

The Right Honourable Geoffrey Hoon MP
The Secretary of State for Defence
Ministry Of Defence
Whitehall
London SW1A 2HB

2 January 2003

Your ref:
Our ref:PS/SA/

Dear Sir,

PROPOSED USE OF FORCE AGAINST IRAQ - ISSUES OF INTERNATIONAL HUMANITARIAN LAW AND "WAR CRIMES"

We are acting for Mark Thomas, The Campaign for Nuclear Disarmament (CND) and other non-governmental organisations (NGOs). We are asked to write to you to put you on notice as to the consequences of any decisions by the UK Government to use further force against Iraq involving methods of attack or weapon systems that breach rules of international humanitarian law (IHL). Specifically we make clear that if the UK acts so as to bring any breaches of IHL within the definition of "war crimes" we, and other, will take steps to ensure that you, and other leaders of the UK Government, are held accountable within international criminal law.

Summary

The purpose of this letter is to put the UK Government on notice as to the position if requirements of IHL are breached in the forthcoming war. From the outset of the use of force various NGOs working in the field will be collecting evidence as to whether the use of force against Iraq adheres to the fundamental requirements of the international humanitarian law, in particular to the principles of distinction, military necessity and proportionality. In analysing this evidence, our clients will seek to determine whether the force used provides evidence of crimes against humanity and war crimes in violation of international criminal law, specifically, Articles 7 and 8 of the International Criminal Court Statute (the ICC Statute) and sections 50 and 51 and schedule 8 of the International Criminal Court Act 2001. In due course, either before the end of the use of force or shortly after its end, NGOs' written and oral evidence will be presented to a tribunal. The tribunal will be organised by the Permanent People's Tribunal (PPT) based in Italy. Its panel will consist of eminent international lawyers and others experienced in this field. The panel will hear evidence from various NGOs and others as to whether requirements of IHL have been breached. If the panel finds that there have been breaches it will prepare a report giving its judgement. That judgement, and the supporting evidence of NGOs and others, will then be presented to the Prosecutor of the International Criminal Court (ICC). The Prosecutor

will be urged to initiate investigations on his own initiative, on the basis of this report and evidence as he is empowered to do under Article 15 of the ICC Statute. Thereafter, those who have initiated this process including various NGOs will work with the Prosecutor as he analyses the seriousness of the information received and makes a decision as to whether or not there is a reasonable basis to proceed with an investigation (Articles 15 (2) and (3) of the ICC Statute). If there is, in the opinion of the tribunal, and the various NGOs a reasonable basis to proceed with an investigation we shall urge that this investigation proceed against yourself and other senior members of the UK Government responsible, at the highest level, for decisions as to how force is used against Iraq and its civilian population. It is our position that pursuant to Article 25 of the ICC Statute,

you and other senior members of the UK Government will be responsible for any breaches of Articles 7 and 8 of the ICC Statute (defining “crimes against humanity” and “war crimes”) notwithstanding the culpability of senior members of the armed forces. Thus we urge that you proceed in any forthcoming war with Iraq on the basis that if there are breaches by the UK Government of IHL you will at least be investigated by the Prosecutor and could likely face prosecution. Accordingly you should ensure that the use of force against Iraq complies with IHL and the principles of distinction, necessity, proportionality and humanity.

“Crime of Aggression” and “Crimes against Peace”

We wish to raise with you at the outset of this letter our clients’ concerns that the UK Government (and its leaders) are about to use force in circumstances where a “crime of aggression” is being committed and, thus, a “crime against peace.” Our reasoning on this is as follows:

1. You will be aware that the crime of aggression is included under Article 5 of the ICC Statute as one of the crimes along with genocide, crimes against humanity and war crimes, over which the ICC has jurisdiction. The ICC may not yet exercise jurisdiction over this crime, however, and will not be able to do so until an agreed definition of the crime is adopted in accordance with Articles 121 and 123 of the ICC Statute. There is nonetheless a broad consensus that the crime of aggression is a crime under international law.
2. Crimes against peace were punishable under Principle 6 of the Nuremberg Principles. Principle 6 defines crimes against peace as
 - i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
 - ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).
3. The International Military Tribunal at Nuremberg described aggression as the ‘supreme international crime.’
4. The outlawing of aggressive war is reflected in Articles 1 and 2 of the United Nations

Charter, and in particular in the prohibition on the use of force at Article 2(4). Article 1 (1) of the United Nations Charter states that the Purposes of the United Nations are (amongst other things)

“To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.”

Article 2 states

“(3) All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

(4) 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, or in any other manner inconsistent with the Purposes of the United Nations.”

5. On 9 September 2002 the Assembly of States Parties to the ICC Statute adopted a resolution proposed by the Preparatory Commission for the International Criminal Court in which it stated that it was desirous of continuing and completing the work on the crime of aggression and to that end established a special Working Group on the crime of aggression. The discussion paper which was attached to the Preparatory Commission’s Draft Resolution suggested the following basic definition of the crime:

“For the purpose of the present Statute, a person commits a “crime of aggression” when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person intentionally and knowingly orders or participates actively in the planning, preparation, initiation or execution of an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations.”

6. Paragraph 2 of the discussion paper suggested that act of aggression be defined as an act referred to in United Nations General Assembly resolution 3314 (XXIX) (“Resolution 3314”) of 14 December 1974. Article 1 of Resolution 3314 states:

“Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.”

Article 3 provides as follows:

”Any of the following acts, regardless of a declaration of war, shall, subject to and in

accordance with the provisions of article 2, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

7. It is the widely held view of legal experts in the field that in the absence of the inherent right arising to take action in self-defence under Article 51 of the UN Charter, any military action taken by the United Kingdom against Iraq without a United Nations Security Council Resolution expressly authorising such force would be in clear violation of the UN Charter and international law.

Background to our clients' concerns

Our clients' concerns are that, based on evidence of the use of armed force in the Gulf War in 1991, in Kosovo and in Afghanistan the US and the UK have clearly breached fundamental requirements of IHL in the past. Thus there is every reason to believe that these requirements will be breached again in any forthcoming war in Iraq. You are better placed than ourselves or the various NGOs that we represent to know the detail of the impacts of the use of force in the Gulf, Kosovo and, more recently, Afghanistan. You will, of course, appreciate that these three recent examples all pre-date July 2002 when the ICC came into being and that its jurisdiction over these matters requires now a fundamentally different approach by the UK. However, our clients' concerns include the following:

ILLEGITIMATE MEANS AND METHODS OF ATTACK

- The unannounced bombing of Amiraya Civilian Air Raid Shelter in Baghdad killing between 600 and 1000 civilians on February 13 1991 when it was known by coalition forces that the facility had been previously used as a civil-defence shelter;
- The deliberate killing of thousands of civilians especially Palestinians, killed as they tried to escape from Kuwait City after February 26 1991;
- What appears to have been the deliberate massacre, without quarter, of tens of thousands of Iraqi soldiers and civilians on the road to Basra on February 26 and 27, 1991;
- The bombing of cities which served as major military communications and supply centres, for example Basra, Ramadi, Diwaniya and Mosul;
- The fact that 93% of the bombs used were free-falling bombs and that most appeared to have been dropped from higher than 30,000 feet;
- The fact that only 7,000 tons were guided bombs leaving 82,000 tons of bombs used that were non-precision guided;
- The use by the US of massive amounts of fire bombs;
- The use by the US of fuel air explosives;
- The use by the US of BLU-82s (otherwise known as “daisy cutters”);
- The use of cluster bombs and anti-personnel bombs;
- The use of the weapon system CBU-75 carrying 1800 bomblets called Sadeyes (each bomblet contains 600 razor sharp steel fragments lethal up to 40 feet).
- The declaration of Basra as a “free fire zone”;
- The use of carpet bombing techniques;
- The targeting of chemical plants;
- The use of at least 320 tons of depleted uranium ammunition in air and tank rounds and sniper bullets.

ATTACKS ON OBJECTS DEDICATED TO CIVILIAN PURPOSES

- The destruction of civilian targets such as the Iraqi Ministries of Justice and Municipal Affairs;
- The destruction of between 10 to 20,000 homes, apartments, and other dwellings;
- The destruction of commercial centres with shops, retail stores, offices, hotels, restaurants and other public accommodation destroyed;
- The destruction or damage of scores of schools, hospitals, mosques and churches;
- The targeting of isolated Bedouin tents in Western Iraq leaving 46 dead civilians, including infants and children;
- The bombing of the “baby-milk” factory in Abu Gharaib on January 22 1991

DESTRUCTION OF IRAQI INFRASTRUCTURE

- The deliberate disproportionate targeting and destruction of Iraq’s infrastructure towards the end of the war leaving it in a pre-industrial condition. Among the facilities targeted and destroyed were:
 - Electricity power generation, relay and transmission

- Water treatment, pumping and distribution systems and reservoirs
- Telephone and radio exchanges, relay stations, towers and transmission facilities
- Food processing, storage and distribution facilities and markets, infant milk formula and beverage plants, animal vaccination facilities and irrigation sites
- Railroad transportation facilities, bus depots, bridges, highway overpasses, highways, highway repair stations, trains, buses and other public transportation vehicles, commercial and private vehicles
- Oil wells and pumps, pipelines, refineries, oil storage tanks, gasoline filling stations and fuel delivery tanks, cars and trucks, and kerosene storage tanks
- Sewage treatment and disposal systems
- Factories engaged in civilian production, for example, textile and automobile assembly
- Historical markers and ancient sites
- As a result of the above the deaths of tens of thousands of civilians from dehydration, dysentery and diseases caused by impure water, inability to obtain effective medical assistance and debilitation from hunger, shock, cold and stress;

CIVILIAN LOSSES IN AFGHANISTAN

- Disproportionate and indiscriminate bombardment of Afghanistan resulting in at least 3,767 civilians being killed between October 7 and December 6, 2001, in particular:
 - Repeated bombing of the farming village of 450 persons of Karam, killing at least 160 civilians on October 11;
 - Falling of a cluster bomb on the military hospital and mosque in Herat, killing 100 on October 21;
 - Carpet-bombing by B-52's of a frontline village near Khanabad, killing at least 150 civilians on November 18.

CIVILIAN LOSSES DURING NATO AIR STRIKES IN KOSOVO

- At least 489 civilians killed in the ninety separate incidents in Operation Allied Force, almost half of which resulted from attacks during daylight hours, when civilians could have been expected to be on the roads and bridges or in public buildings which may have been targeted;
- The most dramatic losses of civilian life came from attacks on fleeing or travelling refugees including repeated attacks on refugees on the Djakovica-Decane road, near Korisa and Savine Vode;
- Bombing of Dubrava prison on 21 May 1998;
- Attacks on populated urban areas in Belgrade, Nis and Vranje
- Use of cluster bombs, resulting in deaths of some 90 to 150 civilians and Britain's refusal to discontinue their use even after NATO confirmation of responsibility for the attack on Nis airfield in southern Serbia on May 7, 1998 and subsequent prohibition of cluster bomb use imposed on the US forces by the White House.
- Failure to provide clear advance warning of the attacks on state Serb Radio and

Television headquarters in Belgrade on April 23, 1998 resulting in civilian deaths

The information that leads us to these conclusion includes:

- Personal accounts from representatives of NGOs.
- The report of the Commission of Inquiry for the International War Crimes Tribunal (“War Crimes. A report on United States war crimes against Iraq to the Commission of Inquiry for the International War Crimes Tribunal” by Ramsey Clark and others, available at www.deoxy.org/wc/wc-index.htm)
- Needless Deaths in the Gulf War, Human Rights Watch, available at www.hrw.org/reports/1991/gulfwar/
- The Secret behind the Sanctions: how the US intentionally destroyed Iraq’s water supply, Thomas Nagy, available at www.progressive.org/0801icsue/nagy0901.html
- Joint WHO/UNICEF team report: A visit to Iraq (New York: United Nations, 1991). A report to the Secretary General dated March 20 1991 by representatives of the UN Secretariat, UNICEF, UNDP, UNDR0, UNHCR, FAO and WHO.
- Amnesty International annual report 1991, pp122-124.
- Counting the Human Cost of the Gulf War, Medical Education Trust background paper, London, July 1991
- US Bombing: The myth of surgical bombing in the Gulf War, Paul Walker, evidence to the Commission of Inquiry for the International War Crimes Tribunal, May 11 1991, available at www.deoxy.org/wc/wc-myth.htm
- International Law and War Crimes, Michael Ratner, evidence to the Commission of Inquiry for the International War Crimes Tribunal, May 11 1991, available at www.deoxy.org/wc-ilaw.htm
- Highway to Hell, Michael Kelly, New Republic, April 1991: 12
- The Gulf War: Not so Clean, George Lopez, Bulletin of the Atomic Scientists, September 1991, vol 47, no.7, available at www.thebulletin.org/issues/1991/s91/s91lopez.html
- Iraqis Reduced to a “Rabble,” General Asserts, R W Apple, JR, New York Times, March 1991, p1
- Report to the Secretary General on Humanitarian Needs in Kuwait and Iraq in the Immediate Post-Crisis Environment, Martti Ahtisaari, United Nations Report No. 5122366, March 20, 1991
- Testimony of Joyce Chediak, a Lebanese-American journalist, report presented to the Commission of Inquiry for the International War Crimes Tribunal, May 11, 1991 available at www.deoxy.org/wc/wc-death.htm
- Various reports from the Washington Post and the New York Times and agency reports from Reuters and Agence France Presse available at www.globalsecurity.org
- Collateral Damage: the health and environmental costs of war in Iraq, November 2002, available at www.medact.org
- Iraq: Consequences of a war, Professor Paul Rogers, Oxford Research Group, October 2002.
- War Plan Iraq, Milan Rai, ARROW Publications, 2002
- War on Iraq, Scott Ritter, Profile Books, 2002
- Targeting Iraq: Sanctions and Bombing in US Policy, Geoff Simons, Saqi Books, 2002

- Material from Defence publications particularly Defense News, Jane's Defence Weekly, Aviation Week and Space Technology.
- Depleted Uranium Weapons: Lessons from the 1991 Gulf War, Dan Fahey, Laka Foundation, May 1999
- A Dossier on Civilian Victims of United States' Aerial Bombing of Afghanistan: A Comprehensive Accounting, Professor Marc W. Herold, December 2001, available at www.ratical.org/ratville/CAH/civilDeaths.html
- Medical ethics and human rights violations: the Iraqi occupation of Kuwait and its aftermath, Troyan Brennan and Robert Kirschner, Annals of Internal Medicine, 117:78-82 (1992)
- Civilian Deaths in the NATO Air Campaign - The crisis in Kosovo, report by the Human Rights Watch, available at www.hrw.org/reports/2000/nato/Natbm200-01.htm

We should make clear that our clients' main concerns are the civilian casualties caused by indiscriminate and/or disproportionate attacks. Further our clients are extremely concerned about the consequent civilian casualties caused by attacks on the economic infrastructure of Iraq as happened in the 1991 Gulf War.

To add to our clients' concerns the following are noted:

Nuclear Weapons

We note that the US Nuclear Posture Review (NPR) submitted to Congress on 31 December 2001 makes clear that the United States continues to plan for massive retaliation or a pre-emptive counter force attack in response to an actual or imminent nuclear attack, and for use of nuclear weapons against an overwhelming conventional attack. Much concern has been expressed about the US's willingness to contemplate a "first strike" against non-nuclear weapons states and particularly those characterised as "rogue states." You have made clear to both the UK House of Commons Defence Committee and to the Jonathan Dimbleby programme on BBC TV that the UK also might under certain circumstances be willing to engage in a "first strike" use of nuclear weapons against a non-nuclear weapon state, namely Iraq. This policy represents a fundamental breach of customary international law and particularly in the light of the International Court of Justice's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. That opinion concludes at paragraph 105E:

"E. By seven votes to seven, by the president's casting vote,
It follows in the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;
However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a state would be at stake...."

It is clear that the threat to use chemical or biological weapons against UK deployed forces in

the filed is far short of a threat such that “the very survival” of the UK “is at stake.” As such if the UK were to carry out the threat you have made to use nuclear weapons against Iraq in these circumstances it would be in clear breach of customary international law.

Other Weapons Systems

We know that in the Gulf War conflict from 1991, in Kosovo and in Afghanistan the following weapons systems have been used:

- Cluster bombs including the BL-755 and the US CBU-55B
- Fuel air explosives including the BLU-82B.
- The multiple launch rocket system
- Depleted uranium munitions including the British Challenger II and US M1A1, M1 and M60 tank rounds, aircraft rounds and 7.62mm calibre bullets.

Our client’s concerns include that these weapons systems, and the UK’s nuclear weapon system, all breach “intransgressible” rules of IHL and in particular the rule on discrimination (Articles 48 and 51 (4) and (5) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflict (Protocol 1) adopted at Geneva, 8 June 1977 (hereafter referred to as AP1)).

Relevant provisions of International Humanitarian Law

The above noted incidents are all examples of where the use of force failed to comply with fundamental principles of IHL, in particular the conventional and customary rules of distinction, military necessity and proportionality. You will be aware that failure to comply with these principles constitute grave breaches of the Geneva Conventions and will amount to violations of articles 7 and 8 of the ICC.

Art 35. Basic Rules

In any armed conflict, the right of the Parties to the conflict to choose methods or means or warfare is not unlimited.

It is prohibited to employ weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.

It is prohibited to employ methods or means of warfare which are intended or may be expected, to cause widespread, long-term and severe damage to the natural environment.

Art 48. Basic Rule

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations against military objectives.

Art 49. Definition of attack and scope of application

“Attacks” means acts of violence against the adversary, whether in offence or defence.

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Art 51. Protection of the civilian population

The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.

Indiscriminate attacks are prohibited. Indiscriminate attacks are:

those which are not directed at a specific military objective;

those which employ a method or means of combat which cannot be directed at a specific military objective; or

those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

Among others, the following types of attacks are to be considered as indiscriminate:

an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects;

and

an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated

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Art 52. General protection of civilian objects

Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution, it shall be presumed not to be so used.

Art 54. Protection of objects indispensable to the survival of the civilian population

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It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

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Art 55. Protection of the natural environment

Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby prejudice the health or survival of the population

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Art 56. Protection of works and installations containing dangerous forces

Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population

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Art 57. Precautions in attack

In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

With respect to attacks, the following precautions shall be taken:

those who plan or decide upon an attack shall:

do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to specific protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;

take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects;

refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

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Art 59. Non-defended localities

It is prohibited for the Parties to the conflict to attack by any means whatsoever, non-defended localities.

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Art 85. Repression of breaches of this Protocol

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In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

making the civilian population or individual civilians the object of attack;

launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a)(i);

launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a)(i);

making non-defended localities and demilitarised zones the object of attack;

making a person the object of attack in the knowledge that he is *hors de combat*;

the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognised by the Conventions or this Protocol

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Specific Notice of Prohibition Under IHL of Certain Modes of Attack and Weapon Systems

Bearing in mind the above concerns our clients have emerging from the 1991 Gulf War and the use of force in Kosovo and Afghanistan, and in the light of the relevant provisions of ICC and IHL our clients wish to make clear that you are on notice that the following modes of attack or weapons systems are prohibited by IHL and if used will be the subject of evidence and a People's Tribunal report to the prosecutor of the Hague:

High level, indiscriminate, air-strikes on known centres of civilian population.

The use of carpet bombing techniques or other methods of attack that do not discriminate against civilians.

The use of fuel-air explosives, cluster bombs, multiple rocket launcher systems, depleted uranium, uranium, or uranium alloy munitions, or other indiscriminate weapon systems and, in particular the use of nuclear weapons, which may include B61-11s (tactical nuclear earth-penetrating weapons designed to destroy deep underground targets).

The bombing of electricity supplies with consequent civilian casualties either related to those attacks or caused by the damage to plants reliant on electricity supplies, for example, water sanitation plants.

The bombing of works or installations containing dangerous forces, namely, dams, dykes and nuclear electrical generating stations.

This list of five summarises the specific concerns arising from the 1991 Gulf War and the use of force in Kosovo. However it is without prejudice to our client's right to add to this list for any reason, for example, once the facts surrounding the use of force are known.

As far as weapons are concerned these are of particular concern to our clients particularly given the indiscriminate nature of weapon systems in the possession of both the US and the UK, and of those used in the 1991 Gulf War. As the International Court of Justice has noted in its Advisory Opinion on The Legality of The Threat or Use of Nuclear Weapons: "states do not have unlimited freedom of choice of means in the weapons they use." (Para 78). Thus our clients assert that the indiscriminate weapons we refer to above at 3 are prohibited by the rule of discrimination which the ICJ described in the Advisory Opinion on nuclear weapons as being an "intransgressible rule." As the ICJ says in its Advisory Opinion on nuclear weapons: "States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets." (Para 78) The issue as to whether the UK has participated in the use of force against Iraq involving non-discriminatory weapon systems will assume critical importance in the tribunal we refer to above in the event of there being evidence of innocent civilian casualties due to attacks by indiscriminate weapon systems.

Relevant Provisions of International Criminal law

The following provisions of the Rome Statute creating the International Criminal Court (the ICC Statute) are relevant.

Article 7

Crimes against humanity

For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

Murder

Extermination

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(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or to mental or physical health.

For the purpose of paragraph 1:

‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack; ‘Extermination’ includes the intentional infliction of conditions of life, *inter alia*, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

Article 8

War crimes

The court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

For the purpose of this Statute, ‘war crimes’ means:

Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

Wilful killing; ...

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Wilfully causing great suffering, or serious injury to body or health;

Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

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Other serious violations of the laws and customs applicable in international law, namely any of

the following acts:

Intentionally directing attacks against the civilian population as such or against individual civilians not taking part in hostilities;

Intentionally directing attacks against individual civilian objects, that is, objects which are not military objectives;

.....
Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

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Intentionally directing attacks against buildings dedicated to religion, education, art, science, or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

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Declaring that no quarter will be given
Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

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Employing poison or poisoned weapons
Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

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Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the court.

The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organisations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

If the Prosecutor concludes that there is reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorisation of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorise the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

The refusal of the Pre-Trial Chamber to authorise the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

If after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

In terms of the specific concerns our clients have about modes of attack or weapons used itemised below at this stage we do not need to identify which specific provisions of Articles 7 and 8 (and the relevant Elements of Crime) cover the potential use of force against Iraq. For obvious reasons we cannot identify the relevant provisions prior to the facts emerging surrounding any use of force against Iraq. However the extracts from Articles 7 and 8 referred to above in our view cover the concerns outlined above from the 1991 Gulf War and the use of force in Kosovo. As you know it is our clients' concern now that these methods of attack and use of weapons will be repeated.

For the above mentioned crimes defined in Articles 7 and 8 we suggest that you read the elements of crime adopted by the Preparatory Commission for the International Criminal Court (PCNICC). These are self-explanatory and should make clear why it is our view that these are relevant in the above context. The crime defined by Article 8 (2)(b)(iv) of the ICC Statute is particularly relevant. It is noted that the *actus reus* of this offence is the launching of an attack to cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term, and severe damage to the natural environment in violation of the principles of necessity and proportionality. The PCNICC have made clear that this crime "reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict" (document PCNICC/1999/WGEC/INF.2/ADD1, at 37-8). As it is our submission that Article 8(2)(b)(iv) is particularly relevant we think it helpful to draw

your specific attention to the relevant Elements of Crime which read as follows:

“ARTICLE 8(2)(b)(iv)

War crime of excessive incidental death, injury or damage

Elements

The perpetrator launched an attack.

The attack was such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term, and severe damage to the natural environment and that such death, injury, or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.³⁶

The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term, and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.³⁷

Conduct took place in the context of and was associated with an international armed conflict. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

(36). The expression “concrete and direct overall military advantage” refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict. It does not address justifications for war or other rules related to *jus ad bellum*. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict.

(37). As opposed to the general rule set forth in paragraph 4 of the General Introduction, this knowledge element requires that the perpetrator make the value judgement as described therein. An evaluation of that value judgement must be based on the requisite information available to the perpetrator at the time.”

Kittichaisare notes as follows:

“In terms of the perpetrator’s *mens rea*, the Elements depart from the general rule that it is not necessary for the perpetrator to have personally completed a particular value judgement. To be guilty of this war crime, the perpetrator must have known, in the sense of making the value judgement that the attack launched by him would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated. However, an evaluation of that value judgement must be based on the requisite information available to the

perpetrator at the time.

It should be noted that there is no result requirement as part of the *actus reus* of this war crime. What is required is the act of launching the attack of the nature and with the perpetrator's state of mind as described above." (Kriangsak Kittichaisare, *International Criminal Law*, Oxford University Press, 2001, at 164).

The NGOs that we represent and the subsequent tribunal we refer to above will be examining the two elements of this crime with great care. In particular the state of mind of yourself and other senior members of the UK Government will be judged in the light of the fact that this letter puts you on clear notice as to the requirements of IHL and the risk, that you may choose to ignore, of an investigation by the prosecutor if the use of force comes within the definitions of Articles 7 and 8 above.

Complicity

We now address the personal culpability of you as the UK's Secretary of State for Defence and other senior members of the UK Government in terms of complicity. In the 1991 Gulf War the US was the main participant but the UK provided active support and participated in some of the bombing raids. It might be thought that you and other members of the UK Government can escape responsibility for breaches of Articles 7 and 8 of the ICC Statute if the UK Government does no more than support a US led campaign. As we make clear below the ICC Statute and international criminal law establishes that in these circumstances you, and other senior members of the UK Government, may be held criminally liable for your participation in the commission of these offences.

Article 25 of the ICC Statute is relevant. It reads:

"Individual criminal responsibility

The Court shall have jurisdiction over natural persons pursuant to this Statute.

A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

Be made with the aim of furthering the criminal activity or criminal purpose of the group,

where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
Be made in the knowledge of the intention of the group to commit the crime

.....

Thus the ICC Statute recognises that in these circumstances you, and other members of the UK Government, may be an “accessory” or “secondary participant” in “complicity.” Complicity is when two or more persons join together to play some part in the commission of a crime. Ordering, soliciting or inducing the commission of a crime as provided in Article 25 (3)(b) of the ICC Statute is no different from direct physical perpetration of the crime. As Lord Steyn put it in *Pinochet*, “there is no distinction between the man who strikes, and the man who orders another to strike.” (R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte [1998] 4 ALL ER 897, HL at 946).

The law of complicity is re-stated in the *Ministries* case that “he who participates [in a crime] or plays a consenting part therein” is guilty of a crime (US v Ernst von Weizsacker et al., TWC, 611, 470-1). In *Tadic* the International Criminal Tribunal for former Yugoslavia (ICTY) Appeals Chamber itself re-states the law as follows: “whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common purpose, may be held to be criminally liable, subject to certain conditions.....” (Prosecutor v Dusko Tadic, case no. IT-94-1-A, ICTY APP.CH., 5 July 1999 at para 190.)

In the light of the above it is clear that the complicity of you, or other senior members of the UK Government, is as relevant for the purposes of potential breaches of Article 7 and 8 of the ICC Statute as if you were the main perpetrator. You should proceed accordingly.

Grave or Serious Breaches

You will be aware that Article 8 (2) of the ICC Statute deals with grave breaches of the 1949 Geneva Conventions of 12 August 1949. “Grave breaches” are serious war crimes that are subject to the universal jurisdiction of all states. Moreover, if a state does not prosecute the offender it shall extradite him to any party to the respective Geneva Conventions that will prosecute and punish that person. Grave breaches must be committed against persons or property protected by any of the four Geneva Conventions of 1949, in particular civilians in the hands of a party to a conflict of which they are not nationals. Since the four Geneva Conventions of 1949 are a part of customary international law, so is the grave breach regime under these Geneva Conventions. AP1 extends the definition of grave breaches. (See Articles 11, 44, 45, 73, 85(2) and (3)).

Article 8(2)(b) deals with other serious violations of the laws and customs applicable in international armed conflict. “Serious” means breach of a rule protecting important values, and the breach must involve “grave consequences” for the victim. All serious war crimes under AP1 and the Hague regulations are proscribed as war crimes under Article 8 (2)(b) of the ICC Statute.

Thus the concepts of “grave” and “serious” are relevant. We submit that in judging whether breaches are either “grave” or “serious” past breaches are relevant. Thus in deciding whether you, and other senior members of the UK Government, have been guilty of grave or serious breaches for the purposes of Article 8 we will invite the prosecutor, if in due course a report from the People’s Tribunal referred to above is made, to take into account the UK Government’s past misconduct during the 1991 Gulf War.

Command Responsibility

It is apposite, given your position within the Government, to address this question. Under the principle of command responsibility, a superior is criminally responsible for the acts committed by his subordinates if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. This command responsibility emanates from a failure to act in breach of a clear, affirmative duty or moral obligation imposed by the law of war or by international law upon those in authority to act. When the superior acts positively by ordering, instigating, or planning criminal acts carried out by his subordinates, he incurs “direct” responsibility. However, if he fails to take measures to prevent or repress his subordinates’ criminal act, his culpable omissions thereby incur “indirect” command responsibility. Where a superior fails to prevent or repress his subordinates’ criminal acts he could be held liable for aiding and abetting or inciting the crimes if all the necessary elements for aiding and abetting or incitement, as the case may be, are present. (Prosecutor v Tihomir Blaskic, case no. IT-95-14-T, T.Ch..1 of the ICTY, 3 March 2000. Paras 337-9). This principle is also applicable to civilian, non-military commanders, who wield the requisite authority. International instruments and case law do not restrict this application to military commanders only but extend it to cover political leaders and other civilian superiors in positions of authority (Celebici, paras 356-63; Prosecutor v Alfred Musema, case no. ICTR-96-13-T, 27 Jan 2000, paras 136, 146-8). The crucial question is not the civilian or military status of the superior, but the degree of authority the superior exercises over his subordinates.

With the above principle of command responsibility in mind we consider it advisable that you copy this letter to those senior members of the UK Government who you know will be responsible for key decisions if the UK are to be involved with the use of force against Iraq. Further, leaving aside the obvious requirement that you copy this letter to the senior members of the armed forces, we suggest that you copy this to those civilian superiors with the requisite degree of authority over their subordinates, who in accordance with the principle of command responsibility might be held liable if there are breaches of Article 7 and 8 of the ICC Statute. Finally we note that this principle has been transposed into UK law through Section 65 of the International Criminal Court Act 2001.

Your Evidence

If in due course it emerges that there is evidence of breaches of Articles 7 and 8 the tribunal we refer to above will sit in session to hear evidence from NGOs and others. Naturally you will be

invited to submit your evidence to that tribunal on the issue of whether there have been breaches of Article 7 and 8. If in due course you decline to submit any evidence we will invite the prosecutor (if in due course a report from the tribunal is submitted to him), to draw such adverse inferences as may be appropriate. You are by this letter on notice of the intention to establish a People's Tribunal on this matter. We submit that if in due course it is your case that there have not been breaches of Articles 7 and 8 of the ICC Statute, you are now in a position where you know that your evidence on that point is highly relevant. Thus, if in due course you fail, or refuse, to produce evidence to show your innocence (or that of other members of the UK Government) of breaches of Articles 7 and 8 of the ICC Statute, in our view this will be highly admissible to show your guilt.

Conclusion

We suggest that you note carefully the contents of this letter and as we have suggested above copy it to all who might subsequently be held responsible for a breach of Articles 7 and 8 of the ICC Statute. You are on clear notice of the intention to present evidence to the prosecutor if it emerges that there have been breaches of Articles 7 and 8. We have made clear above the relationship between the Tribunal we describe and the prosecutor in the Hague using his Article 15 powers. You are required, if the UK participate in the use of armed force against Iraq, to ensure that the use of force does not breach Articles 7 and 8. A failure to ensure compliance will lead to the consequences set out in this letter.

Please acknowledge receipt of this letter within 14 days.

Yours faithfully

Public Interest Lawyers