



RESTRICTED
DECLASSIFIED

154861

11 December 2002

Foreign &
Commonwealth
Office

London SW1A 2AH

*1/10/02
Ruri*

Dear Matthew,

*Background to points Ann Lloyd
asked me to raise. We should
need to push hard from here
to keep this moving forward.*

ICTY-Type Tribunal for Iraq

Matthew 12/12

In your letter of 23 October to Mark Sedwill you asked for further work on the potential need to bring Saddam and his inner circle to justice. In response, I enclose a paper on a tribunal for Iraq.

You also pointed to the need to factor this issue into the Whitehall work on the future of Iraq. We are doing so. We included it in the "day after" discussions in Washington on 6 November. We have also taken soundings of the War Crimes Office in State.

We understand from our contacts with State that, while the US has for many years been following developments relating to the violation of international humanitarian law in Iraq, it has yet to reach any conclusions as to what judicial mechanisms should be put in place following a change of regime. We understand that they do not favour the option of an International (ICTY-style) Tribunal for Iraq, and that they are giving close consideration to the Sierra Leone Special Court model.

In addition to allegations of serious violations of international humanitarian law, there is likely to be pressure to investigate and prosecute individual or systematic human rights abuses. The options outlined in the attached paper may also contribute to the handling of these allegations.

You also asked about which members of Saddam's inner circle might be indicted, and how we might let it be known outside that circle that their best interests might be served by breaking with Saddam. There have been various assumptions as to possible targets for prosecution, including a list of 27 suspects published by the Iraqi National Congress and a secret list produced by the US

RESTRICTED
DECLASSIFIED

DECLASSIFIED

RESTRICTED



containing 40-odd names. It would be inappropriate for a government to issue a list, since this would pre-empt the role of the eventual prosecutor, who will need to act on the basis of the available evidence and within a specific legal framework. Tactically, too, such action could simply reinforce the determination of those on the list to resist to the end, or to abscond or destroy potential evidence. Our US contacts have told us that for these reasons they are cautious about circulating information about potential indictees.

State has initiated a "Future of Iraq" project, which has set up a number of Working Groups involving members of the Iraqi opposition to look at relevant issues. One of these, devoted to Democratic Principles, is considering the issue of transitional justice. We intend to keep in close touch with State as thinking develops in this area.

Yours etc

(Simon McDonald)
Principal Private Secretary

Matthew Rycroft Esq
10 Downing Street

DECLASSIFIED

RESTRICTED

DECLASSIFIED

Tribunal for Iraq

1. In considering the future of Iraq, it will be necessary to take into account the need to bring Saddam Hussein and his inner-circle to justice for their participation in crimes committed by his government. The scope of the offences to be prosecuted will depend on the available evidence, but may range from serious international crimes (such as crimes against humanity and genocide) to specific allegations of human rights abuse (such as those documented in the FCO human rights dossier). How should this be done?
2. In considering how to take this forward, it will be necessary to consider:
 - The types of crimes to be investigated/prosecuted;
 - The capacity of the domestic criminal justice system to deal with these crimes; and
 - The nature and competence of the administration on the ground.

Type of crimes

3. Various accusations of criminal activity have been levelled against Saddam Hussein and his inner circle, by a variety of NGOs and other groups. These allegations include, for example, activities relating to the conflict with Iran, the invasion of Kuwait, crimes against the Kurds and the Marsh Arabs and the systematic use of torture and other grave human rights violations. Allegations of war crimes against Iraqi personnel may also be made during any forthcoming hostilities and could include, for example, activities involving the use of WMD.
4. The effective prosecution of such allegations may require a varied and multi-layered approach, involving a combination of the options outlined below.

Capacity of domestic criminal justice system

5. Some of the above activities may already be criminalised under Iraqi law. But although, under the Constitution adopted by Iraq in 1925, a relatively independent judiciary was established, there is information to suggest that it has been progressively sidelined and undermined by the present regime. It will require substantial re-building and re-training to restore it as an independent and effective body. We should not, therefore, rely on the domestic criminal justice system to guarantee that all these offences will be adequately dealt with quickly in the event of a change in Saddam's regime.

Nature of the administration on the ground

6. The choice of vehicle(s) for transitional justice would depend to at least some extent on the nature of the administration in place at the time. For example, if a UN administration was in place, it might choose to set up special judicial panels to deal with those accused of the most serious crimes, following the model adopted in Kosovo. We

DECLASSIFIED

DECLASSIFIED

understand, however, that the US is not presently in favour of early UN involvement in Iraq.

Possible options

7. A variety of alternative approaches might be considered. Based on experience to date, these include:

- **International Criminal Tribunal (ICTY-type)**

8. The International Criminal Tribunals for Rwanda and the Former Yugoslavia were established pursuant to UNSC Resolutions adopted under Chapter VII of the UN Charter. The crimes under the jurisdiction of the Court are limited to those recognised as crimes under customary international law, including crimes against humanity, war crimes and genocide. The seat of the Tribunals, in The Hague and Arusha, was a consequence of practical security concerns and doubts as to the ability and willingness of relevant states to investigate and prosecute cases fairly and effectively. In the case of the ICTY, it was established in 1993 during the on-going conflict in Bosnia and Herzegovina.

9. It might be possible to adopt a similar model for Iraq. An Iraq Tribunal set up in a third state to try Saddam Hussein and other key targets would have attractions to many Iraqis.

10. But there would be problems. It would require a UN Security Council mandating resolution, for which the requisite support might well not be forthcoming (both France and Russia have expressed firm opposition to such an approach). This model has proved hugely expensive and unwieldy, thus contributing to international reluctance to repeat the exercise. And it would be difficult to obtain Security Council agreement to limit the scope of its jurisdiction only to the Iraqi leadership or, if allied forces are engaged in Iraq, to exclude their actions. And, in a transitional phase (ie after regime change) there may be no need to set up a tribunal outside the country, as there was in the case of ICTY (and ICTR), although there could remain compelling security and other practical reasons for so doing.

11. Below are some options for bodies that could be set up in Iraq, that would have the advantage of bringing justice closer to the Iraqi people and help them to be more associated with its proceedings:

- **A Special mixed - domestic and international - Court** (cf the Sierra Leone model)

12. The Sierra Leone Special Court (SLSC) is a special tribunal, set up inside the country but which exists outside the normal Sierra Leone criminal justice system, and comprises both domestic and international judges and prosecutors. It was established by means of a treaty with the UN which set the parameters of the Court's jurisdiction and procedures. The SLSC has a mandate to prosecute only those responsible for the most serious crimes,

DECLASSIFIED

DECLASSIFIED

thus leaving domestic criminal courts and the truth and reconciliation commission to deal with other perhaps lower level offenders who may have also been involved in criminal activity - so limiting costs.

13. A UN Security Council (or at least a General Assembly) resolution would be needed to give the UN the necessary backing. The jurisdiction of such a tribunal would be dictated by the terms of the relevant Treaty: it could include offences under international criminal law (such as war crimes and crimes against humanity), serious offences under Iraqi domestic law and, theoretically, serious human rights violations. But (as in the case of an ICT) it would not be easy to obtain a UN mandate for a court to try human rights violations, though it is possible that some would qualify as crimes against humanity.

14. The UN Secretariat is directly involved in the management of the SLSC, and consequently its active support for a Special Court in Iraq would be required. Given the difficulties surrounding the establishment of the SLSC, this cannot be assumed. Funding would be provided on a voluntary basis, thus avoiding expensive UN mechanisms, pay and conditions etc.

- **A Special (mixed) domestic Panels**

15. If UN support for the Sierra Leone model was not forthcoming, an alternative could be to establish special judicial panels, including a mixture of international and domestic prosecutors and judges, which could operate within the existing court system. Its jurisdiction would be confined to domestic law, which would need to be reviewed to establish what offences this covered; but it is to be expected that, as Iraq is a Party to the Geneva Conventions, war crimes would be included. International involvement would enable pressure to be brought on the Iraqis to exclude the death penalty. And the presence of international judges would help to ensure the fairness of the proceedings.

- **Ordinary domestic courts**

16. It may be possible for Iraq's normal domestic courts to function as soon as the transitional administration takes over. There is a strong argument for allowing them to play a part in delivering justice for the crimes of the previous regime. But, as noted above, their capacity will be limited. It is likely that they would have the power to deal with war crimes. But for political and practical reasons they may be unable to handle the most high profile cases involving violations of international humanitarian law.

- **Truth and Reconciliation Commission**

17. Truth and Reconciliation Commissions have been widely used in post conflict situations, where a very high number of criminal acts have been committed that, for reasons of practicality and in the interests of reconciliation, cannot all be handled by means of a criminal process. Such commissions are most appropriate for low level crimes or those where evidence is insufficient for a criminal prosecution.

DECLASSIFIED

DECLASSIFIED

- **The International Criminal Court (ICC)**

18. The ICC came into being on 1 July 2002. Its jurisdiction is not retrospective, so it could not try crimes committed before that date. And as Iraq is not a party to the Statute, the Security Council would have to adopt a resolution to submit a situation arising since that date to the Court. Given the US's dislike of the ICC, its co-operation could not be assumed.

Legal base and penalties

19. Consideration would need to be given to the existing scope of offences under Iraqi criminal law and the legal bases for the establishment of alternative systems and mechanisms with alternative jurisdictions. If the UN is not involved in the administration of Iraq, it will be difficult to find a legal base for a number of the possible options. It should also be noted that Iraq retains the death penalty for certain offences: HMG would not wish to be associated with any mechanism that continued to maintain this penalty.

The way forward

20. Consideration will need to be given to various categories of offenders. These could be as follows (though this list is not necessarily conclusive):

- those political and military leaders with the greatest responsibility for committing the international crimes;
- others who have also contributed to the commission of international crimes;
- those who have committed serious domestic crimes eg murder
- those responsible for lesser offences.

21. The extent to which individuals in the various categories should be the subject of criminal (or other) proceedings will be a matter for the prosecutors to consider in the light of available evidence. But a combination of some of the options outlined above is likely to be needed eg

- a special body, separate from the normal criminal justice system, for the most heinous violations of international law;
- use of the domestic courts, certainly for lesser but still serious crimes eg murder;
- a truth and reconciliation commission for offences of a lower order.

DECLASSIFIED