

Advice of Lord Goldsmith QC (UK Attorney General) on the Authorisation for an Interim Administration in Iraq
26 March 2003.

Published in the *New Statesman* on 22 May 2003.

“Confidential Prime Minister

Iraq: Authorisation for an Interim Administration

1. I am writing to confirm the advice I gave at the meeting this morning concerning the need for UN Security Council authorisation for the coalition or the international community to establish an interim Iraqi administration to reform and restructure Iraq and its administration.

2. In short, my view is that a further Security Council resolution is needed to authorise imposing reform and restructuring of Iraq and its Government. In the absence of a further resolution, 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 to give detailed advice on the precise limits of what is possible, but the general principle is that an Occupying Power does not become the government of the occupied territory. Rather, it exercises temporary de facto control in accordance with the defined rights and obligations under Geneva Convention IV and the Hague Regulations. These instruments are complex, but the following points give an indication of the limitations placed on the authority of an Occupying Power:

(a) Article 43 of the Hague Regulations imposes an obligation to respect the laws in force in the occupied territory "unless absolutely prevented". Thus, while some changes to the legislative and administrative structures of Iraq may be permissible if they are necessary for security or public order reasons, or in order to further humanitarian objectives, more wide-ranging reforms of governmental and administrative structures would not be lawful.

(b) Geneva Convention IV prohibits, subject to certain limited exceptions, any alteration in the status of public officials or judges (although officials may be removed from post in certain circumstances).

(c) Geneva Convention IV also requires that the penal laws of the occupied territory must remain in force except where they constitute a threat to security or an obstacle to application of the Convention. In addition, the courts of the occupied territory must be allowed to continue to function. There are limited exceptions allowing the Occupying Power to promulgate its own laws in order to fulfil its obligations under the Convention and to maintain security and public order, but in principle, the existing structures for the administration of justice must remain in place.

(d) Apart from rules on the collection of taxes (which must as far as possible be in accordance with existing local law), there are no specific provisions in Geneva Convention IV or the Hague Regulations dealing with the economy of the occupied territory. However, the general principle outlined in (a) above applies equally to economic reform, so that the imposition of major structural economic reforms would not be authorised by international law.

3. Different considerations could apply if it were suggested that the people of Iraq themselves were engaged in undertaking such governmental and administrative reform, but that is not what I understand is currently envisaged.

4. I can also confirm that the issues set out in paragraph 2 above are a separate matter from the question of whether a further Security Council resolution is necessary to amend the existing Oil for Food and sanctions regimes in order to secure the immediate delivery of humanitarian aid to Iraq.

5. Although unconnected with the requirement for a further Security Council resolution, a further complicating factor for the United Kingdom is the extent to which the ECHR [European Convention on Human Rights] and other international human rights instruments are likely to apply to

any territory of which the UK is the Occupying Power. I am advising the Ministry of Defence separately on the extent of our ECHR obligations in Iraq.

6. Finally and in any event, it must be borne in mind that the lawfulness of any occupation after the conflict has ended is still governed by the legal basis for the use of force. As you know, any military action pursuant to the authorisation in resolution 678 (1990) must be limited to what is necessary to achieve the objectives of that resolution, namely Iraqi disarmament, and must be a proportionate response to that objective. The Government has concluded that the removal of the current Iraqi regime from power is necessary to secure disarmament, but the longer the occupation of Iraq continues, and the more the tasks undertaken by an interim administration depart from the main objective, the more difficult it will be to justify the lawfulness of the occupation. So in the absence of a further Security Council resolution, in addition to the issues raised in paragraph 2 above, it is likely to be difficult to justify the legality of the continued occupation of Iraq once the disarmament requirements of the relevant Security Council resolutions have been completed.

7. I am copying this note to the Foreign Secretary, the Secretary of State for International Development, the Defence Secretary and the Cabinet Secretary.

The Rt Hon the Lord Goldsmith QC Attorney General 26 March 2003.”