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AUSTRALIAN NAVY SYSTEMS COMMAND
MINUTE



CO HMAS MELBOURNE

For Information:

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OPERATION CATALYST - MANAGEMENT OF DETAINEES

References:

- A. Geneva Convention IV
- B. UNSCR 1483
- C. UNSCR 1511
- D. www.cpa-iraq.org

1. In support of Operation CATALYST, HMAS MELBOURNE conducts maritime protection and interception operations to enforce Iraqi sovereignty, including protection of off shore installations, and to enforce any applicable UN Sanctions. The enforcement of domestic law by Coalition Forces is made possible by virtue of Geneva Convention IV (Ref A) and United Nations Security Council Resolutions (UNSCR's). This brief is one of three prepared by the Legal Officer embarked on HMAS MELBOURNE during the deployment and considers issues relating to the status of persons detained on vessels in the area of operations.

United Nations Security Council Resolutions

2. There are numerous UN Security Council Resolutions applicable to the situation surrounding Iraq and this paper is not a comprehensive analysis of those. Two important UN Security Resolutions are at Refs B and C. By virtue of Ref B, the UN has recognised the US, GB and Northern Ireland as occupying powers of Iraq. It also recognises that other states, such as Australia, will work with them. It recognises that the situation in Iraq continues to be a threat to international peace and security and calls upon member states to assist Iraq in reforming institutions, rebuilding the country and contributing to conditions of stability and security. Ref B lifted all prohibitions previously imposed by the UN relating to trade with Iraq, except for sale and supply of arms and related material, and those prohibitions required by the CPA to serve purposes of resolutions.

3. Ref C recognised the essence of security and stability to successful completion of the political process and implementation of Ref B and authorised a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq. Ref C also called on member states to prevent transit of terrorists to Iraq, arms for terrorists and financing of terrorists.

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4. These resolutions provide the authority for Australia to undertake operations as a part of the multinational force authorised under Ref C to implement Ref B.

The Law of Occupation and Human Rights

5. Ref A, in particular Section III, provides that an Occupying Power has certain duties, including in Art 64 that the penal laws of the occupied territory shall remain in force. These laws may be repealed or suspended to the extent that they constitute a threat to security or an obstacle to application of the Convention. Therefore the Occupying power can subject the population of the territory to provisions essential to fulfil its obligations, including maintaining orderly government and ensuring security.

6. The laws relating to occupation are categorised as International Humanitarian Law, and may be considered a subset of the wider International Human Rights Law. International Human Rights Law provides fundamental rights or standards applicable to persons and applies at all times, however derogation from some of those norms is permitted in certain standards, such as times of emergency.

7. In times of armed conflict International Humanitarian Law is considered the 'lex specialis', i.e. it is of primary applicability. Regardless, both IHL and IHRL have a common nucleus of fundamental human rights and as the situation in Iraq progresses from one of conflict and occupation to a new domestic regime, there must be movement away from IHL to the wider IHRL norms.

8. Relevant international instruments which require consideration relate to the treatment of detained persons and include the Charter of The United Nations 1945 (Preamble relating to Human Rights), the Universal Declaration of Human Rights (1948) (particularly Articles 5, 8 and 9) and the International Covenant on Civil and Political Rights (1966) (particularly Articles 2, Art 4 – the public emergency provision, Art 7, 9, 10, and 14).

9. In my view it is necessary to consider whether the protection and rights of individuals is being adequately catered for in the dynamic movement from war, through the occupation period and beyond.

Domestic Law of Iraq

10. I have encountered significant difficulties in establishing the extant applicable laws and regulations in Iraq, particularly those that relate to crimes that may be discovered during HMAS MELBOURNE's maritime operations in support of Operation CATALYST. Reference E is the only resource that I was able to obtain some access to in an effort to ascertain the details of the relevant domestic law in Iraq. It contains copies of promulgated CPA Orders, discussed further below. Reliance on it however was severely hampered by very restricted web access. I also managed to have some contact with Australian and US Legal Officers, but once again communication was hampered by the time delays experienced in downloading on the unclassified e-mail system. Clarification of some of the CPA orders has also been sought, but has not yet been forthcoming.

11. CPA Order 7. This order provides that Iraqi laws are in constant review but as at the date of that order, 10 Jun 03, the 3rd Edition of the 1969 Iraqi Penal Code with amendments, is to apply, but two particular paragraphs are suspended. The order also provided that legal proceedings in respect to publication offences, offences against the external security of the

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state, offences against the internal security of the state, offences against public authorities, and the offence of insulting a public official can only be brought with written permission of the Administrator of the CPA. (As the date of writing this paper I have been unable to get a copy or précis of the Iraqi Penal Code, or any of its relevant provisions).

12. From an international human rights perspective, some of the human rights considered to be fundamental are recognised and being implemented by the CPA. In particular this order provides that capital punishment is suspended, and torture, cruel, degrading or inhuman treatment or punishment is prohibited. It also provides that persons undertaking public duties are to apply the law impartially with no person to be discriminated on the basis of sex, race, colour, language, religion, political opinion, national, ethnic or social origin, or birth. This is consistent with requirements of Articles 6,7 and 10 of the ICCPR.

13. CPA Order 25. This order provides for the confiscation of criminal property involved in theft of natural resources. The order provides that criminal property shall be subject to confiscation and may be seized by Coalition Forces or Iraqi Police. A confiscation hearing will subsequently take place. A criminal conviction is not necessary prior to confiscation. The following definitions are applicable:

- a. **Criminal Property** - is defined as that property used or intended to be used in commission of a criminal offence involving natural resources or utility infrastructure and includes vessels; acquired through or as a result of commission or attempted commission of a criminal offence involving natural resources or utility infrastructure; money, negotiable instruments etc furnished or intended to be furnished in exchange for unlawfully acquired natural resources or parts of utility infrastructure, or to facilitate the commission of one of these offences.
- b. **Natural Resources** - is defined as having the usual meaning and includes refined petroleum, benzene, diesel fuel or other petroleum products after refining.
- c. **Utility Infrastructure** - is defined as relating to power generation and supply, water treatment and delivery and IT components such as telephone and computer cabling.

14. Procedures for seizure and confiscation are also set out in the order. When suspected Criminal property is identified in connection with an investigation or the apprehension of a person for the commission of a relevant criminal offence the suspected criminal property is subject to *immediate* seizure. Prior to HMAS MELBOURNE's arrival on task a number of vessels and crew were detained for significant periods of time at anchorage. During my deployment, vessels and persons on board those vessels continued to be detained, and there remained the potential that if persons were detected who were involved in activities which triggered CPA order 25, then seizure of vessels and detention would be an issue.

15. The order provides that the authority seizing the property shall inform the person in possession or control at the time of seizure that the property is being seized as suspected criminal property and will be subject to confiscation proceedings. Practically this would require the Boarding Officer to inform the master of the vessel. A proforma "Memorandum of Understanding of Care" (at Annex B) appears to have been utilised by Coalition Forces when seizing such property. Although relevant in advising the master of a seized vessel of the extent of assistance and care to be provided by Coalition Forces, it is my view that this

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would disembark and replenish their stocks. It would be unusual for these vessels to be at sea for the lengths of time that some of these vessels have been detained without some respite and replenishment. Further, specific cultural requirements, be they religious or dietary, are not necessarily known by HMAS MELBOURNE or any other vessel tasked to conduct these checks and Coalition vessels, including HMAS MELBOURNE, may not be equipped with foodstuffs that necessarily meet detained persons requirements, eg. I have been made aware that Hindu crew on a detained vessel were given significant quantities of raw frozen beef on health and comfort visits. Foodstuffs prepared in the halal method may also be required for replenishment but may not be available.

22. Although arrangements have been made for contractors to manage care of vessels and crew in the Smug Box, security detachments and health and comfort checks continued to be required and carried out by coalition forces including HMAS MELBOURNE and these issues remain extant for as long as interception operations are carried out in support of the CPA.

23. It is significant that Order 25 only refers to property, and not to persons who may be on board seized vessels and who may be implicated in the commission of a criminal offence. Despite that, persons continue to be detained on those vessels. CPA Memorandum 3 seems to be the only information that I could ascertain relating to criminal or other detention.

24. CPA Memorandum 3. This memorandum establishes procedures for applying the criminal law in Iraq. Section 5 of the memorandum provides that at the time an Iraqi law enforcement officer arrests any person, the officer shall inform the person of his or her right to remain silent and consult a legal representative.

25. Although Coalition forces are not Iraqi law enforcement officers, by implication from the nature of duties being performed, if they are seizing vessels and detaining persons on them, then the same requirement should apply. There is no evidence that this has been occurring, and in relation to persons detained on their own vessels in the Smug Box, I consider has the potential to cause some controversy and needs to be resolved.

26. Section 6 of the Memorandum relates to Criminal Detentions and standards to be applied to all persons detained by Coalition forces solely in relation to allegations of criminal acts, and who are not security detainees. It refers to initial induction into a Coalition Force detention centre and provides that the detainee shall be appraised of his rights to remain silent and consult a legal representative; to be promptly informed in writing, in a language they understand, of the particulars of the charges preferred against them; and to be brought before a judicial officer as rapidly as possible and no later than 90 days after date of induction to the centre; and provisions for access to detainees to ICRC.

27. Section 7 relates to Security Internees, and provides such internees with a right of appeal against the decision to intern them; review after six months by a competent body established for the purpose; standards of the facility, and access to ICRC.

28. I raise concerns with the status of individual persons on board vessels detained/seized by coalition forces. Without particulars of the Iraqi penal code, I am unable to provide exact advice, however I would assume that such people could be detained as criminal detainees, and then the provisions of section 6 of this memorandum would apply. I consider that if persons are detained on a vessel seized by the Coalition Forces perhaps in accordance with Order 25, then regardless of the nature of the vessel or state of registration of that vessel, if they are detained by Coalition forces they are not free to leave. In my view this would constitute

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detention in a Coalition Force Detention Centre. If that is accepted, then the detained persons should be advised of the particulars of the charges against them (orally and in writing in a language they understand), advised of their right to remain silent, advised of their right to consult an legal adviser, and brought before a judicial officer no later than 90 days from the date of detention. I am concerned that because of the circumstances of their detention (on board their own vessel) it is considered that they are not formally inducted into a purpose maintained Coalition Force detention facility and are therefore denied these rights.

29. Even if these persons are not considered Criminal detainees, but security internees, they should be advised of their status, provided a right to appeal the decision to intern them, and have their internment reviewed by a competent body six months from the date of internment as detailed in Section 7.

30. Section 8 of the Memorandum reinforces that criminal detainees suspected of involvement in a felony shall have the right to consult with a legal representative while in detention.

31. I note that paragraph 2 of Section 6 of the Memorandum provides that "...failure to comply with these procedures shall not constitute grounds for any legal remedy...". I would be concerned if this provision was relied on to excuse non-compliance with these procedures for a whole class of detainee.

32. Ref A is also relevant to considerations of detention and standards of detention facilities. Article 76 of Ref A provides that, "... protected persons accused of offences shall be detained in the occupied country and serve their sentences therein. They should enjoy conditions of food and hygiene sufficient to keep them in good health, and conditions should be at least equal to those in prisons in the occupied territory." I do not know what prison conditions within Iraq are like, or the extent of operation of prisons or detention centres there, but I raise the point so that comparison can be made with conditions on detained vessels. Section IV of Ref A is comprehensively devoted to treatment of internees, specifying certain conditions of internment facilities. If the detained persons on vessels in the Smug Box are not criminal detainees, then these provisions should apply, and it is doubtful whether the living conditions on detained vessels are at the standard required by the Convention.

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33. The above paragraphs express concerns regarding adherence to human rights norms that have occurred to me whilst deployed on HMAS MELBOURNE. Although there may be an argument concerning more limited guarantees of individual human rights during conflict and occupation, there is less scope for such arguments after occupation has ceased and it is therefore it is necessary to be alert to the existence of our obligations and provide and protect those fundamental human rights of the civilian population encountered during our operations in the area.

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Annexes:

- A. Proforma "Memorandum of Understanding of Care" which has been utilised by Coalition Forces when seizing suspected criminal property/detaining vessels and crew
- B. Health and Comfort Check Proforma

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SUBJ: MEMORANDUM OF UNDERSTANDING OF CARE FOR THE MOTOR VESSEL
DETAINED IN VIOLATION IMPORT/EXPORT LAWS IN IRAQ.

YOU ARE BEING DETAINED FOR VIOLATING COALITION PROVISIONAL AUTHORITY DIRECTIONS AND/OR IRAQI EXPORT LAWS. YOU, YOUR VESSEL AND CREW WILL BE TURNED OVER TO THE COALITION PROVISIONAL AUTHORITY IN IRAQ AS SOON AS POSSIBLE. UNTIL THEN, COALITION FORCES OPERATING UNDER COALITION PROVISIONAL AUTHORITY WILL PROVIDE YOUR BASIC FOOD AND WATER NEEDS. WHILE YOU ARE DETAINED, IT IS IMPORTANT YOU UNDERSTAND THE FOLLOWING:

1) YOU ARE BEING DETAINED BY THE COALITION PROVISIONAL AUTHORITY. YOU AS MASTER OF THE DETAINED MOTOR VESSEL, ARE RESPONSIBLE FOR THE ACTIONS OF YOUR CREW AND THE SAFETY OF YOUR VESSEL. THE COALITION FORCES TAKE NO RESPONSIBILITY FOR THE SAFE NAVIGATION AND SEA WORTHINESS OF THIS VESSEL. ANY REQUIREMENTS FOR THE SHIP TO MANEUVER, PUMP FLUIDS TO OR FROM BILGES OR TANKS/TO THE SEA, OR CHANGE ITS ENGINEERING STATUS WILL BE YOUR RESPONSIBILITY. ADDITIONALLY, AS MASTER OF THIS VESSEL, YOU ALONE ARE RESPONSIBLE SHOULD FOR ANY REASON THE SHIP RUN AGROUND, COLLIDE WITH ANOTHER VESSEL, OR EXPERIENCE ANY OTHER UNEXPECTED CASUALTY.

2) PRIOR TO BEING TURNED OVER TO THE COALITION PROVISIONAL AUTHORITY, COALITION NAVAL FORCES WILL PROVIDE:

- TWELVE LITERS OF POTABLE WATER PER PERSON PER DAY, WHEN YOU HAVE EXHAUSTED YOUR OWN ONBOARD SUPPLY. YOU MAY USE THIS WATER FOR WHATEVER YOU DESIRE; DRINKING, BATHING, OR WASHING CLOTHES.
- IF YOUR SHIPBOARD FOOD SUPPLY HAS BEEN EXHAUSTED: A CALORIC SUBSTRATE OF 1900 CALORIES PER PERSON PER DAY WITH NO LESS THAN EIGHT PERCENT OF THE CALORIES IN THE FORM OF PROTEIN AND NO LESS THAN TEN PERCENT CALORIES IN FAT.
- IF YOUR SHIPBOARD FUEL SUPPLY IS EXHAUSTED: SUFFICIENT FUEL TO RUN YOUR GENERATOR 6 HOURS EVERY DAY.
- IF YOUR ONBOARD SUPPLY OF COOLING WATER IS EXHAUSTED; COOLING WATER FOR YOUR GENERATOR.
- IF YOU NEED TO CONTACT THE OWNER OR AGENT, WE WILL ALLOW YOU TO DO SO AS LONG AS A BOARDING TEAM MEMBER IS THERE TO MONITOR AND RECORD THE CONVERSATION. THE CONVERSATION MUST BE IN ENGLISH IF YOU CAPABLE, UNLESS A COALITION INTERPRETER IS PRESENT.

3) WE WILL NOT DO THE FOLLOWING:

- PROVIDE CIGARETTES, CHEWING TOBACCO, CHEESE, CLOTHING, OR FRESH FRUIT AND VEGETABLES.
- REPAIR YOUR EQUIPMENT FOR YOU. WE MAY PROVIDE LIMITED TECHNICAL ADVICE, GASKET MATERIAL, AND FASTENERS.
- COOK OR PROVIDE COOKING PROPANE.
- PROVIDE PRESCRIPTION MEDICINE WITHOUT A DOCTORS PRESCRIPTION.

4) YOU ARE RESPONSIBLE FOR THE FOLLOWING:

- MAINTAINING YOUR EQUIPMENT IN OPERATING CONDITION.
- USING YOUR WATER WISELY. DO NOT LET IT LEAK INTO BILGE OR RUN FROM FATHETS INTO SINKS.
- FOLLOWING THE DIRECTIONS OF THE BOARDING TEAMS.

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BOARDING OFFICER

MASTER OF VESSEL

OWNER MAY CONTACT COMMANDER
NAVAL FORCES COMMAND /
NEGOTIATIONS FOR RELEASE OF DETAINED VESSEL.

COMMANDER US

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HEALTH AND COMFORT CHECK PROFORMA

(This check is to ensure that adequate provisions and medical care are made available to detained persons on detained vessels).

MV:

Date:

Boarding Officer:

Food remaining onboard (Measured in days)	
Potable water onboard (litres/days - 12 ltrs per day per person)	
Ships service fuel onboard	
Material condition of vessel	
Medical condition of detained persons onboard	
Requests made by detained persons onboard	
Linguists onboard Language spoken How many speak English	
Security Force or Repair Party personnel onboard Yes/No, number, unit	
No of detained personnel onboard and composition	
Provisions provided to vessel	
Remarks eg. hazards to boarding teams	

*Inform Master to contact coalition ship via VHF in case of rapidly deteriorating situation