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[DOCUMENT UNDATED.
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MANUSCRIPT COMMENT
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Background on material breach

OP4: FCO lawyers take an interpretation that, despite what OP4 actually says should constitute a material breach, that breach must be construed in the light of the Vienna Convention and past practice of the Council. We need to clarify this as this suggests a much higher bar than the US.

OPs 1, 2, and 13: we should ask the AG for advice on how OPs 1 and 2 (and 13) - and the declaration of material breach they contain - affect the legal situation of Iraq and our authority to use force. The AG should be asked to consider the context of the resolution: the references in the preamble to 678/687; the fact that most delegations did not directly question that a "material breach" finding could be a "trigger" for the use of force; the fact that France and others fought unsuccessfully to delete references to "material breach" in OPs 1, 2 and 4 to make clear that the Council and only the Council had to decide on the use of force; and the statements made on adoption of the resolution - most of which simply referred to a discussion in the Council (something the US/UK have conceded). Putting all this together, can one argue that 1441 itself (especially OPs 1, 2 and 13 taken together) contains a conditional authority to use force (the conditions being Iraqi failure to take its last chance and a subsequent discussion in the Council) which will be fully uncovered once that Council discussion has taken place.

If this has merit (and the most we can hope for in the absence of an express Chapter VII authorisation is a reasonable legal argument) it would be very helpful to know that now. We would not have to impale ourselves and Ministers on the difficult point of what happens if the US/UK try and fail to get an express authorisation.

At all events, we think London seriously needs to consider revising its thinking on 1441. If you come at it from the point of view of OP4 the question is "What does Iraq have to do to put itself beyond the protection of the law? At what point does its conduct amount to material breach?" Innocent until proven guilty. But if you come at it through OPs 1 and 2 the question is "When has Iraq blown its last chance? (regardless of whether OP 4 is ever breached)". Compliance with OP4 is strictly irrelevant: Iraq is guilty but released on a suspended sentence/parole. This seems to us to have huge presentational angles - as well as whatever legal deductions can be made. **If we are not careful, we are in danger of losing the key advantage of the resolution and turning a provision which we thought of deleting as unnecessary into the main operational paragraph of the text.** The French and others will not be rushing to point out our mistake.

What happens if a second Resolution is vetoed? This question is probably too difficult at this stage - everything would depend on the circs. And we should perhaps try to keep open the limited scope for manoeuvre that exists on that. But knowing the answer to the legal implications of 1441 (second preceding tiret above) would either (i) leave us no worse off than we are - if the AG thinks the argument doesn't run or (ii) radically improve the situation if the AG thinks we have a case.

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