MEMORANDUM
by the President of the International Progress Organization, Dr. Hans Koechler, on the legal implications of the 2003 war against and subsequent occupation of Iraq and requirements for the establishment of a legitimate constitutional system in Iraq, including measures of criminal justice

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I

The military attacks against the Republic of Iraq, followed by the invasion and occupation of Iraq by troops of the United States, the United Kingdom and other countries, have occurred without authorization by the United Nations Security Council. The war against Iraq has constituted an act of aggression and a violation of Art. 2 (4) of the United Nations Charter. The continued occupation of Iraq by the United States, the United Kingdom and other allied powers constitutes a serious threat to international peace and security in the meaning of Art. 39 of the Charter.

While Security Council resolution 1441 (2002) of 8 November 2002 did not create the legal title for the unilateral use of force against Iraq, resolution 1483 (2003) of 22 May 2003 cannot be seen as justification *post factum* of the armed aggression against and occupation of Iraq. The resolution of 22 May 2003 merely acknowledges the occupation as *fait accompli* and reminds the occupying powers of their "specific authorities, responsibilities, and obligations under applicable international law." The "recognition" of the responsibilities of the "occupying powers" acting as "Authority" under "unified command" by the Security Council can in no way be construed as justifying, *post factum*, the war of aggression and the subsequent occupation of the entire territory of Iraq. Contrary to the wording of a United Nations news release of 22 May 2003, the resolution cannot be interpreted as "granting wide interim governing powers to the United States and its coalition partners" with the UN only being a corollary to the occupation "Authority."

The fact of occupation does not render legitimacy to the so-called "Authority" (or "Coalition Provisional Authority"). The de facto control over the territory of Iraq (in itself only partly established and continuously resisted by many elements of Iraqi society up to the present day) does not create any legal title: *Ex injuria jus non oritur*.

However, the occupying powers, as de facto – though not *de jure* – rulers of the country, are under the specific obligation to respect the provisions of the relevant Geneva Conventions, and in particular those of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949.

The so-called "Governing Council," established by decree of the US head of the occupation "Authority," cannot be seen as source of a legitimate new constitutional order in Iraq. All members of this "Council" have been appointed by the head of the occupation "Authority." Although hailing from various sectors of Iraqi society (in terms of religion, ethnicity, etc.), they do not in any way represent the *people* of Iraq in the true meaning of constitutional representation. The "Council" totally lacks democratic legitimacy and constitutional authority. In this regard, the statement by the Secretary-General of the United Nations at the Security Council meeting in New York on 22 July 2003 is not in conformity with the facts and requirements of international law. The Secretary-General was clearly mistaken when calling the formation of the "Governing Council" "an important first step towards the full restoration of Iraqi sovereignty." In real terms, the formation of this "Council" was a decisive step in a strategy to legitimize the occupation of Iraq by the "coalition forces." The Special Representative of the Secretary-General for Iraq, Mr. Vieira de Mello, was equally mistaken when – in his briefing to the Security Council on the same day – he characterized the formation of the "Governing Council" as "a welcome development for the international community and for the United Nations," saying that "we now have a formal body of senior and distinguished Iraqi counterparts, with credibility and authority, with whom we can chart the way forward."

The basis for *legitimate* authority on the territory of Iraq can only be created through a general referendum on the future constitution of Iraq and through general elections to be held on the basis of such new constitution. This process must not be undertaken under the control, either direct or indirect, of the occupation "Authority" and can, therefore, not be coordinated by the "Governing Council" that, in reality, acts as proxy of the "Coalition Provisional Authority." The constitutional process which is to bring about a democratic system of governance in Iraq must be organized under the auspices of the United Nations Organization. This will require a new Security Council resolution to be adopted on the basis of Chapter VII, formulating the authority for (a) the setting up of an advisory committee, representative of all sectors of Iraqi society, for

the drafting of a constitution; (b) the organization of a general referendum on the proposed new constitution for Iraq; and (c) the organization of general, free and fair elections. The electoral process will have to be transparent and should be monitored by independent international observers. Only these steps will ensure the transition to a legitimate authority and to a system of genuine democracy in Iraq. As stated by the Secretary-General of the United Nations in his speech at the Security Council on 22 July 2003, the collective goal of the United Nations must be "an early end to the military occupation through the formation of an internationally recognized, representative government." By initiating and facilitating the democratic expression of the will of the people of Iraq – in the transitional phase before an independent Iraqi legislature and executive power have been established – the United Nations Organization may follow the precedents established, among others, by the United Nations' missions in Timor-Leste (East Timor) and the Kingdom of Cambodia.

The presently existing "Governing Council," lacking any constitutional authority under internationally recognized standards, is not in a position to represent Iraq in the United Nations – whether in the Security Council or the General Assembly – or in other international organizations such as the League of Arab States. The international representation of Iraq cannot be undertaken by the existing "Governing Council" – a body which, in real terms, has only an advisory role vis-à-vis the occupying "Authority." The proposal recently advanced by the Secretary-General of the United Nations – that the Security Council recognize the "Governing Council" as legitimate authority – is not a viable one as its implementation would legitimize, *post factum*, the war against and the subsequent occupation of Iraq and, thus, would undermine the international rule of law.

The League of Arab States – of which Iraq is a founding member – has been under the obligation to defend the sovereignty and territorial integrity of Iraq. Under Art. VI of the Charter of the Arab League, the Council of the League "shall by unanimous decision determine the measures necessary to repulse the aggression" against a member state. As a result of the lack of unanimity among its members, the Arab League has been unable to deal with the situation brought about by the violation of the sovereignty of the Republic of Iraq. Because of the paralysis of the regional organization in this central issue of peace and security in the Arab world, the international community represented by the United Nations Organization will have to shoulder its collective responsibility for the restoration of peace and security in Iraq and in the entire Middle Eastern region.

II

As far as international crimes committed on the territory of Iraq are concerned, the question of individual criminal responsibility cannot, and should not, be handled in the exclusive constitutional framework of Iraq. Not only does the present "Governing Council" – acting as proxy of the "Coalition Provisional Authority," i.e. the occupying powers – lack the constitutional authority to establish criminal courts; the holding of criminal tribunals in the framework of a future independent Iraqi judiciary (when a legitimate constitutional system will eventually have been established) would also be a highly problematic undertaking. Even if the concerns about "victor's justice" could be dispelled, the emotional proximity of Iraqi judges to many of the Iraqi cases to be dealt with – and their almost unavoidable bias vis-à-vis possible suspects from occupying countries – might be detrimental to the fairness and impartiality of proceedings, particularly in high-profile cases to be expected.

For this reason, the prosecution of international crimes (such as serious violations of the Geneva Conventions, crimes against humanity, the crime of aggression) should be organized in a transparent international setting similar to that worked out by the United Nations Organization, in co-ordination with the respective governments and by way of international agreement, for Sierra Leone ("Special Court for Sierra Leone") or for Cambodia ("Extraordinary Chambers in the Courts of Cambodia"). The existing ad hoc tribunals created by the UN Security Council for the former Yugoslavia and Rwanda respectively cannot be considered as models for the challenging task in Iraq because these tribunals, being attached to the supreme executive organ of the United Nations (where the permanent members enjoy the power of veto), operate in a framework which does not enable a genuine separation of powers and, therefore, lacks basic judicial legitimacy; neither can the International Criminal Court (ICC) be considered as a viable alternative as far as the prosecution of international crimes committed in Iraq is concerned – for the simple reason that it does not have jurisdiction over the territory of Iraq. (The ICC only possesses jurisdiction over citizens of one of the major occupying powers in Iraq, namely the United Kingdom.)

However, in order to give credibility to such a judicial undertaking it must be in conformity with the principles of *universal jurisdiction* which implies a collective obligation of the international community for the prosecution of international crimes irrespective of the nationality of the suspect and the territory on which they have been committed. Specifically, the jurisdiction of tribunals eventually to be set up in Iraq should be *territorial* (as in the case of the Special Court for Sierra Leone) so as to allow the respective tribunals to deal with <u>all</u> international crimes

committed on the territory of Iraq before, during and after the 2003 war without exception (including crimes eventually committed by non-Iraqi nationals). Such tribunals should have a mixed composition of Iraqi and "international" judges from countries not involved in the conflict situation in Iraq. No judges from countries that participated in the war against Iraq and/or are taking part in the occupation of the country should be nominated as international judges. This procedure, if applied, would be in conformity with international legal standards as indeed advocated – since the 19th century – by eminent legal scholars such as Hans Kelsen ("Peace through Law," 1944) or Gustave Moynier, President of the International Committee of the Red Cross, in his 1872 proposal for an international judicial institution to deal with grave breaches of international humanitarian law.

In order to give adequate judicial authority and legitimacy to such tribunals, they should be set up through international agreement between Iraq as the country with primary jurisdiction (as soon as a legitimate authority has been established) and the United Nations Organization, whereby – for reasons of *international* legitimacy – authorization for such a judicial undertaking should be coming from the General Assembly and not from the Security Council. The latter consideration would imply that – with the exception of the provision for *personal* jurisdiction – the model of the proposed *Special Chambers in the Courts of Cambodia* is more suitable in the specific case of Iraq (provided that the respective agreement between a future legitimate government [constitutional authority] of Iraq and the United Nations, unlike the one concluded with Cambodia, does include *territorial* jurisdiction). The Cambodian model's mixed domestic-international composition of the courts and the system of jointly acting domestic and international co-prosecutors and co-investigating judges (provided that the non-Iraqi court officers are citizens of "neutral" countries) – though not yet tested in actual court practice – could ensure for the tribunals eventually to be held in Iraq an essential degree of transparency and might help to avoid the kind of arbitrariness that has often plagued high-profile criminal cases when they are handled in an exclusively domestic framework. In view of the rather difficult experience made with the operation of the Special Court for Sierra Leone, half of the costs of eventual tribunals for the prosecution of international crimes committed on the territory of Iraq should be borne by Iraq, half of the expenses should be covered from the regular budget of the United Nations Organization. A system of voluntary contributions – as in the case of the Sierra Leone Court – would undermine the independence of the judicial process.

However, matters of universal jurisdiction – i.e. of the prosecution of international crimes committed on the territory of Iraq – may only be pursued after the establishment of a legitimate authority in Iraq that will be able to represent the country on the basis of the principle of the sovereign equality of states and that will be entitled to eventually enter into an agreement with the

United Nations Organization for the establishment of *Special Chambers in the Courts of Iraq for the Prosecution of International Crimes Committed in the Territory of Iraq* (for a period to be specified in such agreement). Should the prosecution of international crimes be undertaken through decisions and arrangements made by the present "Governing Council" – i.e. under the control of the occupation "authority" –, the judicial proceedings would not only be illegitimate and unconstitutional, but would almost inevitably produce "victor's justice" and thus not only undermine national reconciliation in Iraq, but subvert one of the fundamental aims of the international community, namely the restoration of peace and security in Iraq and in the entire region of the Middle East.

What is important in such an undertaking of criminal justice is that *justice must be seen to be done* – by the people of Iraq as well as by the citizens of the world. This precludes a policy of double standards in regard to the decisions as to which suspects (whether Iraqi or non-Iraqi nationals) are eventually to be brought before the respective chambers; and it requires that the United Nations Organization, through the General Assembly, enters into an agreement with a future sovereign government of Iraq about the set-up and procedural details of eventual special chambers – in strict observance of the independence of the judiciary from domestic pressure, international power politics and the interference of the present occupying powers in Iraq's domestic affairs in particular. Any such agreement should incorporate the experiences from the earlier undertakings of international criminal justice so as to avoid the pitfalls of universal jurisdiction when applied in cases of domestic and/or international conflict.

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