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The PICAT Project

Care of Ms Angie Zelter

By email only to [reforest@gn.apc.org](mailto:reforest@gn.apc.org)

10 November 2017

Dear Ms Zelter

**Subject: Request for the Attorney General's consent to prosecute the Prime Minister and the Secretary of State for Defence for conspiring to commit a war crime**

I write in response to the request of the PICAT Project for the Attorney General's consent to prosecute the Prime Minister, the Rt Hon Theresa May MP, and the Secretary of State for Defence, the Rt Hon Sir Michael Fallon MP, for conspiring to commit a war crime contrary to section 51(1) of the International Criminal Court Act 2001 and section 1(1) of the Criminal Law Act 1977.

As the PICAT Project has correctly identified, the Attorney General's consent is required under section 53(3) of the International Criminal Court Act 2001 before proceedings may be instituted for the proposed prosecution. I write to inform you that the Attorney General has carefully considered your request and decided not to give his consent.

Between 22 February and 21 June 2016 the Attorney General's Office received five separate requests for the Attorney General's consent to prosecute "...the corporation sole of the office of Her Majesty's Secretary of State for Defence..." for conspiring to commit a war crime contrary to section 52(1) of the International Court Act 2001 and section 1(1) of the Criminal Law Act 1977.

The requests were received from Knighton Action for Peace and Justice on 22 February 2016, Norfolk for Peace and Justice on 12 April 2016, PICAT Pembrokeshire on 20 April 2016, PICAT West Wales on 3 May 2016, and Sevenoaks Action for Peace with Justice on 21 June 2016.

The requests were virtually identical and appeared to be a co-ordinated group action. Since each request was made on the same basis and because a defendant cannot be prosecuted simultaneously in different courts for the same allegation, the Attorney General's Office decided to handle the requests as one single request for the Attorney General's consent received from multiple groups.

On 3 August 2016 the Attorney General's Office wrote to the PICAT Project to request a clear and comprehensive explanation of the basis on which it requested the Attorney General's consent to prosecute the Secretary of State for Defence as a corporation sole by statute. Further, the five requests received between 22 February and 21 June 2016 had each failed to explain: (1) the elements of the offence that it was proposed to prosecute; (2) how they could be proved by the evidence provided; and (3) how, where it was not obvious, that evidence would be admissible in a domestic court.

On 1 October 2016 the Attorney General's Office received a letter from Kirsty Brimelow QC, Megan Hirst, and Professor Nicholas Grief, who were instructed by the PICAT Project, which purported to address these three issues. It has been treated by the Attorney General's Office as the authoritative explanation by the PICAT Project of the basis on which the Attorney General's consent is requested.

The October letter confirmed as preliminary issues: (1) the proposed offence is conspiring to commit a war crime contrary to section 51(1) of the International Criminal Court Act 2001 and section 1(1) of the Criminal Law Act 1977; (2) the proposed defendants are Theresa May and Sir Michael Fallon; and (3) it is not proposed to rely on corporate liability.

It identified that the war crime which the proposed defendants are alleged to have conspired to commit is that of causing excessive incidental death, injury or damage contrary to Article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court. It identified that the offence is committed where:

1. A person agrees with one or more other persons to pursue a course of conduct (whether or not conditional on particular circumstances or events); and
2. If the agreement were carried out in accordance with their intentions it would necessarily involve:
  - (a) the launching of an attack;
  - (b) the attack being such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment;
  - (c) that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
  - (d) the person knew that the attack would cause incidental death or injury to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage;
  - (e) the conduct took place in the context of and was associated with an international armed conflict; and

- (f) the person was aware of factual circumstances that established the existence of an armed conflict.

The October letter narrowed the evidence on which the PICAT Project proposes to rely to the expert evidence reports of: (1) Dr John Ainslie dated 14 September 2015; (2) Dr Phil Webber dated 21 September 2015; and (3) Dr Frank Boulton also dated 21 September 2015.<sup>1</sup> It did not, however, provide any meaningful legal analysis of how this evidence is said to prove each of the elements of the offence alleged by the PICAT Project.

Finally, it stated that the evidence on which the PICAT Project proposes to rely would be admissible through the authors of the reports, further expert evidence, and agreed facts.

On 4 February 2017, at the request of the Attorney General's Office, the PICAT Project provided the indictment on which it proposed to prosecute the proposed defendants. It proposed the following two offences contrary to section 51(1) of the International Criminal Court Act 2001 and section 1(1) of the Criminal Law Act 1977:

1. Theresa May, Michael Fallon, and other [unidentified] persons between the 15<sup>th</sup> day of July 2014 and [an unspecified day in] February 2017 conspired together and with other [unidentified] persons to commit the war crime of excessive incidental death, injury, or damage by continuing and/or agreeing a policy to maintain the capability to launch a nuclear attack on targets in and around Moscow (the 'Moscow Criterion') and an agreement to launch such an attack under certain conditions, knowing that such an attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.
2. The Secretary of State for Defence, the Prime Minister, and other [unidentified] persons between [an unspecified day in] 1993 and [an unspecified day in] February 2017 conspired together and with other [unidentified] persons to commit the war crime of excessive incidental death, injury, or damage by continuing and/or agreeing a policy to maintain the capability to launch a nuclear attack on targets in and around Moscow (the 'Moscow Criterion') and an agreement to launch such an attack under certain conditions, knowing that such an attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

The first proposed offence corresponds broadly to the explanation of the allegation made by the PICAT Project in the letter from Kirsty Brimelow QC, Megan Hirst, and Professor Nicholas Grief.

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<sup>1</sup> The expert evidence reports of (1) Dr Nick Ritchie dated 27 September 2015 and (2) Professor Paul Rogers dated 26 September 2015 have also been provided to the Attorney General's Office by the PICAT Project. For the avoidance of any doubt, they were considered by the Attorney General in reaching his decision.

There has, however, been no explanation of the second offence which proposes as defendants the Offices of the Prime Minister and the Secretary of State for Defence. Indeed, the second proposed offence appears to contradict the earlier confirmation from Kirsty Brimelow QC, Megan Hirst, and Professor Nicholas Grief that the proposed defendants are Theresa May and Sir Michael Fallon and that the PICAT Project does not propose to rely on corporate liability.

The Attorney General has now given his careful consideration to whether to consent to the proposed prosecution of either or both of the proposed offences. In doing so he has considered all of the material provided by the PICAT project, its admissibility as evidence in criminal proceedings, and the extent to which it might establish the elements of the offence set out above.

It is a constitutional principle that, when deciding whether or not to give his consent to any proposed prosecution, the Attorney General acts independently of government applying the well-established prosecution principles of evidential sufficiency and, only if there is sufficient evidence for a realistic prospect of conviction, public interest.

In the Attorney General's view, the material provided by the PICAT Project is insufficient to show that any offence has been committed. Accordingly, the Attorney General has declined to give his consent to the proposed prosecution.

Yours sincerely



Julia Crouch

Deputy Director of the Public Law and Litigation Team  
Attorney General's Office