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Date: 16 February 2003

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Reference: UNR054/018/2003

To: UND

SUBJECT: OCCUPATION RIGHTS: THE ADMINISTRATION OF JUSTICE

1. I promised that I would give you an overview of the general legal framework within which the administration of justice may fall following conflict in Iraq. I have divided this advice into two general headings: the administration of justice during a state of conflict and during a state of occupation. In so far as it deals with a state of occupation, this advice focuses on the powers that would be available to an occupying force in the absence of a UN mandate. I would emphasise that this is a basic guide to the various complex legal issues involved in this area. The MOD's view will be critical in all aspects (I have copied this minute to the MOD Legal Adviser accordingly).

Summary

2. In the event of a military (belligerent) occupation of Iraq we would need to ensure that the activities of UK armed forces and other UK officials were in strict compliance with the laws governing belligerent occupation, as well as other domestic and international legal

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obligations. These laws place certain limits on the administration of an occupied territory, excluding, for example, the possibility of undertaking widespread reforms of the criminal justice system. Provisions also exist as to the prosecution of individuals for prior criminal acts, including those alleged to have committed war crimes or other serious international crimes.

The Administration of Justice during a Conflict

3. In general terms, where members of the Armed Forces fall into the hands of an adversary, they are to be considered prisoners of war and are to be treated in accordance with Geneva Convention III and Protocol I. They may not be punished for the mere fact of having taken part in the fighting. They may however be prosecuted for war crimes and for offences committed before the conflict. These proceedings may be conducted before the military or civil courts of the detaining power, if so allowed by the laws of that country (but I understand that our own Armed Forces would not seek to try such individuals before UK military courts). The accused must be afforded the minimum guarantees provided for under the Geneva Conventions and Additional Protocol I, including the right to defence counsel.

The Administration of Justice during an Occupation

4. The rights of coalition forces to occupy Iraq following a conflict would be closely related to their rights under international law to use force. It is likely that those rights will be based on the express or implicit authorisation of the United Nations Security Council in a resolution adopted under Chapter VII of the Charter. Such an authorisation will not give an unlimited right to use force; the scope of the authorisation will need to be interpreted within the overall objective of Iraqi compliance with disarmament obligations imposed by the Security Council and the requirement for restoring international peace and security in the area. Any use of force would have to be limited to what is necessary to enforce those obligations and be a proportionate response to Iraq's breach. As regards occupation post-conflict, the authorisation will again only justify such steps as are necessary to achieve the above objectives. A coalition presence in Iraq post-conflict will become progressively more difficult to justify as time elapses following a conflict.
5. The laws governing belligerent occupation are set out principally in Geneva Convention IV of 1949 (Relative to the Protection of Civilian Persons in Time of War) and the Regulations annexed to the 1907 Hague Convention IV, as well as general principles of international and customary law.
6. In the event that control over Iraq passes to an occupying military force, that force takes on responsibility for, amongst other things, the restoration and maintenance of public order and safety (Hague Regulations article 43; Geneva Convention IV articles 13 and 27). These responsibilities are not, however, without limits:

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i. Applicable law

7. The penal laws of the occupied territory shall remain in force following an occupation. This general rule is subject to three exceptions: (i) laws which serve to further the purposes of warfare in the occupied territory; (ii) laws which constitute a threat to security; and (iii) laws which represent an obstacle to the application of humanitarian law (Geneva Convention IV article 64).
8. In addition to the exceptions outlined above, the Occupying Power may enact legislation of its own provided that such legislation is essential to allow the Occupying Power to fulfil its duties, or if such legislation is militarily necessary or essential to maintaining public order (Geneva Convention IV article 64(2); Hague Regulations article 43). Laws enacted by the Occupying Power do not come into force until they are published in the local language and brought to the attention of the local population.
9. In the context of Iraq, this does not amount to a power to conduct a wholesale revision of existing laws and constitutional arrangements. The power is to allow the occupying forces to fulfil their temporary administrative duties.
10. From a practical point of view, the ability of an Occupying Power to determine the laws applicable in the context of the criminal justice sector is dependent upon an examination of existing laws in the light of the responsibilities outlined above. You may wish to consider undertaking this exercise in advance, in order to prevent, in so far as is possible, inconsistencies and confusion on the ground in the early stages of an occupation. Work has already been done in this regard in the context of the Future of Iraq project, with whom you already have contacts. Whilst we have concerns as to the substance of the proposals emerging from that project, they may provide a useful resource in terms of accessing existing domestic Iraqi legislation.
11. In addition, it is critical to keep in mind that, in the event that UK forces are involved in an occupation of Iraq, those forces must act in accordance with the UK's international legal obligations, including those responsibilities set out in the European Convention on Human Rights - unless we intend to make a derogation under the ECHR and the International Covenant on Civil and Political Rights. These legal obligations will impact upon the activities of UK forces and other UK officials in the context of a belligerent occupation.

ii. Judicial Infrastructure

12. In the event of an occupation, the administration of justice should remain in the hands of the incumbent administration and courts (Geneva Convention IV article 64; Hague Regulations article 43). Exceptions exist to this general rule where the current

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administrative bodies represent a threat to security and public order or an obstacle to the application of humanitarian law (Geneva Convention IV article 64). In addition, where the existing courts are unable or unwilling to carry out their duties, the Occupying Power may establish its own administrative bodies. This power does not enable the occupying force to entirely reform the occupied territory's judicial structure. Action may be taken such as is essential to allow the occupying force to fulfil its duties during the occupation. Functioning national systems and bodies should be left intact.

13. Where possible, existing personnel involved in the administration of justice in the occupied territory should remain in their positions. Article 54 of the Geneva Convention IV states that,

"The Occupying Power may not alter the status of public officials or judges in the occupied territories..."

This is intended to better facilitate the uninterrupted functioning of the administration of justice and to avoid the creation of a vacuum. In carrying out their tasks, such individuals will be required to take direction from the occupying force. In accordance with the principle of the independence of the judiciary, the Occupying Power should allow the judiciary to function with as minimum interference as possible. The Occupying Power may, however, regulate the appointment of judges to proceedings, and may appoint and dismiss judges as and when required.

14. The extent to which the administration of justice may remain in the hands of the local Iraqi judiciary and law enforcement agencies will depend in large part upon the capacity (physical and personnel) of the existing system. The degree to which individual members of the criminal justice sector have been tainted by the current regime will also be an important factor. It is difficult to assess these issues from outside Iraq. We are aware that the NSC is currently engaged in developing a 'vetting in' and 'vetting out' process. In the event of a military occupation of Iraq, there would need to be a rapid scoping study and needs assessment of the justice sector - avoiding, as far as possible, both the creation of a vacuum and the pursuit of local summary justice and reprisals.

The Exercise of Criminal Jurisdiction

15. In addition to the general principles outlined above, the laws of occupation also set out a basic framework for the prosecution of individuals suspected of criminal conduct prior to, or during, the occupation.

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i. Role of the Local Iraqi Courts

Breaches of Iraqi Penal Law during the period of Occupation

16. Subject to the principles and exceptions outlined above, the local Iraqi courts and law enforcement authorities should continue to administer the justice sector, including the conduct of investigations and prosecutions. In so far as possible, this should take place in accordance with the Iraqi criminal procedure code in force at the relevant time. In the event that domestic courts are not able to function, the Occupying Power may establish alternative structures on a temporary basis.

Breaches of Iraqi Penal Law prior to Occupation

17. Offences committed prior to the occupation may be prosecuted by Iraqi courts provided that they would otherwise have had jurisdiction (i.e. the prohibition against retroactive punishment). Any prosecutions undertaken by the Occupying Power may be subject to scrutiny by the Protecting Power (or a substitute international organisation) (Geneva Convention IV article 71).

ii. Role of the Occupying Power

Breaches of Iraqi Penal Law during the period of Occupation

18. As indicated above, breaches of Iraqi penal law will fall, in the first instance, to be prosecuted by the local Iraqi courts. In the event that such courts are unable or unwilling to carry out this task, or that military necessity otherwise dictates, the Occupying Power may administer justice through alternative institutions.

Breaches of Penal Laws enacted by the Occupying Power

19. Offences against penal laws enacted by the Occupying Power may be prosecuted before the military courts of the Occupying Power sitting within the occupied territory (Geneva Convention IV article 66). Such proceedings must take place before an ordinary or special military court, provided that such proceedings meet the minimum fair trial requirements of the Conventions. The minimum guarantees include, amongst other things, the right to defence counsel and the right to adequate facilities to present a defence. In the event that the UK was involved in the prosecution of such cases, consideration would need to be given to the UK's fair trial obligations under article 6 of the European Convention on Human Rights.

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Serious Violations of International Humanitarian Law Committed Prior to Occupation

20. The Occupying Power is not entitled to prosecute individuals for acts committed prior to the occupation; such offences remain a matter for the local courts. The exception to this general principle relates to acts amounting to a breach of the 'laws and customs of war' - including grave breaches of the Geneva Conventions, crimes against humanity and other serious international crimes (Geneva Convention IV article 70). Individuals suspected of having committed these offences may be prosecuted before appropriately constituted courts of the Occupying Power.
21. As regards the prosecution of individuals for serious violations of international humanitarian law and other serious international crimes, it is questionable whether the laws of occupation would allow the establishment of special internationalised tribunals, such as the Sierra Leone Special Court. In any event, from a practical point of view, the establishment of such mechanisms by an Occupying Power would be extremely resource intensive and time consuming. Moreover, the credibility of such mechanisms may be brought into question as a form of 'victors justice.' These considerations give further weight to the need for an appropriate UN mandate encompassing the prosecution of serious international crimes (see my paper to you dated 30 January 2003 on the possible terms of such a UN mandate).

The Death Penalty

22. Protocol 6 to the European Convention on Human Rights prohibits the use of the death penalty. The UK ratified the Protocol on 27 January 1999. The death penalty may not be imposed by UK courts, nor may UK officials or service personnel assist in the implementation of the death penalty. This prohibition will have an impact upon the extent to which the UK could be involved in the administration and development of an Iraqi justice sector that retains such a penalty.

Conclusion

23. The limits placed upon the role and responsibilities of an Occupying Power do not allow it to conduct a widespread reform of the criminal justice system. Any such undertaking would require an appropriate UN mandate; either as part of an interim administration, or in the form of a direct authority given to an individual state or a coalition of states.
24. Bearing in mind the obligations and responsibilities of an occupying force outlined above, it may be useful to consider the following issues in advance of a conflict (this list is by no means exhaustive):

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- i. The identification of the laws to be applied by either an occupying force or a provisional administration, including those existing laws to be amended or repealed and new laws that will need to be enacted.
- ii. To the extent possible, a scoping study of the current state of the criminal justice system. This may include, the identification of key courts and detention facilities, the identification of criteria for 'vetting in' and 'vetting out' individuals, logistical and personnel requirements.
- iii. In so far as military exigencies may allow, the identification of systems for the seizure and preservation of evidence and the maintenance of key known crime sites.
- iv. The development of a public information and awareness campaign in order to avoid the presentation of a law and order vacuum.

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