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IN THE MATTER OF IRAQI CRIMES AGAINST HUMANITY

ADVICE

*Can I have
some paper work
done on when this
is a good idea
or if it have
P.R. value?*

1. In this matter I am instructed on behalf of Indict. Indict is an international campaigning organisation whose mission is to bring leading members of the Iraqi regime to trial for crimes committed against humanity. I have been supplied with a dossier of evidence collected by Indict and have been asked to consider whether it is sufficient to warrant a prosecution of Saddam Hussein and Tariq Aziz in England and Wales, applying the evidential test laid down in the Code for Crown Prosecutors.
2. The evidence discloses that, following the invasion of Kuwait by Iraqi forces in August 1990, a number of foreign nationals, including a large number of United Kingdom nationals, were detained by Iraqi troops in Kuwait and Iraq ("the hostages"). Members of the Iraqi armed forces held the hostages against their will in various locations in those countries. The hostages were released at intervals during the latter half of 1990. The last hostages were released in December 1990.
3. In my view there is a powerful body of evidence that establishes that Saddam Hussein and Tariq Aziz were party to, and criminally responsible for, those detentions. There is also evidence that implicates other Iraqi official such as Saddam Hussein's sons Uday and Qusay, as well as other ministers, including Taha Yassin Ramadan and Ali Hassan Al Majid.
4. Dealing specifically with Saddam Hussein and Tariq Aziz there is a strong inference to be drawn from the evidence of concerted activity by the Iraqi armed forces and diplomatic corps over many months in effecting and continuing the detentions and bargaining in connection with

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the hostages' release. A jury would be entitled to infer that the detaining forces were acting with the authority, knowledge, and approval of the Government of Iraq, and in particular Saddam Hussein, then the Prime Minister and President of Iraq and Commander in Chief of the Iraqi Armed Forces, and Tariq Aziz, then Minister for Foreign Affairs.

5. There is also direct evidence that implicates Saddam Hussein and Tariq Aziz in issuing threats to detain the hostages in order to force the United Kingdom and the United States, amongst others, to abstain from taking military or diplomatic action against Iraq and to withdraw their forces from the Gulf region.
6. In the case of Saddam Hussein there is evidence that he had a number of meetings with the hostages. The meetings are described in witness statements made by eye witnesses and were recorded on a video tape, authenticated and verified by an eye witness. The evidence establishes that Saddam Hussein was personally involved in authorising the detention of the hostages and was using the threat of continuing their detention in order to compel the United Kingdom, the United States of America and the United Nations to act in accordance with Iraqi wishes.
7. This evidence is supported by documentary material obtained from the United Nations in the form of a letter written by Saddam Hussein in which he states that the hostages "are not allowed to leave Iraq". Saddam Hussein writes that the National Assembly had "decided to take [steps] ... to prevent foreigners from leaving Iraq. ... This will be one of the factors that will pave the way for an intensive dialogue [with the United States and the United Kingdom] ... for the purpose of bringing about a peaceful solution and sparing the region - and possibly all mankind - from certain disaster should war break out. In any event their presence with Iraqi families working at vital installations may prevent military aggression." The letter continues by referring to a threatened economic blockade and states: "Therefore anyone who pauses to consider this scenario ... will recognise the reasons why we must all ensure that the foreigners concerned do not leave for a certain period of time, until the clouds roll back from the sky again."
8. In my view the letter is to be construed as containing an explicit threat to continue to detain the

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hostages in order to compel the United States and the United Kingdom to engage in dialogue and to refrain from taking military action against Iraqi forces or from imposing economic sanctions.

9. In the circumstances I consider there is formidable case for Saddam Hussein to answer on charges of hostage taking contrary to section 1 of the Taking of Hostages Act 1982. I find the claim made by the Attorney General ("the AG") that there is insufficient evidence hard to understand. Given the clarity of the video film and of the eye witness statements, coupled with the written admission in the letter to the United Nations, the evidence appears to be overwhelming.

10. I do not consider that the fact that Saddam Hussein was, and is, the head of state of Iraq makes any difference to his criminal liability in the United Kingdom. The hostage taking established by the evidence was carried out in clear violation of Article 34 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, of 12th August 1949 ("the Geneva Convention"). By virtue of Articles 146 and 147 of the Geneva Convention, such conduct is to be made the subject to universal jurisdiction in all States party to the Convention. Iraq ratified the Geneva Convention on 14th February 1956, the United Kingdom signed the Convention on 8th December 1949 and ratified it on 23rd September 1957 and Kuwait ratified the Convention of 2nd September 1967.

11. Insofar as it may be argued that the conduct of Saddam Hussein took place in Iraq after the close of hostilities with Kuwait, such conduct would nevertheless breach the International Convention against the Taking of Hostages, adopted by the United Nations General Assembly on 17th December 1979 ("the Hostages Convention"). The United Kingdom ratified the Hostages Convention on 22nd December 1982 and the Convention entered into force on 3rd June 1983. The jurisdiction established by the Hostages Convention is one where existing domestic courts of all countries are authorised and required to take jurisdiction internationally.

12. The only possible bar to proceedings in the United Kingdom against Saddam Hussein is a claim to immunity. In Democratic Republic of Congo v. Belgium ICJ judgment 14th February 2002, the ICJ held that, as a matter of customary international law, certain holders of high-ranking

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office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, are entitled to claim complete immunity from jurisdiction in other States, both civil and criminal.

13. According to the ICJ, no distinction is to be drawn between acts performed by such an officer in an "official" capacity and those performed in a "private capacity", or, for that matter, between acts performed before the person concerned assumed office and acts committed during the period of office. There is no exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent officers, even where they are suspected of having committed war crimes or crimes against humanity.
14. The ICJ confirmed that immunity will cease to apply after the officer has left office, in respect of acts committed prior or subsequent to his or her period of office, and for acts committed during that period of office in a private capacity. However, the ICJ did not express a view on whether war crimes and crimes against humanity fall into this last category or whether they may remain official acts to which immunity continues to apply.
15. The decision of the ICJ is not directly binding on the English courts. However the English courts must apply international customary law, and will treat the judgment of the ICJ as effectively determinative of the state of international law.
16. This means that (subject to what is said below) it is not possible to issue an arrest warrant for the arrest of Saddam Hussein whilst he holds office as Head of State. The ICJ has not determined whether a warrant can be issued after he leaves office for crimes against humanity.
17. However the ICJ emphasised that the immunity from jurisdiction enjoyed by high-ranking officers does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.
18. The immunities enjoyed under international law by such an officer do not represent a bar to

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criminal prosecution in the following circumstances:

- where such persons are tried in their own countries,
- where the State which they represent or have represented decides to waive that immunity,
- where such persons no longer enjoy all of the immunities accorded by international law in other States after ceasing to hold office, and
- where such persons are subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.

19. These are important exceptions. They mean that there is nothing to prevent the Police and the Law Officers continuing to investigate, prepare and analyse the case against Saddam Hussein.
20. There is nothing to prevent the AG indicating that he would be minded to issue his fiat permitting a prosecution, in the event that the Iraqi government declined to bring proceedings itself or waived immunity. Indeed it would be sensible for the AG to take this step in order to make it clear that any delay in issuing proceedings is due to the Iraqi decision to claim immunity, rather than any delay on the part of the United Kingdom authorities.
21. Once Saddam Hussein leaves office, it is an open question as to whether any immunity will continue to apply. There is a powerful separate opinion, delivered by Judges Higgins (the British Judge), Koolimans, and Buergenthal, in the ICJ to the effect that former ministers will not continue to be immune after they leave office since serious international crimes cannot be regarded as official acts for the purpose of any continuing immunity because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform.
22. It is arguable that this approach will apply also to former Heads of State. It is certainly the approach adopted by the House of Lords in Pinochet. For this reason the case against Saddam Hussein must be prepared now, so that action may be taken swiftly on any loss of office to test the extent to which any immunities enjoyed under international law continue to apply and if not, to conduct a fair and speedy trial.

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23. In the case of Tariq Aziz, there is evidence of a series of statements that he made to journalists, politicians, civil servants, and diplomats from various European nations during the course of the detention of the hostages. One witness, a German civil servant, recalls Tariq Aziz saying "that [the hostages] freedom was explicitly linked to the political stance of their countries and if their countries made the correct political gestures on the developing crisis then their nationals would be freed immediately. He said he could arrange this although the exact number of hostages would be the decision of Saddam Hussein."
24. John Simpson, a BBC reporter, has made a witness statement which records Tariq Aziz, whilst denying that there was any hostage taking, as admitting that: "We are saying make peace and your nationals will enjoy freedom." Simpson also remembers Tariq Aziz saying: "We would like to keep [the hostages] as guests for a while and they might, living with people in sites where they lived, contribute to peace and prevent the dangerous policy of the United States administration ... If the Americans attack the cities where those people are living now they and our people will be hurt."
25. In my opinion the language used by Tariq Aziz constituted a clear threat to detain the hostages in order to compel the international community to refrain from acting in a manner that is inconsistent with Iraqi wishes.
26. Accordingly I consider there a real case to be made against Tariq Aziz on charges of hostage taking contrary to section 1 of the Taking of Hostages Act 1982. The evidence is clearly more than sufficient to provide a realistic prospect of conviction. I find the AG's claim that there is no sufficient evidence surprising.
27. I understand that the AG also takes the view that Tariq Aziz is entitled to immunity. In my opinion, the AG is wrong to take this view. Tariq Aziz has ceased to hold office as foreign minister. Accordingly he is not entitled to immunity by reason of his status. The only basis on which Tariq Aziz can claim immunity is by asserting that his acts of hostage taking were official acts and thus the subject of continuing immunity, notwithstanding his loss of office.
28. However, as Judges Higgins, Koolimans, and Buergenthal point out in paragraph 85 of their

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opinion, this is not the case: "Immunity prevails only as long as the [Foreign] Minister is in office and continues to shield him or her after that time only for "official" acts. It is now increasingly claimed in the literature (see e.g., Andrea Bianchi "Denying State Immunity to Violators of Human Rights", 46 Austrian Journal of Public and International Law (1994), pp. 227-228) that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform: (Goff, J. (as he then was) and Lord Wilberforce articulated this test in the case of 1^o Congreso del Partido (1978) QB 500 at 528 and (1983) AC 244 at 268, respectively). This view is underscored by the increasing realization that State-related motives are not the proper test for determining what constitutes public State acts. The same view is gradually also finding expression in State practice, as evidenced in judicial decisions and opinions. (For an early example, see the judgment of the Israel Supreme Court in the Eichmann case; Supreme Court, 29 May 1962, 36 International Law Reports, p. 312.) See also the speeches of Lords Hutton and Phillips of Worth Matravers in R v. Bartle and the Commissioner of Police for the Metropolis and Others, ex parte Pinochet ("Pinochet III"); and of Lords Steyn and Nicholls of Birkenhead in "Pinochet I", as well as the judgment of the Court of Appeal of Amsterdam in the Bouterse case (Gerechtshof Amsterdam, 20 November 2000, para. 4.2.)."

29. The Attorney General's view on immunity for Tariq Aziz appear to give no weight to this powerful opinion. If the opinion is right, there is no reason why proceedings cannot be commenced against Tariq Aziz and any lesser official involved in the hostage taking. I would expect that the AG will, on reflection, accept the opinion expressed by Dame Rosalyn Higgins QC on this point.
30. Section 2 of the Taking of Hostages Act 1982 provides that proceedings for offences under the Act can only be instituted with the consent of the AG. It will be therefore be necessary to obtain the leave of the AG if a prosecution is to be brought. Any refusal based on a material error of law or fact is capable of being reviewed by the Administrative Court. An error on the law relating to immunity would be likely to be reviewed by that court.
31. Furthermore the fact that the consent of the AG is required does not prevent the issue and execution of a warrant of arrest if that is required as a matter of urgency. Section 25(2) of the

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Prosecution of Offences Act 1985 provides that a person may be arrested and remanded in custody even if consent has not been given under section 2 of the Taking of Hostages Act 1982.

32. I have been asked to provide a brief note of the possible way forward in this case. The note is attached hereto.



Clare Montgomery QC
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INDICT - THE WAY FORWARD

1. The problem of immunity should not give rise to impunity. Whether or not Saddam Hussein, Tariq Aziz or any other ministers are entitled to claim immunity, they are not exculpated from personal criminal responsibility.
2. The UK has a clear and established right under the Geneva Conventions and the Hostages Convention to assert jurisdiction over crimes committed in relation to UK nationals in Kuwait and Iraq (as well as the right to assert universal jurisdiction).
3. This means that the UK has an unfettered right to investigate such crimes and prepare for the prosecution of any offences.
4. There are strong practical reasons for the UK to do so.
 - The evidence may be degraded, if not collected or preserved.
 - Potential defendants may be disadvantaged if not given the opportunity to deal with the allegations promptly.
 - Any other course will in practice tend to confer impunity on the potential defendants.
5. The only restriction placed on the UK by the recent ICJ judgment is that it cannot assert any compulsive jurisdiction over a person who has immunity because of his status. The UK can however prepare to assert that jurisdiction once immunity ends.
6. The only persons who are definitely entitled to immunity because of their status are the Iraqi Head of State and the Foreign Minister.
7. The only potential defendant who has this form of immunity is Saddam Hussein
8. The UK may invite Iraq to waive that immunity in any event.

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9. The UK could also promote the formation of an ad hoc international tribunal to deal with him
10. The UK can, in any event, prepare to prosecute Saddam Hussein when he ceases to hold office. It is lawful for the UK to take all steps to prepare for a prosecution provided only that no coercive measures are taken.
11. Tariq Aziz is no longer Iraqi Foreign Minister and he is not entitled to any status immunity.
12. Tariq Aziz can be arrested and prosecuted in the UK since his acts of hostage taking are not "official" acts for the purpose of continuing immunity.
13. The investigation and prosecution of other Iraqi officials and ministers may also proceed.
14. The following steps should be taken immediately:
 - Any investigations should be completed
 - Any suspects should be notified of the allegations and invited to comment
 - The AG should indicate that he is minded to issue a fiat (assuming he is satisfied about evidential sufficiency/public interest criteria)
 - Warrants should be issued for the arrest of non immune officials
 - Iraq should be invited to waive immunity for immune officials or try them in Iraq
 - When the immune officials leave office warrants should be issued for their arrest



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