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ATTORNEY GENERAL

cc: DAVID BRUMMELL

IRAQ: RESOLUTION 1441: SIR JEREMY GREENSTOCK'S POINTS

1. Following your meeting with Sir J Greenstock yesterday, I attach the following additional material for you to consider in connection with resolution 1441:

A: Christopher Greenwood's submission to the FAC

B: the Security Council record of the meeting at which resolution 1205 (1998) was adopted

C: the SC record of the meeting following commencement of Operation Desert Fox

D: FCO telegram setting out legal basis for the use of force for Desert Fox.

2. Leaving aside the drafting points on the draft advice (I will submit a revised version separately), JG had three main criticisms of the conclusion that resolution 1441 does not authorise force.

Textual arguments

3. His main argument relating to the text of 1441 is that the draft advice understates the significance of OPs 1 and 2 and overstates the relevance of OP4. OP1 determines a continuing material breach but OP2 suspends this determination. JG argued that if Iraq failed to take the final opportunity, the suspension would be lifted, reactivating the determination of breach and, therefore, the authorisation implicit in OP1.

4. Any failures to comply/interference, which would establish that Iraq had failed to take the final opportunity, could be established by UNMOVIC/IAEA under OP11. This could lead to an OP12 discussion without the need to have regard to OP4. OP12 states that reports may be submitted under OPs 4 or 11, thus making clear that OP4 is not necessarily in play. Implicit in this argument is that if you don't need to have regard to OP4, then you don't need to worry about the meaning of "for assessment".

5. The main difficulty with this argument is that OP4 uses similar language to OP11, so that any conduct falling under OP11 would almost certainly fall under OP4 too. This is how I had initially understood the resolution and which is why in my analysis of OP12 in the draft advice I said that the Council will convene on report of a "further material breach": because I took the view that any OP11 conduct would also constitute a further material breach under OP4. I drew support for this view from the reference to OP11 in OP4. If that view is right, then

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arguably any OP11 report would also be covered by the words "for assessment" in OP4. But it is true that this view does not take account of "paragraphs 4 or 11" in OP12. OP 4, which was changed at the last minute to refer to "paragraphs 11 and 12", and OP12 are in effect contradictory on this point.

6. JG's other textual points were:

(i) there are two meanings of "assessment": to assess the character of the breach (a past assessment) and to assess the position of the Council (a future assessment). I understood his argument to be that OP4 meant the former only. But I am not sure that this helps, because even in that case assessment implies some kind of determination by the Council that the breach is sufficiently serious to be material.

(ii) he also said that the history of the negotiations (on which more below) showed that "assessment" was a one word telescoping of the procedure under paragraphs 11 and 12. On this basis, the assessment is not for the Council alone, but also for Blix and El Baradei under OP11, eg to decide whether or not the conduct amounts to a failure by Iraq to comply with its disarmament obligations. For this argument to work, you need to read OP 4 as "for assessment in accordance with paragraphs 11 and 12" rather than "for assessment by the Council".

(iii) he argued that OP12 in effect places a limitation on the words "for assessment" in OP4 because of the reference to "for assessment in accordance with paragraphs 11 and 12". Since OP12 deliberately contains no reference to the need for a decision, the assessment need not constitute a decision. The Council would meet to assess the situation, and would have the opportunity to take a decision, but there was no requirement for a further decision.

History of the negotiations

7. His textual points were supported by reference to the history of the negotiations. First, he argued that OPs 11 and 12 were negotiated and agreed before the debate began on OP4 and that this must be taken into account when considering the relationship between them. His point is certainly born out by the telegram record (at Tab E of the black file. All the telegrams I refer to are flagged in green). The FCO telegram of 8 October shows various options for the language of OP12 (then OP10). The language of what eventually became OP12 was agreed between the French and US in mid-October: see UKMIS telegrams of 16 and 18 October. (The 16 October telegram is also interesting for US and UK views at that time on the significance of the OP12 language.) OP4 was added to the text only when it was presented to the P5, ie after the deal

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had effectively been struck on OP12. The words "for assessment" were only introduced in late October: see the UKMIS telegram of 1 November where the French Ambassador first suggests "assessment", which was followed up by the Straw/Powell record of 2 November.

8. JG also argued strongly that OP12 has to be seen in the light of the clear French position (as shown in their draft text dated 14 October) in favour of an unambiguous requirement to return to the Council for a further decision. It was clearly understood that OP12 as it emerged was a fallback position for France and a compromise for the US: the Council would have an opportunity to take a decision, but there would be legal no requirement for a decision.

9. His second point was that the words "for assessment" in OP4 were added with the intention of making clear that any further material breach established under OP4 would also (ie in addition to the OP1 breach) be subject to the agreed procedures in OPs 11 and 12 to ensure that there was "no automaticity" in the resolution. These words should not therefore be read as qualifying OP12. This view of the negotiations is supported by the telegram record: see the UKMIS telegrams of 30 October and 1 November.

The 1205 precedent

10. The records of the Security Council debates on adoption of 1205 and on commencement of the military action are attached at Flags B and C. The record at Flag C includes the statement of JG which he handed over at the meeting. Flag D is an FCO telegram setting out the legal basis for military action following 1205, but this does not actually assist greatly. It simply sets out in familiar terms the basis of the revival argument.

11. There are two ways in which it could be argued that 1205 is a relevant precedent. First, you will see from the records of both the debates that the majority of the Council expressed themselves, either explicitly or implicitly, opposed to the view that 1205 revived the authorisation in 678. On adoption of the resolution, only the UK stated that we did consider it to constitute such authorisation. The EOVs in 1998 could be seen as less favourable to the US/UK position than those made following adoption of 1441. On this basis, it might be argued that the UK position now is at least as good as it was in 1998 when we took the view that action was lawful.

12. Secondly, and I think more significantly, JG referred to the sequence of events following the adoption of 1205. The resolution was adopted on 5 November 1998 following Iraq's decision to eject the inspectors. The US and UK were ready to commence action in mid-November, but pulled back at the last minute because Saddam made a commitment on 14

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November to re-admit the inspectors. However, a month later, UNSCOM reported to the Council that the Iraqis had gone back on the undertakings they had given in mid-November. (This is all set out in the JG's statement to the Council on 16 December.) In that statement (see page 9) the UK representative stated that force had not been used immediately because the US and UK were willing to "go the extra mile" for a peaceful resolution. But when Iraq failed to fulfil its assurances (according to UNSCOM) it once again acted in material breach thus triggering the authorisation to use force.

13. This scenario is of course very similar to the situation we face now, the main difference being that 1441 explicitly gives Iraq a "final opportunity". The UK relied in 1998 on a finding of material breach some weeks previously which had been "suspended" by Iraq's decision to cooperate, but which then revived when they went back on the promise of cooperation. The question is of course whether the terms of OPs 4 and 12 of 1441 make a significant difference to the analysis of the current situation, which is otherwise very much the same as in 1998.

The Greenwood paper

14. Finally, JG drew attention to a paper written by Christopher Greenwood on the use of force against Iraq. I have established that this was indeed the paper he submitted to the FAC enquiry in October last year, which you saw at the time. It is attached at flag A.

15. The significant reference is at the end of paragraph 19, which concludes a section where he finds in favour of the validity of the revival argument. He states that "a resolution stipulating that Iraq must take certain steps by a prescribed date could (depending on its wording) mean that the Council was determined that failure by Iraq to take such steps was a breach threatening international peace and security". If I understood JG correctly, he was arguing that this sentence could be taken as support for the proposition that the Council may give a conditional authorisation to use force. If it is evident that Iraq has failed to take the steps prescribed by the Council, then the authorisation to use force revives. On this basis, if it is evident that Iraq has failed to take the final opportunity, then the authorisation revives once the conditions in OPs 11 and 12 have been fulfilled.

Conclusion

16. You will want to reflect on the merits of these arguments. I have tried to give some flavour of what I think in the paragraphs above. Overall, although I don't believe the arguments can all be taken without challenge, I certainly think they strengthen the case for the second view and make the balance of view as to which is the better of the two alternative interpretations of the resolution rather closer.

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17. You might want to consider whether you would like to put these arguments to Michael Wood. This would, however, probably mean disclosing to him your provisional view of the resolution and perhaps even the draft advice.

CATHY ADAMS

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