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2 April 2003

Sir David Manning KCMG
No.10

Dear David,

ORHA

1. When we discussed this issue in COBR(R) on Saturday, you said that you wanted to see any papers prepared here which might be circulated for the Ministerial group.
2. The Iraq Planning Unit have produced a useful base paper on ORHA and UK policy towards it, which I thought would be useful as an initial paper for the Ministerial group. I enclose a copy and would be grateful to know whether you and Desmond think this is worth circulating.
3. On post-conflict issues more generally, our Private Secretary letter of 31 March provides a further assessment of the UK and US approaches and how to bridge the gaps. That could also be circulated to the Ministerial group if you wished.
4. I am copying this letter to Desmond Bower and Dominick Chilcott.

Yours ever,

Peter Ricketts

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IRAQ: OFFICE FOR RECONSTRUCTION AND HUMANITARIAN ASSISTANCE (ORHA)

1. This paper reviews UK policy towards ORHA in the light of recent developments. It starts from the premise that, although our objective in Phase IV is an effective Interim Iraqi Administration (IIA) acting under appropriate UN authorisation, this is unlikely to be in place earlier than 90 days from the cessation of hostilities. So we need to ensure that mechanisms exist from the outset that are capable of delivering humanitarian assistance and, when necessary and within the relevant legal constraints, administering civil authority, in co-operation with our military and where possible with the Iraqis. Without this, these tasks will fall on the military – who have other priorities – with resource implications and with no viable exit strategy in sight. The options are as follows:

- We task and resource 1 Div to do this autonomously in those areas of Iraq for which they are responsible;
- We work through ORHA and do what we can to increase ORHA's institutional capacity, while accepting that UK-US differences about the legality of some activities ORHA will undertake is likely to impact at some stage on our ability to do so;
- We find other ways to fulfil these tasks, eg through NGOs or international agencies.

Current Situation

2. ORHA was set up by the Department of Defence to provide the transitional civilian authority for post-conflict Iraq, under coalition military control. It has now relocated from Washington to Kuwait. On current plans, once Baghdad falls the US will announce military government over Iraq (although the legal basis for this is controversial). Shortly after, ORHA will deploy to Baghdad and evolve into the civil administration dealing with humanitarian and in due course perhaps political and reconstruction issues. Jay Garner will assume the role of Interim Transitional Civilian Administrator. ORHA will remain within the overall military chain of command, but distinct from the military command structure on the ground.

3. Once into Phase IV, ORHA will work as far as possible with and through the existing Ministries in Baghdad. On current plans a senior US official (a "Shadow Minister") will be assigned to each Ministry to liaise with ORHA. There will also be a network of provincial offices. A team within ORHA will work on constitutional issues including setting up the Iraqi Interim Authority (IIA), likely to be drawn in part from those Iraqi exiles currently working alongside ORHA. As circumstances permit, ORHA plans to conduct a phased transfer of civilian authority from ORHA to the IIA.

4. ORHA's current staffing level is about 200. This is expected to rise to over 1000 by the time ORHA deploys into Iraq. The UK now has six officers seconded to ORHA in theatre, with five more in the pipeline, and one working full time in ORHA's reach-back office in the Pentagon. Their role is to influence and shape ORHA's thinking on the key Phase IV issues, and to ensure that information flows effectively from theatre to HMG – including information about commercial

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opportunities likely to arise in Phase IV. Our secondees are fully integrated and are adding significant value. At ORHA's request we are considering whether to strengthen our representation, particularly in the following areas: public relations, civil administration, and humanitarian advice, as well as support staff for our existing secondees. The Australians also have six secondees in ORHA.

5. There is considerable tension between the US State Department and the Department of Defence for control over ORHA. There remain also deep differences of view within the Administration over the desirability and need for UN authorisation for Phase IV reconstruction work, and over the relationship between ORHA, the IIA, and a possible future UN Special Co-ordinator.

The Legal Position

6. The Attorney General has set out the legal position regarding the rights and obligations of an occupying power. The key point in this for our involvement in ORHA is that a further UNSCR is needed to authorise imposing reform and restructuring of Iraq and its Government. In the absence of such a UNSCR, the UK (and US) would be bound by the provisions of international law governing belligerent occupation, notably the Fourth Geneva Convention and the 1907 Hague Regulations. The provisions of these treaties would need to be considered against specific proposals in order for the law officers to give detailed advice on the precise limits of what is possible. So the examples given below are illustrative only of the possible issues that may arise during Phase IV. The Attorney General also notes that the longer the occupation of Iraq continues, and the more tasks undertaken by an interim administration depart from the main objective of the use of force, the more difficult it will be to justify the lawfulness of the occupation.

7. The rights of an occupying power are in the nature of temporary and provisional administration. The national laws must in principle remain in force, except in so far as they constitute a threat to security or an obstacle to the application of humanitarian law. New laws are, however, allowed to ensure the security of our forces, the maintenance of order, the administration of the country and the ability of our forces to look after the welfare of the Iraqi people. Any process leading to changes to the constitution would require Security Council authorisation.

8. The Coalition cannot circumvent its responsibilities by installing a puppet government. So the creation of an Iraqi interim authority, without an authorising UNSCR, would not change the obligations on the Coalition or the limits to its powers.

9. The Coalition has obligations under international humanitarian law to provide for the humanitarian needs of the Iraqi people under its occupation. This situation is unaffected by whether or not there is an authorising resolution for Phase IV.

10. The same goes for rehabilitation. Reconnecting power, repairing water and sewage plants, building shelters, and repairing buildings such as schools and hospitals to allow normal civilian life to continue all fall within the heading of humanitarian assistance. So the immediate post-conflict rehabilitation tasks will be lawful without another UNSCR.

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11. The Coalition is also obliged to maintain law and order. Coalition forces, therefore, have the right and duty to intervene to stop revenge killings and maintain public order. The Coalition also has the right to take steps to preserve its own security. As well as detaining anyone resisting their presence, the Coalition has the right to remove people from positions in public office if they refuse to obey them. But this power must not be used arbitrarily.

12. It may be possible to construct a humanitarian justification for repairing the oil fields. But new exploration would be ruled out. Political and presentational concerns also lead us to be cautious. There could be no change to the handling of the oil revenues without separate UNSC authorisation.

13. These constraints severely limit what the Coalition can legally do on the economic front. Administrative actions requiring no change in the law should be permissible; and the requirement to look after the welfare of the population provides some scope for changing the law. Most of what the Coalition might want to do in the first few months of occupation might well be covered under these heads. But without UNSC authorisation it would be illegal to make substantial changes in the economic system not closely tied to short-term improvements in conditions. The Coalition would thus not be able to introduce market-oriented economic reforms.

Likely Sequence of Events in Phase IV

14. Jay Garner sees ORHA acting as the transitional administration for perhaps 30-90 days. The priority for the first 30 days are likely to be to deal with immediate humanitarian needs. These will include: the restoration of food supplies as far as possible through the existing ration system; the payment of public sector salaries; the re-establishment and rehabilitation of essential public services such as water/sanitation, power, education and primary healthcare provision. ORHA will also need to work closely with UN staff to ensure that the Oil for Food programme can restart as soon as possible. These activities fall clearly within the responsibilities of occupying powers and will be crucial to securing public consent for ORHA in the early days.

15. Depending on the circumstances, we are likely quite quickly (perhaps during the second 30 days) to be faced with a grey area of activities which ORHA might wish to perform for politically or economically sound reasons but which could move ORHA beyond the UK's understanding of an occupying power's rights and responsibilities. Examples might include: initiation of a small business loan programme; abolition of restrictions on private business; significant changes to the exchange or trade regimes; significant changes to the structure of the state budget; reform of the police. These are likely to be addressed in a slightly longer time scale. Whether they would be addressed by ORHA (i.e. without a covering UNSCR) or by an Iraqi Interim Authority (potentially under UNSCR cover) remains to be seen, and will depend both on progress in setting up a functional IIA and on progress in New York on the "fourth" resolution.

16. Finally, there continues to be a view in DoD that the absence of a UNSCR need not be an impediment to thorough-going political and economic reform, including in areas that the UK would consider to be clearly outside the scope of an occupying

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power's rights and responsibilities. These could include: significant changes to the country's political or economic governance such as: constitutional reform; substantive decisions on oil market strategy and the attraction of foreign investment in the oil sector; introduction of a new currency; phasing out of subsidies and price controls, restructuring of the civil service and of state owned enterprises, including possibly moves towards privatisation; reform and liberalisation of laws and regulations governing domestic economic activity; reform of the external trade and investment regimes; budgetary reform including creation of federal fiscal arrangements.

17. There is also a political dimension to this: there is no agreed US inter-agency view, still less an agreed UK-US view, on how to handle key political issues such as the composition of the IIA, the nature of its relationship with the coalition through ORHA, or the timing or remit of a "Baghdad Conference". We are preparing a separate paper on this.

Implications for UK Involvement

18. ORHA is in many ways a sub-optimal organisation for delivering the UK's Phase IV objectives on the ground in Iraq. But it is at present the only game in town, and will remain so until negotiations over an authorising UNSCR and UN involvement in the administration of Iraq are completed or until there is large-scale NGO activity in Iraq.

19. On the positive side, there is ample scope to use our secondees to exert leverage over both US Phase IV planning and over practical implementation on the ground. **We therefore recommend that the UK should continue to commit resources to ORHA where we can add real value and exert real influence.** We should consider fielding additional expertise that can help the Iraqis re-establish essential public services, i.e. working at the humanitarian end of the spectrum.

20. But there remain a number of risks:

- That even with UK secondees ORHA may not be up to the tasks.
- That continued US inter-agency jockeying makes it difficult for our secondees to work effectively to deliver UK objectives.
- That failure to secure local, regional or international political legitimacy for ORHA as a result of its close association with military rule will incur significant political costs for the UK.
- That, *in extremis*, our involvement with ORHA might in the absence of an authorising UNSCR mean we were asked to take part in activities that are illegal.

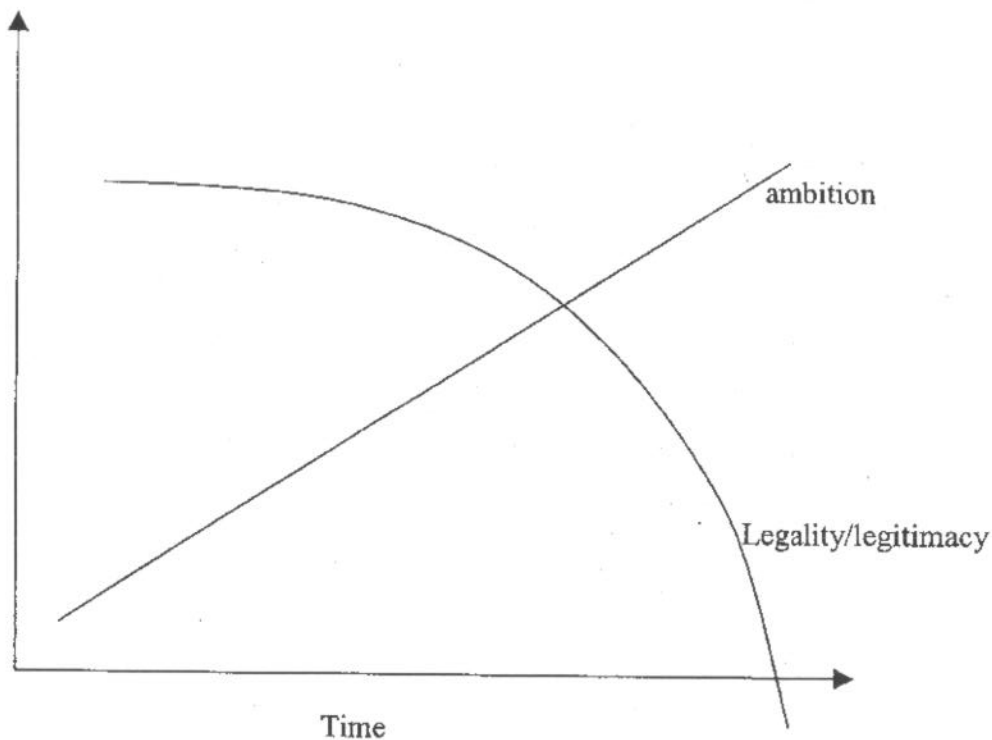
21. The first two are strong arguments for our engagement with ORHA: only by full, constructive engagement can we hope to shape the outcomes in ways that meet our objectives. The second is a real risk, and one that arises from our prominent role in the coalition. We can manage the ORHA dimension of this risk by managing our profile within ORHA/ORHA: in particular, **we recommend that General Cross' formal appointment as Garner's deputy should be conditional on ORHA acting within the relevant law.**

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22. The third is at present hypothetical but potentially serious. This is not – yet – so compelling as to be the determining factor in deciding our commitment to ORHA. But nor is it impossible to imagine a situation where we would have to withdraw part or all of the UK contingent from ORHA if we believed their situation was legally unsustainable. This would be a major blow to the coalition's cohesion and to our ability to deliver UK objectives in Iraq. At this stage, **we recommend that we factor this into our continuing discussions with the US on the complex of Phase IV issues under the "fourth" UNSCR.** We shall need to keep this in view when planning the nature and scale of our commitment to ORHA and deciding what the terms of any secondments should be.

23. In collaboration with FCO Legal Advisers we need urgently to **advise Ministers on the legality of specific actions planned by ORHA for the early stages of Phase IV**, where these are known.



Iraq Planning Unit
27 March 2003

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