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ATTORNEY GENERAL

**cc SOLICITOR GENERAL
DAVID BRUMMELL**

IRAQ: INTERPRETATION OF RESOLUTION 1441

1. The long-awaited letter from Michael Wood analysing resolution 1441 has now arrived. I attach below his letter of 9 December with the following flags:
 - A** Resolution 1441 (2002)
 - B** Record of Security Council debate on adoption of resolution 1441.
 - C** Joint statement of China, France and Russia on adoption of resolution 1441.
 - D** Response of Iraq to resolution 1441.
 - E** Record of negotiations of resolution 1441.
 - F** Draft versions of resolution 1441 dated 25 September, 23 October and 6 November.
 - G** Articles 31 - 33 of the Vienna Convention on the Law of Treaties.
 - H** Your advice of 30 July.
 - I** Letter to David Manning of 23 October following your meeting with the PM.
 - J** LSLO record of your conversation with the Foreign Secretary on 12 November.
 - K** Set of previous resolutions.
 - L** Extract from CND skeleton argument
 - M** Papers on resolution 1205
 - N** Further legal background papers.
2. You will see that paragraphs 9 and 10 of Michael's letter refer to the P5 negotiations prior to the draft resolution being submitted to the full Council on 23 October. These negotiations are particularly relevant to "the second view" of the resolution as described in the letter. Michael only sent over a few telegrams reporting discussions in the full Council, so I have augmented this collection (**at flag E**) with further records of P5 meetings from our files. But we do not have a full set of telegrams here because we did not see everything at the time (despite requests that we should). I have therefore asked Michael if he could arrange to send over a full set of papers, as he offers in paragraph 10, in anticipation that you would wish to be fully informed of the process of the negotiations given that this appears to have a bearing on the interpretation of the resolution.
3. In addition to the papers listed above, you may also wish to refer to the compendium of previous Law Officers' advice contained in your "Use of

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Force" file and to the yellow ring-binder of background material. I would recommend, in particular, reading Michael Wood's article "The Interpretation of Security Council Resolutions" (on the yellow file) before studying the papers, as it sets the context.

Issue

4. You will see from paragraph 3 of the letter that Michael says that "no advice is required now". I understand that this reflects the views of the Foreign Secretary. While it is certainly true that definitive advice could not be given at this stage on whether a further Council decision is required (because such advice would need to take account of all the circumstances at the time, including further discussions in the Council), there is no reason why advice could not be given now on whether resolution 1441 is capable in any circumstances of being interpreted as authorising the use of force without a further Security Council decision.
5. Notwithstanding the comment in paragraph 3, I think a serious issue for consideration is whether, if you were to reach the view that resolution 1441 was under no circumstances capable of being interpreted as authorising force without a further Council decision (ie if you were to reject the "second view" as unsustainable), this should be relayed to the Foreign Office and Number 10. As you know, the Foreign Secretary (and other Ministers) have gone beyond the neutral line suggested in paragraph 3 of Michael's letter in stating that resolution 1441 does not "necessarily" require a further Council decision. These statements have been prayed in aid by CND in support of their argument that HMG has already reached a decision to this effect (see **Flag L**).
6. An alternative option, if you are minded not to give advice, might be for me to reply to Michael's letter confirming that you do not propose to advise at this stage, but stressing the need for neutrality in HMG's public line for so long as you have not advised on the interpretation of the resolution. You indicated that you were inclined to write along these lines in response to the Foreign Secretary's statements in the House in the Iraq debate on 25 November.
7. Whether or not you decide to give formal advice at this stage, I would recommend that it would be worth studying the letter and attachments now. The issues are far from straightforward and you will no doubt wish to consider all the papers in detail, including the negotiating record. Clearly it would be preferable to be able to do this before you come under immediate pressure to give a view (which may be later this month or early in the New Year). In addition, I have as requested set up a meeting with Jonathan Powell on Thursday 19th December at 3:15pm.

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Argument

8. Michael's letter puts forward two alternative views of the legal effect of resolution 1441:
 - (a) that it does not authorise the use of force expressly or revive the authorisation in resolution 678 (1990) ("the first view"); and
 - (b) that it can be read as conditionally authorising the use of force, the conditions being (i) that Iraq fails to take the "final opportunity" offered by the resolution and (ii) that there has been a further discussion (but not necessarily a decision) in the Security Council ("the second view").
9. The **first view** is analysed at paragraphs 24-27 of the letter. Michael does not say so expressly, but I understand that he believes this to be the better analysis of the resolution. The essence of this interpretation is that, even though there is a finding of material breach of resolution 687 in OP1, and a finding that breaches of the new inspection regime will constitute further material breaches (OP4), OP12 makes it clear that it is for the Council to consider next steps. There is no other sensible meaning of OP12 other than that it is for the Council to decide at that stage what those steps should be. This view, it is argued, is supported by the statements made by the members of the Council on adoption of the resolution (**see Flags B and C**).
10. The **second view** is described in paragraphs 28-31 of Michael's letter. However, I am not convinced that he puts the arguments in support of this view at their strongest. It seems to me that the argument goes as follows:
 - PPs 4, 5 and 10 recall the authorisation to use force in resolution 678 and that resolution 687 imposed obligations on Iraq as a necessary condition of the ceasefire. This sets up the revival argument.
 - OP1 provides that Iraq remains in material breach of resolution 687. This satisfies the requirement of a determination of a breach of the ceasefire conditions by the Council (your advice of 29 July (at **Flag J**)).
 - OP2 affords Iraq a "final opportunity" to comply "while acknowledging" OP1. This was added as a "firebreak" to satisfy the French etc that the resolution would not have the effect of immediately authorising the use of force through the reference to material breach in OP1, but it also makes clear that the Council has determined that compliance with this resolution is Iraq's last chance before the ceasefire resolution will be enforced (OP13). "While acknowledging" OP1 indicates that this paragraph does not undermine the finding of material breach.

- OP4: the Council decides that future breaches of resolution 1441 will constitute a further material breach of the ceasefire. In negotiation, France and Russia sought to make clear that such breaches would not be "material" unless assessed as such by the Council, but this change was not accepted: see telegrams recording Straw/Powell conversation on 2 November and P5 meeting on 7 November at **Flag E**.
 - OPs 4 and 11: reports of breaches will be submitted to the Council. (The better view is probably that Member State reports under OP4 would need to be assessed under OP11 before submission to the Council, given the references to paragraphs 11 and 12 in OP4.)
 - OP12: the Council will then convene "in order to consider the situation and the need for compliance with all relevant resolutions in order to secure international peace and security". This does not state that a further Council decision is required. During the course of negotiations the French and Russians made at least two proposals to amend this paragraph to make clear that a further decision was required, but these were not accepted: eg "to consider any measure to ensure full compliance [with] all its relevant resolutions" (French text in e-mail of 30 September) and "to consider the needed steps to ensure full compliance with relevant SCRs" (Russian draft in telegram of 25 October) (both at **Flag E**).
 - OP13 makes clear that "serious consequences" will follow a further failure to comply. It is clear from the negotiations that this is accepted as code for the use of force: see for example telegrams reporting Security Council consultations on 25 October (para 13, Ireland), 30 October (para 18, France) and 7 November (para 8, Syria) (all at **Flag E**).
11. The "second view" can certainly be criticised, but I am not sure that the difficulties identified in paragraph 29 of Michael's letter are significant. In particular, I don't think the argument relies solely on OP1. OP4 is equally important to the analysis: OP4 is in effect the mechanism by which it is established whether or not Iraq has accepted the "final opportunity" in OP2. I don't therefore see that the argument on OP4 is really a different point (Michael's paragraph 30): they are part of the same analysis. If you accept that then the objections in Michael's paragraph 29 fall away.
 12. The principal difficulties with the second view are, it seems to me, the reference in OP4 to breaches being referred to the Council "for assessment" under OP12, which, if those words are to be given any meaning, tends to imply that the Council will take a further decision, and the wording of OP12 itself. As Michael makes clear in paragraph 31 of his letter, the second view involves arguing that the further meeting of

the Council is effectively just a procedural requirement. The record of the negotiating history (as it appears from our files) does not help a great deal on this point. It is clear that the wording of OP12 was a compromise between the original US draft (which contained "all necessary means" in the equivalent paragraph see **Flag F**) and the French/Russian preference for an explicit reference to a further Council decision (see discussion of OP12 in paragraph 10 above). However, it must be acknowledged that the wording of OP12 was deliberate, ie it is not inadvertently obscure. Those advocating the second view would therefore argue that the Council deliberately chose not to refer to the need for a second decision and effect should be given to this.

Statements on adoption

13. As you know, where the wording of a resolution is unclear, statements made by Council members on adoption may be relied on to assist with interpretation. Michael argues (his paragraph 25) that the statements support the first view. But I am not sure that the position is quite as clear cut as that. I have added to the full record of the Council meeting and the FCO summary at **Flag B** a table showing the statements made by each Council member concerning the "automaticity" of the resolution. The US and UK made clear that breaches would be reported to the Council "for discussion" (as they had also done during the negotiations). Only two members (Mexico and Ireland) expressly stated that a further decision of the Council was required, although I think Syria's comments can be taken to mean the same thing. The statements of France, Russia and China (and their joint statement at **Flag C**) which might have been expected to support this view are by no means clear on this point. And although the majority welcomed the lack of automaticity in the resolution, that begs the question of what they actually meant by "automaticity". There is some evidence from the negotiating record that the principal concern was that the resolution should not authorise the use of force against Iraq immediately following its adoption on the basis of the "material breach" plus "serious consequences" combination: see for example telegram reporting P5 discussion on 22 October (at **Flag E**).

Conclusion

14. The one thing which is clearer following adoption of this resolution is that the existence of the "revival argument" does not seem to be doubted within the Security Council. The whole basis of the negotiation relating to OPs 1, 2, 4, 12 and 13 was that that the words "material breach" and "serious consequences" were code for authorising the use of force. There is now therefore a much sounder basis for relying on the revival argument than previously.

15. However, the question of whether resolution 1441 alone satisfies the conditions for reviving the authorisation in resolution 678 without a further decision of the Council is far from clear from the text: it is a "complicated compromise" to paraphrase the Russian UN Ambassador. Nor are the statements on adoption conclusive. It is therefore not easy to ascertain the intention of the Security Council. What advice you give on the interpretation of the resolution may therefore depend on the view you take as to your role in advising on use of force issues. For example, you might give a different answer to the question: what is the better interpretation of resolution 1441? than to the question: can it reasonably be argued that resolution 1441 is capable of authorising the use of force without a further Council decision?
16. You have previously indicated that you are not entirely comfortable with advising that "there is a respectable argument" that the use of force is lawful, given the quasi-judicial nature of your role in this area. Previous Law Officers have of course advised in these terms on other occasions, notably in relation to the lawfulness of the No-Fly Zones and the "revival argument".
17. For my own part, I think that the first view is the better interpretation, but that the arguments in favour of the second view are probably as strong as the legal case for relying on the revival argument in December 1998 when the UK participated in Operation Desert Fox. Then, you will recall, HMG took the view that resolution 1205 revived the authorisation to use force in resolution 678 (at **Flag K**). No advice was given in writing by the Law Officers, but it appears that the then Attorney General endorsed the view that there was "a respectable legal argument" that the revival argument could be relied on. This view seems to have been based both on the text of the resolution and statements made on adoption (although a number of speakers expressly denied that the resolution should be taken as authorising the use of force). I attach at **Flag M** relevant papers from the files.
18. Of course, even if you accept the view that resolution 1441 is capable of being interpreted as authorising the use of force without a further decision, a definitive view on whether or not the Council has in fact authorised the use of force against Iraq would need to await the outcome of the further discussion in the Council. That discussion will be equally relevant to the interpretation of resolution 1441 as the statements made on adoption. The discussion might, for example, clarify that in light of Iraq's response, Council members believed that force could be used on the basis of resolution 1441 without a further decision. Alternatively the discussion could undermine the arguments for the "second view".

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18. Please let me know if you would like to discuss this, or require any further information, or would like me to fix up a meeting with Michael Wood before you see Jonathan Powell.

CATHY ADAMS
11 DECEMBER 2002

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