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15 November 2002



Foreign &
Commonwealth
Office

London SW1A 2AH

Jonathan
David - But see
my notes on para 6.
"and" as put there
just during
Greenstock / Neg /
Greenstock
The reason for a
way down
to six stars /
our 5 stars
(16 notes)
Foreign Secretary
13/11

Stephen Pattison - inspired work on
what constitutes a material breach.

Jonathan

Iraq: Material Breach

I enclose a paper we have prepared on what might constitute a material breach by Iraq of its obligations under resolution 1441 (2002). The paper highlights a number of difficult questions, including whether and how a material breach might come to the Council. As the paper acknowledges, there are certain points on which we will need to consult the Attorney General.

The paper also describes the approach the Council has taken in the past, where it has been prepared to describe a variety of Iraqi actions as constituting a material breach. A key consideration was whether the breach demonstrated that Iraq was seriously impeding the work of UN inspectors in the fulfilment of their mandate.

We will have another opportunity to go over these issues when Sir Jeremy Greenstock is here on 20 November. Once we have clarified our own thinking further, we should discuss our approach with the Americans.

We should continue to decline to be drawn into public comment about what constitutes a material breach. But media interest in this question is growing, and we need to be careful not to sound evasive, which will only encourage further probing. We should, therefore, stick to the line that a decision on material breach would depend on the circumstances in which Iraq obstructed the inspection arrangements. But it would need to be an incident or pattern of incidents which demonstrated Iraq's unwillingness to comply.

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I am copying this paper to Sir Jeremy Greenstock (New York),
Sir Christopher Meyer (Washington) and Peter Watkins (MOD).

Yours ever,

Jonathan.

(Jonathan Sinclair)
Private Secretary

Sir David Manning KCMG
10 Downing Street

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IRAQ: A MATERIAL BREACH

Issue

1. The issue of "material breach" could come back to the Council in two ways under the terms of UNSCR 1441:

- i) follow up to OP4, which says that **"false statements or omissions in the declarations submitted by Iraq ... and failure ... at any time to comply with, and co-operate fully in the implementation of, this resolution shall constitute a further material breach of Iraq's obligations and will be reported to the Council for assessment in accordance with paragraphs 11 and 12"**.
- ii) follow up to OP11 which requires Blix/el Baradei to report **"any interference by Iraq with inspection activities, as well as any failure by Iraq to comply with its disarmament obligations, including its obligations regarding inspections under this resolution"**.

OP12 of SCR 1441 (2002) commits the Council to convening immediately upon receipt of a report in accordance with the above paragraphs. As OP12 refers to the receipt of a report in accordance with **"paragraphs 4 or 11"**, the US may well be inclined to report any material breach directly to the Council, rather than via Blix and El-Baradei. ✓

2. In addition, OPs 1 and 2 deal with the existing material breach of Iraq's obligations and make clear that, while acknowledging that material breach, Iraq is being given a final opportunity to comply with its disarmament obligations.

What is a material breach?

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Legal Definition of a Material Breach

3. A "material breach" of a treaty, according to the definition in the Vienna Convention on the Law of Treaties, cannot be a minor violation, but must be a "violation of a provision essential to the accomplishment of the object or purpose of the treaty". The ceasefire terms set out in Resolution 687 (1991) are not strictly a treaty, but in the past members of the Council have used this term by analogy.
4. This focus on the Vienna Convention was echoed by Ireland in its explanation of vote on adoption of resolution 1441 (2002). Most, if not all members of the Council will be inclined to take a similar view. Blix has made it clear that he will be using a similar definition for the purposes of his reporting under OP11. It is not for Blix to determine what constitutes a material breach, but his decision (or not) to report to the Council and the terms in which he reports will be influential.

Possible Breaches Under the New Resolution

5. **The new Resolution imposes a number of specific obligations on Iraq:**
 - To confirm acceptance of the Resolution by 15 November;
 - To produce an accurate, full and complete declaration of its WMD programmes, including research and development, as well as non-WMD chemical, biological and nuclear programmes by 8 December;
 - To co-operate with UNMOVIC/IAEA and in particular to allow UNMOVIC/IAEA to resume inspections by 23 December;
 - To provide UNMOVIC/IAEA with unimpeded access, the names of all relevant personnel etc;
 - To refrain from taking or threatening hostile acts against UN personnel, or any member state taking action to uphold any Council decision.
6. OP4 "Decides that false statements or omissions in the declarations submitted by Iraq... and failure by Iraq to comply with, and cooperate fully in the

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This misinterpretation of the word "and" (without comma) - which is false disclosure and failure to comply

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to be a material breach

implementation of, this Resolution shall constitute a further material breach.. and will be reported to the Council for assessment...". This language reflects the view expressed during the negotiations that trivial omissions/errors in the declaration should not, by themselves, constitute a material breach - there must also be evidence of failure to comply/co-operate. Read literally, it appears to set a relatively low bar for what shall constitute a material breach, but in our view the paragraph should, nevertheless, be construed in light of the Vienna Convention and the past practice of the Council.

- I do not agree that is low.*
7. In addition to OP4, OPs 1 and 2 are of crucial importance. OP1 decides that Iraq has been and remains in material breach, while OP2 makes clear, while acknowledging OP1, that Iraq is being afforded a final opportunity to comply. We are seeking legal advice on these two paragraphs.
 8. The US are becoming more and more inclined to interpret the 1441 definition downwards (e.g. Bush talk of zero tolerance and warnings that a false statement in Iraq's acceptance letter would constitute a material breach). Given the opportunity OP12 leaves them for making a unilateral report to the Council, we need to be clear in our own minds where the dividing lines are.
 9. Some Council Members may take as a criterion what breaches have been considered "material" in the past. Since 1991 the Council has determined Iraq to be in material breach of its obligations under resolution 687 (1991) on seven separate occasions. These have followed a variety of failings by Iraq including failure to disclose and destroy weapons, failure to permit access to sites and failure to allow UNSCOM to use its own aircraft to transport personnel into Iraq. (List at Annex B).
 10. On each of these occasions, there seems to have been a conviction that an Iraqi act would seriously impede inspectors in the fulfilment of their mandate, and thereby undermine an essential condition of the ceasefire. PP5 of resolution 1205 (1998) recalls that the effective operation of UNSCOM and the IAEA is essential for

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the implementation of resolution 687 (1991), language also reflected in PP10 of resolution 1441 (2002).

11. Against the background of the legal definition and past practice we would consider the following incidents as material breaches:

- i) any incident sufficiently serious to demonstrate that Iraq had no real intention of complying. This might be an Iraqi decision to expel UNMOVIC, or to refuse access to a particular site, parts of a site or important information. It would also include discovery by UNMOVIC/IAEA of a concealed weapons programme, or of a cache of WMD material not declared in the 30-day submission;
- ii) Efforts to constrain UNMOVIC/IAEA's operations in significant ways contrary to the provisions of SCR 1441 (2002), OP7 and other relevant resolutions. Systematic efforts to deter, obstruct or intimidate the interview process would need to be particularly carefully watched.
- iii) Systematic Iraqi harassment of inspectors, including threatening hostile acts, which jeopardised their ability to fulfil their duties. (SCR 1441 (2002), OP8).
- iv) Iraqi failure to accept SCR 1441 (2002) under the terms of OP9.
- v) A pattern of relatively minor Iraqi obstructions of UNMOVIC/IAEA. We would not take the view that a short (hours) delay in giving UNMOVIC access to a site would constitute a material breach unless there was clear evidence that the Iraqis used such a delay to smuggle information out of a site or to coach potential witnesses. But repeated incidents of such obstruction, even without evidence of accompanying Iraqi deception, would cumulatively indicate that the Iraqis were not fully co-operating, and thus cast doubt upon whether UNMOVIC would ever be able to implement its mandate properly.

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12. An American version of para 11 above would probably be drafted in even tougher terms. Although, some weeks ago, NSC indicated that they would not regard trivial omissions in Iraq's declaration [or minor problems encountered by UNMOVIC] as triggers for use of force, more recently DOD have indicated that they want to test Saddam early. Following adoption of the Resolution, President Bush spoke of "zero tolerance", and warned against "unproductive debates" about what constitutes an Iraqi violation. It may also be that the US would regard an Iraqi threat to USUK aircraft patrolling the NFZ as a material breach under OP8 of SCR 1441 (2002), despite their explanations at certain points during the debate on the text that OP8 was designed to protect UN and IAEA personnel and national personnel helping UNMOVIC and IAEA carry out their mandates.

Conclusion

13. There are bound to be grey areas over whether Iraqi failure to co-operate is sufficiently serious to constitute a material breach. We will need to work out with the Americans where to draw our red lines. In the interests of maintaining maximum Council support for use of force, we should try to persuade the Americans to focus on the more serious possible violations, or to establish a pattern of minor obstruction. It may be that we will need – subject to American views – to discuss this with the P5.

14. This paper does not deal with the issue of whether a future Council decision is needed to determine that Iraq's actions justify the serious consequences referred to in OP13 of 1441. This is a matter on which we will need the Attorney General's views.

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