**Doc 3 - Letter to the Attorney General for the Court to send**

Dear Attorney-General,

**Re. Laying of an Information alleging a Conspiracy to Commit a War Crime**

**Laid by ……………………………………….**

We/I\* write concerning the above referenced criminal information, a copy of which is appended for your information, and which was duly laid before me/us this past …………….day, the ……. of ……………….., 2015. As you will appreciate rapidly from the nature of both the class of the offence alleged, and indeed from the character of the accused person, being that of the corporation sole of the office of Her Majesty’s Secretary of State for Defence, this matter is of an unusual, if not extraordinary, character.

That said, those who laid the said information before me/us \*, [and who upon invitation appeared in person to support their case]**\***, did so accompanied with extensive and comprehensive explanatory documentation and materials, aimed at informing and indeed reassuring this Court that the said information, and the criminal process thereby sought, was fully within our jurisdiction, and competent for us to act upon.

In a matter such as this I/we\* consider that the general scope of our/my\* role remains essentially as governed by the considerations laid down by Lord Widgery C.J. in the matter of *R. v. West London Justices, ex p. Klahn*  in 1979[[1]](#footnote-2), as follows:

**(a) Offence known to the law**

*whether the allegation is of an offence known to the law and if so whether the essential ingredients are prima facie present.*

We/I \* have broken this consideration down into its two natural elements, viz: ‘*an offence known to the law*’ and then secondly the presence of *prima facie ingredients.* As to the first

we are/I am\* entirely satisfied, principally by the terms of the criminal information (as attached) that indeed such an offence is so known to our law.

Secondly, as to the presence of *prima facie* ingredients, we/I\* have taken due and proper account of the documentary materials which the Informants appended and submitted together with the said information. However, in this regard, it is especially important to observe that:

(i) whilst we/I\* took due note of the factual assertions made in the expert witness statements, as supplied by the informants, and testifying as to the enormous destructive power and the widespread and harmful effects of the detonation of a Trident SLBM (D5) in and over a populated area; we/I\* remain aware that such material is potentially open to factual challenge by others. Furthermore, that in any event, at this stage in the proceedings, there can be no question of any scrutiny of the evidence which is a matter only for consideration by any future trial court.

In this regard, we/I\* take particular note of Lord Widgery C.J.’s further observations in *ex p. Klahn*, as follows[[2]](#footnote-3):

*“There can be no question, however, of conducting a preliminary hearing. Until a summons has been issued there is no allegation to meet, no charge has been made. A proposed defendant has no locus standi and no right at this stage to be heard. …”*

(ii) Equally, it is important to note, that whilst we/I\* took due account of the content of the letter dated ……….of …………, 20.. and signed by ………………….……….. answering on behalf of the Government to the earlier communication sent by the Informants, and declining the invitation of the Informants to the Secretary of State to make a declaration, on behalf of the Government, as sought, nevertheless we/I\* regard that as being only of circumstantial relevance of any particular agreement, inconsistent with the terms of such a said declaration, let alone of a criminal conspiracy to do any particular future act.

That said, we are/I am\*, however, satisfied that there is evidence going to the *prima facie* ingredients of the offence, which if it were to be found reliable upon future judicial examination could be a sufficient basis for making out the charge alleged.

**(b) Within time limits**

Accordingly, we/I\* moved to apply the next of Lord Widgery C.J.’s considerations, namely that the alleged offence is not out of time.

The informants supplied materials to the effect telling us/me \* that the initial operational deployment of the Trident II D5 SLBM system, as carried aboard HM Submarine Vanguard (and the three subsequent vessels also members of her class), which is the weapon delivery system upon whose future use their case principally relies, dates from the initial operational deployment of that vessel in December 1993 [[3]](#footnote-4).

The missile system itself underwent an initial operational capability assessment with the U.S. Navy earlier in March 1990 [[4]](#footnote-5)**,** whereby following launch and commissioning the initial American vessels were deployed on Demonstration and Shakedown Operations (DASOs), which included test firing of Trident II missiles at the United States' SLBM Launch Area, Eastern Test Range, [Cape Canaveral](http://en.wikipedia.org/wiki/Cape_Canaveral), off the coast of Florida. HMS Vanguard itself received its full naval commission on 14 August 1993.

However, it is the Informants’ case that it is only since that first operational deployment of HMS Vanguard, in December 1993, that the alleged defendant, the corporate office of the Secretary of State for Defence, which itself has been in existence since created by Letters Patent issued on Wednesday 17 March 1964, has possessed the technical capacity to carry out the specific agreement, comprising the offence alleged, albeit that inevitably and progressively some measure of planning, design, preparation, and simulation for the command, communication and control of the same must have at least begun at an earlier point in time.

In this regard, it is important to note that we/I\* were informed that, whilst the statutory section establishing the criminal offence cited under the ICC Act 2001, namely the commission of an offence ancillary to the commission of a war crime, only came into force, as of September 1, 2001[[5]](#footnote-6); nonetheless, the retrospective effect of the subsequent amending provisions of S.65A thereof ‘*Retrospective application of certain offences’* [[6]](#footnote-7)**,** and in particular the effect which that provision has on subsection 52(2) of that Act, by reason of subsection (3) thereof, means that the court has temporal jurisdiction with regard to the offence if and when committed at any time since 1 January 1991. Accordingly, that temporal jurisdiction for this offence, being an indictable only offence [[7]](#footnote-8)**,** has existed and continues since at least the said initial operational deployment aboard HMS Vanguard, in December of 1993.

**Jurisdiction**

Accordingly, we/I\* moved to then apply the next of Lord Widgery C.J.’s considerations, namely to determine whether the ‘*the Court has jurisdiction’*.

In this regard it seemed to me/us \* that the principal issue to be addressed was with regard to the position whereby the Informants, seek to invoke the criminal jurisdiction of the courts of this country, as regards a prosecution for the commission of an alleged offence, as committed by a Minister of the Crown, where the entire factual premise for the allegation relates to and would require investigation of the Crown’s declared on-going policies for securing the defence of the Realm and the national security interests of the United Kingdom.

The Informants accept that were they to rely instead upon the exercise by this court of its jurisdiction at common law, in order to be satisfied that we have the necessary jurisdiction to issue the criminal process sought; the well-known line of authorities, holding that matters relating to the "defence of the realm" and the "disposition and armament of the Royal forces" are non-justiciable would be a serious impediment. However, given that they rely entirely upon the statutory authority of the offence created by the ICC Act, 2001, they maintain, with good cause, that so long as it can be shown beyond question that the Crown, its servants and agents etc., are bound by that statute, any common law impediments are irrelevant.

To be clear, this Court is fully aware that even where clear and unambiguous statutory provisions exist, as a general proposition that will not be deemed binding upon and operate to the detriment of the Crown, its authorised servants and agents, unless the same be made plain in the language of the statute concerned.

However, as the Informants have been at pains to point out, the relevant section of the International Criminal Court Act 2001 is clear as to its plain and natural meaning.

“78 Crown application

This Act binds the Crown and applies to persons in the public service of the Crown, and property held for the purposes of the public service of the Crown, as it applies to other persons and property.”

**Necessary Authority**

Accordingly, having found that this Court possesses the requisite jurisdiction, we/I\* moved to apply the next and last of Lord Widgery C.J.’s considerations, namely, whether these informants have the necessary authority to institute the prosecution proceedings. The answer to which, as they themselves willingly concede, is that they do not. Under s.53(1)(*c*)&(3) of the International Criminal Court Act 2001 your consent is expressly required for the institution of proceedings under the Act, including proceedings such as these.

Accordingly, we arrive at the purpose of this letter, namely to ask you to reach a determination as to whether, in your view, it is in the ‘*public interest’* that the process sought by these informants should issue, and whether or not you are willing to grant your consent to prosecute.

We/I\* conclude by taking the opportunity to explain that we have thought it appropriate to ask you directly to decide on your consent, rather than leaving it up to the Informants to do so separately as a preliminary matter, because we/I\* felt it important that (a) you should be fully aware of our own understandings and determinations in relation to those other matters to which, in its turn, this Court is separately bound to have due and proper regard; and (b) that we should take this opportunity to explain fully why it is that, in the event you are willing to so consent, we/I\* will then proceed to issue the process by way of summons as sought forthwith.

Finally, we are advised by the Informants that, in the event that you decline to consent, they intend to pursue the opportunity to approach the Office of the Prosecutor of the International Criminal Court, in The Hague, to ask her to consider whether it may be appropriate for her to institute an investigation into this situation, pursuant to her powers under Art.15 of the Rome Statute (1998). Further, that in that regard we have been satisfied that it may then become especially important to her decision as to whether to institute such proceedings for her to take a preliminary view, as per Art.53(1)(b) of that Statute, at least, as to the technical ‘*admissibility*’ of this situation under the provisions of Art.17 of the Statute. In turn, this would require her to come to a view as to whether, consistent with the principle of complementarity, any failure to institute proceedings in the UK was or was not due to the “*unwillingness* ***or*** *inability of the State genuinely to prosecute”* as per art.17 §1(*b*) of that Statute. Accordingly, to that end our/my\* reasoning as now set out might be useful.

Yours sincerely,

1. [1979] 2 All ER 221 (see esp.@ 223A *et seq*.) [↑](#footnote-ref-2)
2. Ibid @ p.236C [↑](#footnote-ref-3)
3. <http://www.globalsecurity.org/wmd/world/uk/vanguard.htm> [↑](#footnote-ref-4)
4. <http://www.designation-systems.net/dusrm/m-133.html> [↑](#footnote-ref-5)
5. As to which see the terms of Art 2. SI 2001/2161 [↑](#footnote-ref-6)
6. Added by Coroners and Justice Act 2009 c. 25 Pt 2 c.3 s.70(3) (April 6, 2010) [↑](#footnote-ref-7)
7. As to which see s.53(2) of the 2001 Act [↑](#footnote-ref-8)