage them to cooperate with QC Law. I look forward to this approach being adopted by PIL in future cases.

The availability of legal advice, medical assistance, and undertakings to soldiers giving evidence to the IFI

Soldiers are told that independent legal advice is available to them from the Government Legal Department. I have concluded that in the normal course that where a soldier who is an eyewitness requests anonymity the balance of public interest in the Investigation requires that anonymity should be accorded. I gave my reasons for according anonymity in the *Abdullah* and *Said* report. They stand, as an appropriate general approach which can be adopted in all cases.

I have received confirmation from the AG, the DPP and the SPA that in general all witnesses in IFI cases will have the benefit of a formal undertaking providing protection against self-incrimination. The same comfort is being sought in the case of *Salim* from the ICC at The Hague. I am seeking to have that comfort available in future cases as well.

Many of the military witnesses I have interviewed suffer from PTSD and psychological trauma. For example some, having initially been seen, have suffered setbacks and relapses in considering the draft statements which they have been sent for signature. It appears that many of them require medical assistance because currently, for reasons which it is unnecessary for me to go into, they have not been receiving it. It should not be assumed that these conditions are specifically attributable to the cases being investigated, but arise from events occurring during their service in Iraq. I am pleased to say that I have received approval from the MOD that I can inform witnesses that they can obtain counselling and necessary assistance through the Veterans Support Programme. It will be provided through the Veterans Welfare Unit and I shall endeavour to see that it is available to all who ask for it.

The impact on the timetable for disposal

I referred to the likely impact of what I have been describing upon the IFI. There are practical difficulties encountered in identifying and locating witnesses. These seem to vary in accordance with security conditions as they change in Iraq. Arranging for witness interviews with the IFI by way of video link gives rise to a number of practical difficulties. It was done in the past at a hotel in Basra, but there can be interruptions and technical problems which can lead to that process of communication not operating with great efficiency. It may prove necessary for the IFI to need to make contact with witnesses and persons holding relevant information through the agency of the IHAT. That will depend upon each case.

Finally, insofar as the case of *Salim* is concerned, having cleared away the difficulties which arose from non-disclosure and fresh information becoming available which had not been seen by the IHAT, following the efforts of all concerned we have been able to move the case forward. I have some optimism that in the next few weeks I shall be able to interview further soldiers, re-interview some soldiers, and at the same time carry out some form of video contact with witnesses in Iraq. So far as the investigation is concerned, the availability of QC Law to assist is critical and important.