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from The Foreign Secretary

Dear Matthew

ICTY-Type Tribunal for Iraq

In his Cincinnati speech, President Bush referred to the prosecution of those who might use WMD during any future hostilities in Iraq, but made no mention of a mechanism. You have asked for information on the creation of a Tribunal for Iraq along the lines of the International Criminal Tribunals for Yugoslavia (ICTY) and Rwanda (ICTR).

The US has raised the possibility of an Iraq Tribunal or investigative Commission several times since 1990, without attracting any significant support in the Security Council. Their attitude to the ICC has not helped. The French and Russians in particular have expressed firm opposition to the idea of a UN-created mechanism; we doubt their views have changed. It should also be noted that the costs and complexity of administering the existing Tribunals has dampened enthusiasm amongst member states for such instruments: for example, from 1993 to 2000 the ICTY concluded 12 cases at a cost of \$334m; the cost to UK of the ICTY is currently £4.5m pa.

ICTY and ICTR were established by Security Council Resolutions. A United Nations International Criminal Tribunal for Iraq (ICTI), modelled on the ICTY/ICTR, would have to be established by a Chapter VII UN Security Council Resolution to ensure the necessary co-operation of states. The Tribunals were each preceded by the appointment of a Special Rapporteur of the Commission on Human Rights and the establishment of a Commission of Experts. The findings of the Rapporteurs and the Commissions provided the evidence that laid the foundation for the establishment of the Tribunals and the definition of their jurisdiction.

The jurisdiction of an Iraq Tribunal, both in terms of substantive jurisdiction and the potential scope of those accused, would also be extremely contentious. It would be difficult to limit its jurisdiction only to the Iraqi leadership. Depending on the course of future events, there could be strong calls (particularly amongst Arab states) for the expansion of jurisdiction to cover the actions of Allied forces - as ICTY does. There may also be an objection to the argument that the prosecution of the Iraqi leadership for past crimes is necessary for the restoration and maintenance of international peace and security. China raised objections of this nature in the context of the Tribunals, resulting in its abstention from UNSC Resolution 955 (1994) establishing the ICTR.

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The International Criminal Court (ICC) is, of course, intended to be the universal guarantor of international justice in respect of war crimes, crimes against humanity and genocide. Iraq is not currently a party to the Statute of the Court. If it were to ratify the Statute, the jurisdiction of the Court would be limited to crimes committed after the entry into force of the Statute for Iraq (ie in practice after Saddam's fall). The Court may also exercise its jurisdiction if an allegation were referred to the Prosecutor by the Security Council. Any such referral would be limited to crimes committed after the entry into force of the Statute (1 July 2002).

Our assessment is that to pursue efforts to set up an ICTI now, when we are seeking to engage the UNSCR on a range of substantive Iraq-related issues, would be a serious own goal. However, in the event of a change in the Iraqi administration, a variety of alternative approaches to achieving criminal justice might be considered:

- i. The establishment of a special hybrid domestic tribunal, in connection with the United Nations, with a strong international presence (including international judges and prosecutors). A tribunal of this nature has been established for Sierra Leone, with a limited life span and a mandate is restricted to the prosecution of those bearing the 'greatest responsibility' for serious violations of international humanitarian law.
- ii. The establishment of special hybrid panels, within the existing domestic criminal justice system, again with a strong international presence (including international judges and prosecutors). Panels of this nature have been established for East Timor and Kosovo and operate within the existing criminal court structures.
- iii. The establishment of truth and reconciliation style commissions. Commissions of this nature could be used in relation to lower-level accused, or in relation to those cases where evidence is insufficient for a criminal prosecution.
- iv. The use of the existing domestic criminal justice system in Iraq. We would need to consider whether the Iraqi criminal justice system could fairly and effectively prosecute serious ethnic crimes or serious violations of international humanitarian law, or whether it could only handle lower-level cases.

Yours aye,

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Private Secretary

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