



Rt Hon David Davis MP
House of Commons
London SW1A 0AA

Ref.: OTP2021/007134

Date: 23 April 2021

Dear Mr Davis,

I write further to your letter of 22 April 2021, regarding the Overseas Operations (Service Personnel and Veterans) Bill currently before the UK Parliament. Your letter asks what impact recent amendments to the Bill, made by the UK Government, may have on the potential admissibility of cases involving alleged crimes committed by British troops in, *inter alia*, Iraq.

As you know, my Office has been closely following the ongoing debate in the House of Commons and House of Lords. As we set out in our previous correspondence with you, my Office has paid particular attention to the possible impact of any new legislation, if passed, in order to consider whether the re-opening of the preliminary examination would be warranted on the basis of the State's unwillingness or inability to pursue relevant lines of criminal inquiry genuinely. As I stressed both in my correspondence with the Secretary of State for Defence of the United Kingdom and separately with the parliamentary Joint Committee on Human Rights, I felt myself duty-bound to emphasise that if the effect of applying a statutory presumption was to impede further investigation and prosecution of Rome Statute crimes allegedly committed by British service members in Iraq – because such allegations would not overcome the statutory presumption – the result would be to render such cases admissible before the International Criminal Court (“ICC” or the “Court”), as a result of State inaction or alternatively State unwillingness or inability to proceed genuinely under articles 17(1)(a)-(c) of the Rome Statute.

As my Office observed in its final report on the preliminary examination into the situation in Iraq/UK, the inclusion of a section on ‘excluded offences’ suggests that the legislation, were it to come into force, would have the potential to impact the ordinary course of criminal inquiries into certain categories of conduct. Accordingly, I expressed our view that the UK Government's assurance, previously conveyed to the Office, that “all allegations of serious offences, including those within the

jurisdiction of the Court, will be investigated and, where appropriate, prosecuted” would be clearer if *all* crimes within the jurisdiction of the Court were set out in the exceptions section of the draft legislation. Lastly, I stated that our concerns arose equally in relation to the possible retroactive or prospective application of such a statutory presumption with respect to alleged conduct constituting crimes within the jurisdiction of the Court.

I was heartened to read in a recent letter received from the Secretary of State for Defence that our comments were being considered in the Government’s preparations for the progress of the Bill through Parliament. We also took note of the proposed amendments tabled by the Secretary of State for Defence to extend the scope of excluded offences to encompass torture, crimes against humanity and genocide, following the earlier amendment proposed by the House of Lords to exclude all crimes within the jurisdiction of the Court.

Your letter asks whether the scope of the proposed amendment now tabled by the Secretary of State for Defence has allayed our concerns or whether these might persist. While the latest amendment tabled by the UK Government would appear to significantly reduce the scope for the competent authorities being deemed unwilling or unable to investigate and prosecute such crimes, I remain concerned that many war crimes within the Court’s jurisdiction would still be subject to the envisaged statutory presumption. In particular, I note that this would encompass a number of alleged crimes for which our report entered reasonable basis findings (i.e. finding that these allegations would in principle merit investigation by the ICC), including for the war crime of wilful killing/murder pursuant to article 8(2)(a)(i) or article 8(2)(c)(i); the war crime of inhuman/cruel treatment (article 8(2)(a)(ii) or article 8(2)(c)(i)); and the war crime of outrages upon personal dignity (article 8(2)(b)(xxi) or article 8(2)(c)(ii)). As our report noted, some of the most serious cases pending before the competent investigating and prosecuting authorities in the UK, including those examining pattern evidence and command responsibility, concern such alleged crimes. We further stated in the conclusions of our report that the fate of these pending cases, in demonstrating the willingness and/or ability of the UK authorities to carry them out genuinely, would be among the factors that might warrant a reconsideration of our decision with respect to the preliminary examination.

As such, I would observe that *any* gap between the scope of coverage in the excludable offences under the proposed legislation and conduct which might otherwise constitute a crime within the jurisdiction of the Court would risk the persistence of the prospect I articulated earlier, that of rendering relevant cases concerning such conduct admissible before the ICC.

I hope this clarification is of assistance. We will continue to closely follow the ongoing parliamentary process in relation to this important matter, which will have consequences not only for how the UK

approaches its duties under international law, but more generally for how States uphold their primary responsibility to investigate and prosecute such crimes, or yield their jurisdiction to the ICC.

Yours sincerely,

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

Fatou Bensouda
Prosecutor