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From: Michael Wood
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cc: PS/Mr O'Brien
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PS

IRAQ

1. The Secretary of State has asked for urgent preliminary views on the practical consequences of the UK's acting without international legal authority in using force against Iraq, including possible legal consequences in domestic law, in the international Criminal Court, and in the International Court of Justice (PS minute of 15 October). I am grateful to Elizabeth Wilmshurst and John Grainger for assisting in preparing this advice at short notice. I should stress that in view of the time constraints these views are necessarily preliminary. I have not repeated the obvious practical consequences we would face in terms of loss of international, EU and domestic support and damage to our international standing (eg Suez).

2. What follows proceeds on the basis that we enter into an armed conflict which is clearly unlawful, without respectable legal arguments. It is therefore in the realm of extremely theoretical speculation. It would be inconceivable that a Government which has on numerous occasions made clear its intention to comply with international law would order troops into a conflict without justification in international law.

3. I should first recall that the Ministerial Code (Code of Conduct and Guidance on Procedures for Ministers issued by the Prime Minister in July 1997) notes the duty of Ministers to comply with the law, including international law. It also requires Ministers not to ask civil servants to act in any way which would conflict with the Civil Service Code. The Diplomatic Service Code of Ethics requires members of the Diplomatic Service to recognise their duty to comply with the law, including international law. A requirement by Ministers to plan and execute actions which conflicted with international

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law would be likely to give rise at the least to requests by officials to the Permanent Secretary for guidance as to their proper course of action in the light of the Code. In addition there are requirements both on Ministers and on civil servants to be honest in their dealings with Parliament; to act knowingly against international law could not be hidden from Parliament. Parliamentary interest in this area of law is clear: see the debate last month and the FAC inquiry into Kosovo.

Criminal law and the ICC

4. It is surprising that there is no completely clear answer to the question whether troops involved in conflicts which are unlawful under international law would be committing criminal offences under UK law. It is the firm view of MOD legal advisers that the lawfulness, or not, of a conflict under international law would not affect the lawfulness under domestic law of the actions of the troops concerned. Activities engaged in by troops in prosecution of any armed conflict will be lawful under domestic law, unless of course they amount to war crimes or crimes against humanity, owing to the manner in which the activity is carried out, or genocide (not relevant here).
5. The basis of the MOD legal analysis is that the definition of murder in English law involves the killing of a person within "the Queen's peace". An alien enemy of the Queen would not be within "the Queen's peace", the argument goes. The doctrine is further that the common law will accept the international recognition that belligerents in an armed conflict cannot be prosecuted for normal acts of conflict.
6. The MOD legal analysis may well be right. And as a matter of legal policy their position is completely understandable. If necessary it could be put to the Law Officers. But there must at least be uncertainty, arising from the fact that the law is nowhere laid down. The same conclusions (or uncertainties) would arise with regard to attempts to prosecute those planning an unlawful use of force.
7. A further area of vulnerability may involve possible offences under the International Criminal Court Act 2002, which covers war crimes including offences under the Geneva Conventions. These offences (for which the ICC will have jurisdiction only if our own authorities do not investigate properly and, if appropriate, prosecute) do not stem from the illegality of the use of force itself (*ius ad bellum*) but relate to matters such as unlawful targeting (*ius in bello*). The legality of the conflict would not therefore be directly in issue, either in our own courts under the Act, or in the International Criminal Court. But the choice of lawful targets would be difficult if the objectives of the conflict were themselves unlawful, and it is not inconceivable that the ICC would receive allegations of war crimes in this context, which we would want to investigate in order to ensure that the ICC itself did not take jurisdiction.

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8. A further point relates to the crime of aggression. Under international law, use of force of the kind envisaged, if not legally justified by Security Council resolution or as self-defence, would constitute an act of aggression. Under customary international law the planning or waging of a war of aggression constitutes an international crime. (The Charter of the Nuremberg Tribunal clarified that this was an existing crime in 1945.) The International Criminal Court at present has no jurisdiction over the crime of aggression, since a definition of the crime and the conditions under which jurisdiction would be exercised have not yet been agreed upon. But since there is such a crime in international criminal law, it is just conceivable that there could be an attempt in our domestic courts to launch a private prosecution for the crime of aggression. The crime certainly does not appear in Archbold, but individuals may seek to rely on the well-established doctrine that the common law accepts international customary law.

Civil law

9. We have considered the tort of misfeasance in public office, largely in terms of the nuisance value of a possible action. The tort stems from the deliberate and dishonest use of power by a public official. The defendant must have had actual knowledge not only of the unlawfulness of the act but also of the probable injury to the plaintiff (the plaintiff in this case being, for example, a British soldier wounded in conflict). The case law on the tort is confined to unlawfulness under domestic law (including the Treaty of Rome) but an imaginative lawyer, relying on the Ministerial Code and, possibly, the international crime of aggression, might seek to mount an action against an individual Minister.

International Court of Justice

10. The ICJ has jurisdiction over States, not over individuals. The UK, unlike Iraq, has accepted the compulsory jurisdiction of the Court, but with a number of reservations. These include a reservation in respect of disputes where the acceptance of the Court's compulsory jurisdiction by the other party was deposited less than 12 months before bringing a case. So even in the unlikely event that Iraq were to accept the compulsory jurisdiction of the ICJ it could still not bring a case against the UK before the Court for another 12 months.

[signed]

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