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Mr Pattison, UND

**RIGHTS UNDER INTERNATIONAL LAW TO OCCUPY AND ADMINISTER
IRAQ AFTER A CONFLICT**

1. I was tasked by the Cabinet Office to pursue with US Legal Advisers the issue of rights under international law to occupy and administer Iraq after a conflict (Jim Drummond's letter to Edward Chaplin of 23 January).

They did however let me have a public memorandum which they produced in 1976 on Israel's right as occupying power to develop oil fields in Sinai and the Gulf of Suez, which goes over some of the ground in relation to Articles 53 and 55 of the Hague Regulations of 1907. I can let you or any copy addressees have a copy if you are interested. I suspect more may have been done DoD, and will look into it.

2. I have now tried my hand at a "basic principles" paper on this subject. I attach it for you and copy addressees and would be happy to receive comments. The legal arguments in the paper support the conclusions which you and others had already been drawing on the need for a rapid transition to a UN interim administration.

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DECLASSIFIED

46

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RIGHTS UNDER INTERNATIONAL LAW TO OCCUPY AND ADMINISTER IRAQ AFTER A CONFLICT

1. 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.
2. To the extent that Iraqi came under coalition control during the course of any conflict the rights and obligations of the coalition would be those of an Occupying Power, as set out in detail in Articles 42 to 56 of the Regulations annexed to Hague Convention IV of 1907, and in Geneva Convention IV relative to the Protection of Civilian Persons in Time of War of 1949. In general, the Occupying Power must take all measures in its power to restore and ensure public safety by respecting, unless absolutely prevented, the law in the occupied State (Hague Regulation Article 43). Detailed provisions include limited rights to take

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possession of and use state property as administrator and “usufructuary” (Articles 53 and 55 of the Hague Regulations); to remove officials or judges (Articles 51 to 54 of the Geneva Convention); and to amend the penal laws of the occupying territory if they threaten security or impede compliance with international law and set up its own military courts to try offences under occupation legislation (Articles 64 to 67 of the Geneva Convention). The Geneva Convention also provides a comprehensive code on the protection of the civilian population and internees.

3. In these and other areas it is likely that aspects of the reconstruction of institutions and infrastructure post-conflict could fall outside the competencies of an Occupying Power under international law. For these reasons it is important that a further Security Council Resolution be adopted under Chapter VII as soon as possible to confer upon the coalition and/or other States and international organisations as appropriate the necessary powers. Possible recent precedents include the United Nations Interim Administrations in East Timor and Kosovo (see in particular Security Council Resolution 1244 (1999) on the latter). A United Nations administration would not be an occupying power and would not be constrained by the provisions of international humanitarian law though it should apply general international law, including human rights standards; rather, it would derive its powers (which could be very broad) from the Security Council Resolution authorising its presence. Equally a military presence in Iraq post-conflict mandated by the UN would no longer be an occupying power regulated by the Hague and Geneva Conventions.

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4. A further point is the alleged parallel with the situation following World War II in respect of Germany. The legal position there was in brief that from 18 September 1944, when allied troops first occupied German territory, until 5 June 1945, the territory of the German Reich came progressively under belligerent occupation. The provisions of the Hague Regulations were at that stage applicable (the Geneva Conventions not yet having been adopted). Allied legislation was enacted abrogating Nazi laws, dissolving the Nazi party and Nazi courts, suspending other courts and educational establishments. It is not clear that all of these measures were justified under the Hague Regulations on military necessity or human rights grounds (Articles 43 and 46 Hague Regulations).
5. On 5 June 1945 the four war time allies issued a declaration assuming supreme authority with respect to Germany, following the defeat and unconditional surrender of its armed forces. The declaration expressly provided that the annexation of Germany was not being effected. In substance, the declaration drew a distinction between the Government and the State; the wartime allies assumed all the powers of the former while stopping short of annexing and therefore extinguishing the later. The powers exercised by the four powers pursuant to that declaration were governmental powers in the broadest sense, including on status questions such as Germany's borders.
6. In the case of measures in relation to Germany, Article 107 of the Charter of the UN, together with Article 53 (the so called "enemy states" clauses), provided

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specifically that nothing in the Charter shall invalidate or preclude action taken by the war time allies as a result of that war. In the case of Iraq it is highly questionable whether such an assumption of power could be justified under current international law, unless authorised by the Security Council. In particular, it is difficult to see how such an extraordinary measure (which apart from Germany is unprecedented) could be regarded as proportionate to any authority granted by the Security Council to enforce Iraq's WMD obligations. Any measure falling outside this authorisation would be in breach of Article 2 (4) of the Charter of the United Nations (all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state) and the fundamental principle of non-intervention in matters which are essentially within the domestic jurisdiction of any State (Article 2(7)). No provision like Article 107 of the Charter would be available to protect coalition actions in respect of Iraq from the application of the provisions of the Charter.