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OCCUPATION RIGHTS: IRAQI OIL

1. I promised to let you have an outline of the legal position as regards occupying forces and their rights to deal with oil reserves in occupied territory.
2. The general international law on this issue stems mainly from the regulations annexed to the 1907 Hague Convention IV respecting the laws and customs of war on land. The main instrument applicable to the responsibilities of occupying forces ie Geneva Convention IV of 1949 relative to the Protection of Civilian Persons in Time of War) does not significantly affect the situation. The Hague regulations are now regarded as part of customary international law, ie they do not depend on whether the States involved are or are not parties to the 1907 Convention.
3. The Hague Regulations are applicable to occupied territory, ie territory actually placed under the authority of the hostile army (Article 42). Article 43 provides that the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country. The effect of this provision is that the occupying power acquires a temporary right of administration, but not sovereignty. He does not acquire the right to dispose of property in that territory except according to the strict rules laid down in those regulations. So occupation is by no means a licence for unregulated economic exploitation.

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4. The application of the Hague Regulations is complicated in that there are different rules applicable to private and public property, and to moveable and immovable property. It is likely that Iraqi oil will be publicly-owned immovable property. UK and US practice appears to be that if ownership is doubtful, property should be regarded as owned by the occupied State unless private ownership can be established. If it should turn out that for some reason Iraqi oil (or some of it) is privately owned then to that extent different rules will apply.
5. The most directly relevant Article of the Hague Regulations is no 55, which provides that "the occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties and administer them in accordance with the rules of usufruct". Usufruct is a civil law concept, deriving from Roman law, and means the right to enjoy and take the fruits of another's property, but not to destroy it or fundamentally alter its character.
6. There is some limited authority on this issue concerning Singapore oil stocks seized by Japan in the Second World War. The judgment in that case indicated that oil in the ground is part of immovable property (though this also appears to depend on the characterisation under local law). The effect of this classification would be that the reasonable operation of oil wells would be permitted, at least up to the rate at which they were previously operated. But there would be no right to develop new oil wells, (as that would not be safeguarding the capital).
7. Furthermore, commentators note that, in broad terms, an occupants' powers are to continue orderly government and to exercise control over the resources of the country so far as necessary for that purpose and for them to meet their own military needs. What this means is that the occupant may exercise Hague Regulation rights to the limit of what is required for the purposes of the occupation and the needs of the local population; so the use of the oil of the occupied State for supplying the needs of the occupying power outside the occupied territory would not fall within the Hague regulations. A further point is that the grant of any new concession relating to oil fields may breach Article 43 of the Hague Regulations (above) on the grounds of failure to respect the laws in force in the occupied country.
8. I should add that moveable property (such as oil already extracted) may be requisitioned by occupying forces, but again only for the needs of the army of occupation. The authorities appear to suggest that the wider powers conferred by the Hague Regulations in relation to the seizure of munitions of war do not apply in the case of oil (Articles 52 and 53 of the Hague Regulations – and also the Singapore Oil Stocks Case).
9. In the case of Iraqi oil a further complication is the existence of a range of Security Council resolutions which regulate the export of Iraqi oil. Under resolution 661(1990), the import of all commodities and products originating in Iraq is prohibited (paragraph 3). As you will know, there is a complex structure of resolutions permitting the export of oil by Iraq, the payment of those proceeds into

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a UN escrow account and use of those proceeds for the humanitarian needs of the Iraqi population under the oil for food programme, established in accordance with resolution 986(1995) and repeatedly renewed at six-monthly intervals. These resolutions deal with all oil exports from the territory of Iraq; there is no limitation to supplies under the control of the current Iraqi government (though clearly the purpose of the sanctions and OFF programme is to prevent money falling into the hands of the Iraqi regime with which it can buy prohibited weapons).

10. The current oil for food for regime assumes a degree of Iraqi government involvement (indeed paragraph 10 of resolution 1361(2001) urges the government of Iraq to provide their full cooperation and its effective implementation). As I understand it, Iraqi government involvement includes endorsement by the government of Iraq of each application for purchase of Iraqi petroleum or petroleum products (paragraph 1 of resolution 986), and guaranteeing equitable distribution on the basis of a plan submitted to and approved by the Secretary-General (paragraph 8). There is also provision for notification to the government of Iraq under the GRL system set up in resolution 1409 (2002). This is apart from the underlying involvement of Iraqi authorities at many stages in the process, including their involvement in contracts for the sale of oil and the supply of humanitarian goods. There are also numerous practical issues such as the presence within Iraq of UN agents to check the supply of goods.
11. It is hard to escape the conclusion that in the event of their being, for a period, no government in active control of Iraq, and coalition forces being involved to some extent in the operation of Iraqi oil supplies, significant changes to the oil for food programme would be required. As a minimum, such changes would require the substitution of an occupying authority for the government of Iraq in the oil for food programme. But there will be more complicated policy decisions about how far the oil for food programme, and indeed the sanctions regime as a whole, should continue following any conflict. I understand that the US may be working on a draft, but we do not yet have a copy.

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