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The Rt. Hon. the Lord Goldsmith QC

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24th January 2003

Dear Ann

SADDAM HUSSEIN, TARIQ AZIZ, ALI HASSAN AL-MAJID AND TAHA RAMADAN

In a letter of 11th November 2002 Mr Forrest on behalf of Indict asked me to grant my fiat for the prosecution of the four persons: Saddam Hussein, Tariq Aziz, Ali Hassan Al-Majid and Taha Ramadan for the crime of hostage taking contrary to s 1 of the Taking of Hostages Act 1982.

By his letter of 21 November 2002, in response to a request from this office, Charles Forrest sent to me the evidence on which Indict relies in support of that request for consent. That material has since been supplemented under cover of a letter of 8 January 2003. The evidence has now been reviewed in conjunction with the material provided by Indict in support of its first request for consent, made to my predecessor, as have the opinions from Clare Montgomery QC that you or Indict have provided to my office from time to time; and I have reached conclusions based upon that material. Like my predecessor, I have also had the benefit of advice from experienced Treasury Counsel well used to prosecuting difficult and serious cases.

Before turning to deal in turn with each of the individuals, there are three preliminary observations I would like to make.

First, I have seen the record of an exchange in the House of Commons in an oral question you put to the Prime Minister on 22 January. It might be inferred from what you said that I (and my predecessor) had not responded over a period of two and a half years to evidence provided. In particular it might be inferred that a request supported by evidence had been provided over two and a half years ago supporting a prosecution against Ali Hassan al-Majid. He was the particular person your question was directed to. You drew attention in particular to the allegation that he was responsible for

27.Jan. 2003 11:59 No.9412 P. 2/12

DECLASSIFIED

63

DECLASSIFIED

killing 100,000 Kurds and a listener might have inferred that evidence had been produced over two and a half years ago sufficient to issue an arrest warrant.

I recognise of course that the process of question time leads to a necessary brevity of question which will often prevent a full exposition of the facts and which may lead to an impression being given which is not intended. Nonetheless, given how some might have interpreted your remarks, it is right that I should record the actual position.

First, the fact is that no request to grant a fiat in respect of the prosecution of Ali Hassan al-Majid (or for that matter Taha Ramadan) was made until just over two months ago on 11th November, and that request was not supported by evidence until 21st November 2002 when Mr Forrest sent a dossier of material consisting of documents and witness statements, most of which had not been seen by this office before. It has been necessary to consider that information and to obtain the views of Counsel, which has now been done.

In addition, it is worth adding in the light of the reference to the allegations against Ali Hassan Al-Majid that he had killed 100,000 Kurdish people (a matter which is also referred to in the letter of Mr Forrest of 14 January) that the request for my fiat for a prosecution has at no time included any suggestion that I should consent to any prosecution in relation to these matters. The request has related only to the crime of hostage-taking.

Second, in relation to the request in relation to Saddam Hussein and Tariq Aziz, a request to consent to a prosecution (in respect of hostage taking) was first made by Indict in 2000 and some evidence was provided for my predecessor's consideration in November 2000. However, decisions were given in relation to that request by my predecessor Gareth Williams in his letter of 22 March 2001 and by me in my letter of 15 May 2002.

I of course acknowledge that you and Indict have repeated that request, notably in the letter of 11th November 2002, and moreover that there have been in the interim some further discussions both between you and me and between my office and Clare Montgomery QC. It is the fact, however, that the original request was considered and answered.

Before turning to the conclusions I have reached in respect of the most recent request for consent, it is I believe important to say something about my role. Under the Taking of Hostages Act 1982, no prosecution can be brought without my consent. The Attorney General is not, however, unlike perhaps in some countries, the head of the criminal investigation branch of the government. My office does not have the facilities or the powers to carry

27 Jan 2003 11:59 No. 9412 P. 3/12

DECLASSIFIED

DECLASSIFIED

out investigation work of the sort normally carried out by the police, nor do I have the power to direct any police force to carry out any investigations. The normal process, as you will be aware, is that police (or in some cases other investigating forces) investigate alleged crimes. In doing so, they should pursue all reasonable lines of inquiry, whether these point towards or away from a suspect. When they consider that they have enough evidence to prosecute, under the present framework they make a decision to bring charges (a decision on which they may or may not have taken the advice of prosecutors). The prosecutor, usually the Crown Prosecution Service, will then take over the case and consider whether it should be continued. If it is an offence that requires my consent, I will then be asked for that consent.

That course has not been followed in these cases. Indict has asked me to grant my consent to the institution of criminal proceedings and failing that, to indicate that I am minded to issue a fiat. However, I believe that Indict is in truth prematurely seeking my consent (or, as Indict puts it, on a "minded to" basis) in the expectation that this will trigger further investigation (this is certainly consistent with Clare Montgomery's observation at paragraph 19 of her advice of 27 September 2002). I do not consider this a proper exercise of my power. I do not consider it appropriate to grant my consent to the institution of criminal proceedings where there has not been a full investigation into the matters that Treasury Counsel and the Metropolitan Police have advised me ought to be addressed.

The third preliminary observation is to say something about the criteria for prosecution. The evidential test applied by the Crown Prosecution Service, and to which I have regard, is whether there is a realistic prospect of conviction against each defendant on each prospective charge. When deciding whether there is enough evidence, prosecutors must consider whether the evidence presented to them is admissible in court and is reliable. If there is further evidence that the police should be asked to gather which may resolve doubts or questions raised by the evidence, or to meet any lines of defence that may arise, or to meet gaps in that evidence, then such inquiries are requested.

If, solely on the material provided, a jury is more likely than not to convict, the evidential test is satisfied. Once the evidential test is passed, I then consider whether a prosecution is needed in the public interest. However strong the public interest in bringing a prosecution may be in an individual case, no prosecution is started or continued unless there is sufficient evidence to provide a realistic prospect of conviction. But if both tests are passed it means that I am satisfied that a prosecution can be commenced immediately.

27.Jan. 2003 11:59 No.9412 P. 4/12

DECLASSIFIED

DECLASSIFIED

I have no doubt that Indict, as an extremely serious organisation dedicated to seeing leading members of the Iraqi regime brought to justice, wishes to see genuinely viable prosecutions mounted.

I have concluded, having taken advice from Treasury Counsel, that in none of the named cases is the evidence, as provided to me (or my predecessor) by Indict, sufficient at present to provide a realistic prospect of conviction. That is to say I am not satisfied that a jury is more likely than not to convict these individuals for offences of hostage-taking based on this material alone. I set out below in more detail the considerations that have led me to form those conclusions.

Saddam Hussein

I have concluded that Saddam Hussein is **at present** immune from criminal jurisdiction in this country while Head of State, for the offence or offences that seem to me to fall to be considered. I do not understand Indict's advisers to disagree with this view. On that ground alone, I would decline to grant a fiat. Assuming for the moment that the admissible evidence does provide a realistic prospect of conviction, I would not have been prepared to grant a fiat simply on the basis, as posited by Indict, that there is a theoretical possibility that Saddam Hussein's current immunity could at some point lapse. Moreover, it is arguable that the grant of a fiat, amounting to the exercise of criminal jurisdiction, of itself contravenes the immunity set out in the case of Democratic Republic of Congo v Belgium.

Clare Montgomery QC has advised Indict that there is "a formidable case for Saddam Hussein to answer". The material that is provided relating to Saddam Hussein does, in my view, at first sight provide prima facie evidence of hostage-taking. This is not, however, the same as saying that there is a realistic prospect of conviction (the evidential test found in the Code for Crown Prosecutors). Like my predecessor, I believe that with further investigation the evidence may be capable of being strengthened.

However, experienced Treasury Counsel has reviewed all of the evidence afresh. Taking account of his advice, and having reviewed the matter myself, I am of the view that the admissible evidence provided by Indict provides no realistic prospect of conviction and that it really would be essential to undertake further inquiries and revisit the evidence already obtained. On this ground also, I therefore decline to grant a fiat.

The evidence provided by Indict consists principally of the accounts of a number of individual hostages. There is also evidence from those who sought to negotiate the release of their nationals. John Simpson summarises the effect of certain press conferences he either attended or

27.Jan. 2003 12:00 No.9412 P. 5/12

DECLASSIFIED

DECLASSIFIED

whose broadcasts he saw. The accounts of the hostages do indicate an organised distribution of men, women and children of many nationalities around Kuwait and Iraq. These individuals were shipped from hotels to various strategic installations to ward off the possibility of allied attack. The women and children were set free shortly after a propaganda broadcast attended by Saddam Hussein. The evidence certainly shows that these people were held against their will. The central issue relates to whether there is currently sufficient evidence to demonstrate that Saddam Hussein bears personal responsibility for their plight.

It may appear odd to question whether Saddam Hussein bears personal responsibility for the events. It may be thought to be a matter of common sense that in a regime like that which exists in Iraq, the detention of persons in these circumstances could not take place without the express knowledge and connivance of the Head of State. But in a criminal trial, evidence of all matters relevant to establishing such matters would have to be formally provided to the court.

A prosecutor would need to be able to show by admissible evidence the identity and roles of each of the proposed defendants in practice; and the functioning of the regime at that time in terms of the inception of the hostage taking policy, its implementation/operation and the location of the powerbase(s) (this will almost certainly require expert evidence). The statement from Latif Al-Salihy dated 15 October 2000 and provided to me on 21 November 2002, illustrates (if accurate) the uncertainties about the functioning of the regime at the time and the true power base, in its references to the power and role of others. What was the role of Qusay Hussein in the hostage policy? What was the true role of the members of the National Assembly, which your evidence suggests played an instrumental role in the release of some of the hostages? The material you have provided itself raises a number of questions.

No serious prosecution on a scale envisaged by Indict should invite a court to assume facts that are necessarily outside its knowledge. Nor, I suggest, is it sensible for any prosecutor to proceed on the basis of a partial case in which many relevant lines of inquiry have so obviously not been explored.

Moreover, some of the material provided by Indict could not be relied on in its current form. Two letters to the United Nations, one of which was purportedly signed by Saddam Hussein himself on 19 August 1990, are provided as direct evidence of his personal responsibility and the purpose of the hostage policy. The translated letter from Saddam Hussein is currently not authenticated.

27.Jan. 2003 12:00 No.9412 P. 6/12

DECLASSIFIED

DECLASSIFIED

There are personal appearances at staged meetings with hostages during which he made promises which appear to have been fulfilled. To the extent that the material provided by Indict records these meetings, there are a number of difficulties with authentication, the completeness of translations, whether some material was originally in English or was heard in translated form; evidence of source, date and continuity, all which would have to be rectified by revisiting that material completely. The chronology of these recordings is confusing to say the least.

With these kinds of gaps in, and problems with, the material provided by Indict there is in my view no realistic prospect of conviction of Saddam Hussein for hostage-taking, as at present advised. The new evidence does nothing to weaken the earlier case against Saddam Hussein. It does not rectify the weaknesses identified in 2001. But although there are elements of this evidence that superficially strengthen aspects of Saddam's grip through his family; equally, as counsel states, it just indicates how little material there is in the file of evidence so far to indicate the facts about the way the regime operated.

Tariq Aziz

Indict has been advised by Clare Montgomery QC that "there is a real case to be made against Tariq Aziz". Treasury Counsel's view, with which I agree, is that there is insufficient evidence in the material provided by Indict to provide a realistic prospect of conviction. My remarks above outlining the impact of the lack of adequate material about the roles and powers/authority of individuals and the functioning of the regime - including the relationship with Saddam Hussein - are particularly important where persons subordinate to Saddam himself are concerned. One cannot so easily infer personal responsibility.

Although there is some evidence that he had some influence and authority for the continuance of the hostage situation, if not the policy. Given the successes of the German delegation and his statement to them, for example, it appears that his authority was not absolute if the evidence provided by Indict is accurate. There is no evidence from which it can be inferred that he assisted in the formulation of the policy and its execution any more than anyone else in the Iraqi Cabinet or for that matter the National Assembly. The majority of the evidence records his role in securing the release of hostages. Without proper evidence of his role there is no realistic prospect of conviction in my view. The material provided by Indict in November 2002, to the extent that it had not been submitted with the first request for consent, does not significantly alter the evidential position as it existed

27 Jan 2003 12:01 No. 9412 P. 1/12

DECLASSIFIED

DECLASSIFIED

when my predecessor wrote to you in March 2001, and as you know I agree with the view he took.

I have not had to take a view on any question of immunity that may arise in the case of Tariq Aziz because of my central conclusion that there is insufficient evidence. I decline to grant a fiat in this case.

Taha Ramadan

Clare Montgomery QC has advised Indict that there is evidence that implicates other Iraqi officials such as Taha Ramadan. Treasury Counsel advises, and I agree, that there is insufficient evidence to provide a realistic prospect of conviction at this time.

A couple of witness statements refer to Taha Ramadan in the context of meetings held by those hoping to secure the release of hostages. In both meetings he appears to have held the government line that the hostages were "guests" of Iraq and protecting the country from attack, and in the other that release depended on the attitude of the requesting government. He is said to have agreed to arrange a meeting between the Canadian delegation and the Arab Foreign Relations Committee, which is said to be the first step in obtaining a debate in the National Assembly in which there would be a decision to release hostages from a particular country. The witness understood that if such a debate took place the Canadian hostages would be released, as had already been the case with Swedish hostages. They did not see Ramadan again. Ultimately Saddam Hussein is said to have written to the National Assembly, which is said to have passed a resolution for the release of all foreign nationals.

There is some evidence that he was on one or two occasions defending, supporting or upholding the policy of hostage taking during negotiations with foreign dignitaries, but I reiterate the points I made above about the need for proper evidence about the roles of individuals and the functioning of the regime and hostage policy. As with Tariq Aziz, one cannot so easily infer personal responsibility in his case. There is no evidence that Ramadan was instrumental in the taking of hostages, there is some evidence that may show he was complicit in their release. He may have agreed with the policy, but that does not mean that he is criminally liable for that policy. If, as is suggested in one of the statements, he was the second most powerful man in Iraq, there may well be more evidence that could and should be gathered to throw light on his true role, which might explain and enhance such evidence as already exists.

Given my conclusion on the evidence, I have not needed to form a view on any question of immunity that may arise.

27 Jan 2003 12:01

DECLASSIFIED

DECLASSIFIED

Al-Majid

Clare Montgomery QC has advised Indict that there is evidence to implicate Al-Majid. Treasury Counsel's view, with which I agree, is that there is insufficient evidence to provide a realistic prospect of conviction. Indict has obtained copies of a number of documents held by the Centre of Research and Studies on Kuwait - remarkably few given that this organisation is said to be the repository and focus of study for all occupation documents seized after the expulsion of Iraq from Kuwait – produced by a series of witnesses working for the Centre, all of whom produce the same documents, each of them giving the majority of the documents their own exhibit references.

As examples of the difficulties with the material provided, one of these documents, dated 22 August 1990, is said to be a Presidential Decree showing that Al-Majid has been made Governor of occupied Kuwait. This is not a properly authenticated document, nor is there any evidence as to translation. Another document dated 20 August 1990 is said to be signed by Al-Majid. In my view the purported recognition of the signature by the witnesses at the Centre and the limited evidence of continuity is inadequate evidence of authentication. This document orders the detention of Japanese nationals two days before Al-Majid apparently had authority over Kuwait. The documents and the dates all need explanation and examination by admissible evidence.

While there may be some evidence of involvement in hostage taking against Al-Majid in the material submitted, there is currently no realistic prospect of conviction.

Given my conclusion on the evidence, I have not needed to form a view on any question of immunity.

I was not invited by Indict's letter of 21 November to consider any material other than that relating to hostage-taking.

Further inquiries

In my view, a full police investigation would be needed if this matter were to be pursued further.

Lord Williams's letter to you of 24 April 2001, gave the following advice:

> *I do not propose to set out in detail the further inquiries that would need to be carried out; indeed the police are considering what action they*

27 Jan 2003 12:01 No. 9412 P. 9/12

DECLASSIFIED

DECLASSIFIED

ought to take in response to my report. Nevertheless, I can indicate that I have had regard among other things to whether the evidence shows sufficiently cogently for the purposes of a criminal prosecution the workings of the regime and the ruling party, the constitutional set up, the role and powers of each man and the interpretation of events against that background. It is not possible as a matter of principle to take such matters for granted in the context of a criminal trial. I have also considered in detail questions concerning the authentication of documents or recordings and translations and other relevant matters affecting the provenance and accuracy of the evidence on which Indict invites me to rely. These matters would have to be properly established for the purposes of any criminal proceedings and presented cogently. Generally, a considerable amount of further work would be needed.

I agree with these views. In addition to the important matters referred to above, the Metropolitan Police themselves have indicated that an investigation ought, among other things, to interview and take statements from the former Heads of State of Japan and Germany, and appropriate Government Ministers from the USA and the UK, to establish the status of Tariq Aziz. They would also wish to identify, interview and take statements from witnesses who were close to Saddam Hussein and Tariq Aziz during the Gulf Conflict.

Any investigator or prosecutor would wish to be in a position to consider whether the evidence justified any other individuals being investigated, to ensure that both the investigation and any subsequent prosecution was directed at the right defendants; and that the case against such defendants was the right one (for example, the full evidence might show that one or more individuals – perhaps one or more of the persons named by Indict in its request to me - was liable to be prosecuted as a principal in his own right rather than merely as a secondary party).

Like Lord Williams, I do not think it right to provide a long list of the further inquiries that would be needed, based just on the evidence Indict has provided.

As I have said above, I do not believe that there is sufficient evidence at present based on the evidence presented to me and to my predecessor. But the point I seek to make and emphasise here is that any serious prosecution in these cases should not be based on limited witness evidence or a sample of documents obtained by Indict, but on a full and professional investigation

27 Jan 2003 12:02 No.9412 P. 10/12

DECLASSIFIED

DECLASSIFIED

of all the relevant facts and circumstances. As I say, and from what I know of Indict's work, I have no doubt that as a serious organisation dedicated to seeing leading members of the Iraqi regime brought to justice, Indict would wish to see genuinely viable prosecutions mounted. To commence a prosecution, especially on the scale envisaged by Indict, based on a partial investigation would I suggest be unwise in the extreme.

Indict refers to the evidence gathered by Operation Sandcastle immediately after the end of the Gulf Conflict. So far as those inquiries directed themselves to the hostage taking events, they focused on the events themselves rather than on the criminal liability of the individuals named by Indict in their request for my fiat.

As Indict will be aware, the investigation of alleged criminal offences does not fall to the Law Officers or to the Crown Prosecution Service, but to the police. As Indict is also aware, the advice of Deputy Assistant Commissioner Fry of the Metropolitan Police in 2002 was that the Metropolitan Police were not in favour of embarking on a full-scale investigation, with the significant cost and resource implications for the Metropolitan Police Service at that time. Having already bid for extra resources for counter-terrorism measures, the Anti-Terrorist Branch would regard such an investigation as low on its list of priorities and would prefer to have that position made clear to Indict. I passed on that advice in my letter of 15 May 2002. Their position today remains unchanged.

Both my predecessor and I have given the evidence and Indict's arguments our full and personal attention. Like Gareth Williams, I was moved by the accounts of the witnesses about their experiences in Kuwait and Iraq during these events, and their treatment during at time. But I must take a view based on the evidence as presented to me and I believe that our position and the conclusions we have independently reached are clear. It is generous of Indict to offer to take some steps to assist in follow up inquiries. But the preparation of a case for major international prosecutions of this kind, should the question of prosecution become possible and feasible, is a matter for a thorough and dedicated professional investigation, whether by the police alone or a dedicated unit set up for the purpose.

My conclusions on the material provided focus only on the question of exercising criminal jurisdiction against individuals in the domestic courts. They have nothing to do, of course, with the quite separate question of whether the international community may in due course consider it worthwhile to establish an international tribunal, depending on how the international situation develops. An international tribunal can be set up on a basis that overrides Sovereign immunity. But this is not a matter for me

27 Jan 2003 12:02 NO.3912 P. 11/12

DECLASSIFIED

DECLASSIFIED

and it would not be right for me to speculate as to how the situation will develop over the next few weeks or months.

Yours sincerely

27.Jan. 2003 12:03 No.9412 P. 12/12

DECLASSIFIED