

ATTORNEY GENERAL

cc: SOLICITOR GENERAL
DAVID BRUMMELL

IRAQ: MEETING WITH THE PRIME MINISTER, 22 OCTOBER

1. You are seeing the Prime minister at 4pm today to discuss Iraq. I attach by way of background:

A: the latest version of the draft resolution. This differs slightly from the version you saw on Friday (the changes are described in the covering fax) but the FCO view (with which I agree) is that the changes do not affect the analysis that the resolution does not provide a legal basis for the use of force either expressly or via the revival argument.

B: John Grainger minute (11/10) and Michael Wood letter (18/10) commenting on earlier versions of the resolution. Their analysis holds good for the latest text.

C: Your advice of 30 July

D: Record of your conversation with the Foreign Secretary of 18 October

E: PS/Foreign Secretary letter to David Manning dated 21 October with draft press lines. You will wish to note the passage at X which apparently the Foreign Secretary added personally.

F: Set of previous resolutions.

G: Note on meaning of "imminence" in the law of self-defence

H: Legal background notes.

2. I attach some suggested lines to take (including on Kosovo). In my view, the Foreign Secretary's comments in the letter to David Manning at flag E make it all the more important for you to place your views clearly on the record in writing.

CA

CATHY ADAMS
22 OCTOBER 2002

① Manning knew my legal advice

② Answer Mr Manning's -

political remarks -

③ As it stands - will need a draft resolution - (says do - 22/10)

④ Need to express my view in writing?

⑤ Graham Allen's letter

LINES TO TAKE

Legal Effect of current draft resolution

- Does not amount to an authorisation to use force.
- Contains no express language (ie "all necessary means") which would authorise use of force
- Advised in July that in order to rely on the authorisation in resolution 678 (the revival argument) there would need to be a clear determination by the Council that there had been a sufficiently serious breach of the ceasefire conditions such as to undermine the basis of the ceasefire.
- Resolutions have to be interpreted as a whole and in light of the circumstances prevailing at the time of adoption (eg statements made on adoption by Council members)
- But as it stands at present, do not believe current draft would justify recourse to revival argument because:

(a) although refers to material breach in OP1 and OP1bis and "serious consequences" in OP1ter, the resolution goes on to prescribe the measures which Iraq must take to comply.

(b) OP10 makes clear that Council will reconvene for a further discussion if a breach is reported. That implies that it will be for the Council to decide at the stage what further measures are to be taken.

- Therefore consider that if a resolution were adopted in these terms a second resolution would be necessary to authorise force in the event of a breach by Iraq.

Kosovo precedent?

- Simply not relevant

- Facts are these. Council adopted resolution 1199 which demanded FRY should cease hostilities in Kosovo and comply with its international obligations. In paragraph 16 of that resolution, the Council decided that if the FRY did not comply, it would "consider further action and additional measures to maintain and restore international peace and security in the region". (ie similar language to OP10 of draft Iraq resolution).

*Said it needed to
make clear what
consequences of non-compliance
would be. Was to still say*

*Council
will
decide*

- FRY did not comply. We considered tabling a resolution to authorise the use of force, but Russia made clear it would veto such a resolution so we did not proceed.

- BUT we were nevertheless able to take military action because we had an alternative legal base, namely the need for action to prevent an overwhelming humanitarian catastrophe. The Law Officers at the time agreed that international law recognised that in exceptional cases such circumstances could justify the use of force. No such justification would apply in relation to Iraq.

- Other key differences between Kosovo and Iraq:

- (a) there was a general recognition in the international community of the need to take action to prevent human rights abuses by the Milosovic regime. This is reflected in the fact that the Russians tabled a draft resolution condemning the NATO action and this was defeated by 12 negative votes in the Council (ie we did not need to rely on a UK/US veto to prevent the adoption of the resolution. There were strong indications that the Council as a whole approved of the NATO action.)

- (b) military action was taken by NATO. It could therefore not be criticised as unilateral US/UK action.

What about self defence?

- Anticipatory self defence is controversial in any circumstances, even where there is a clear imminent threat. Article 51 of the Charter speaks of a State taking action in self-defence "if an armed attack occurs".

- UK view is that Article 51 does preserve the right of anticipatory self defence which existed in customary international law prior to adoption of the Charter. But it would be difficult to justify action against Iraq on this basis unless it could be shown that there is an imminent threat either to the UK or to an ally who has requested us to assist in their defence.

- Current intelligence shown to me indicates that there is no threat from WMD unless we attack Iraq.

- Of course circumstances may change (eg if Iraq attacked Kuwait again) but as things stand, I have not seen sufficient evidence to warrant action in self defence.

What if Russia vetoes a second resolution?

- This is a question which would have to be considered very carefully in light of the circumstances at the time.
- The Law Officers advised in 1997 that there could be "exceptional circumstances in which although the Council had not made a determination of material breach it was evident to and generally accepted by the international community as a whole that Iraq had in effect repudiated the ceasefire and that a resort to military force to deal with the consequences of Iraq's conduct was the only way to ensure compliance with the ceasefire conditions".
- This might perhaps cover the situation where there has been a perverse veto of a resolution against the general will of the Council.))
- But of course, the counter view would be that if the Council has rejected a resolution authorising the use of force, then under the scheme of the Charter, it cannot be said that force is legally justified.
- It is impossible to give a firm view on this now. We should certainly not plan on being able to rely on such a justification. There does not seem to wide support for military action among the wider international community at present.

Public statements

- Have seen draft press lines circulated by FCO. Of course fully support commitment to act within international law, but am concerned that we are misleading ourselves (and the US) that without a further resolution we would be able to act "within international law".
- As things stand, my view is that unless circumstances change we would have no legal justification to take military action, without a second resolution.