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ATTORNEY GENERAL

cc: DAVID BRUMMELL

IRAQ: LINES TO TAKE FOR NO 10 MEETING

Would military action against Iraq be lawful without a second resolution?

- Since last discussion have had the benefit of discussions with Foreign Secretary and Jeremy Greenstock. I have also had the opportunity to hear the views of the US administration. These discussions were valuable as they gave me background information on the negotiating history which I had not previously had. US discussions particularly useful as they gave me a clearer insight into the important US/French bilateral discussions over the terms of OP12 of resolution 1441. This is relevant to the interpretation of the resolution.

- There are two questions:

1. Would military action be lawful without express authorisation from the Security Council (ie "all necessary means")?

- The argument that the authorisation to use force in resolution 678 revives if the Security Council finds that Iraq is in material breach of the ceasefire resolution (687) is controversial. Not widely accepted among academic commentators.

- But I have already made clear that I agree with the advice of my predecessors that the so-called "revival argument" provides a valid legal basis for the use of force provided that the conditions for revival are satisfied. I believe that the arguments in support of the revival argument are stronger following adoption of resolution 1441, which makes clear that resolution 678 remains valid. I am satisfied that a good legal case can be made out that military action may be authorised implicitly by the Security Council by means of the revival argument.

2. Is resolution 1441 sufficient to revive the authorisation in resolution 678?

- Certain elements of the resolution indicate the Council intended to revive the authorisation in 678, eg preambular paragraphs referring to 678 and 687, the finding of "material breach" in OP1 and "serious consequences" in OP13.

- But clearly the Council did not intend 678 to revive immediately. The "final opportunity" in OP2 effectively suspends the legal consequences of the finding of material breach in OP1.

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- OPs 4, 11 and 12 set out the procedure for determining whether or not Iraq has taken the final opportunity. Unfortunately these paragraphs are somewhat ambiguous. It is clear from the text of the resolution that if Iraq does not comply, there will be a further Council discussion, but it is not clear what happens next.

- It is arguable, as I set out in the draft note of my provisional views, that OPs 4 and 12 indicate that a further Council decision is required.

- But Condi Rice and the US lawyers I met in Washington were adamant that throughout the negotiations they had made it clear that they would not accept a resolution which constrained their right to act. They are absolutely confident that in accepting OPs 4 and 12, they were conceding a Council discussion and no more. I was impressed by the strength and sincerity of their views on this point.

- The difficulty is that we are reliant on these assertions for the view that the French knew and accepted that this is what they were voting for. There is very little hard evidence of this beyond a couple of telegrams recording admissions by French negotiators that they knew the US would not accept a resolution which required a further Council decision. The possibility remains that the French and others accepted OP12 because in their view it gave them a sufficient basis on which to argue that a second resolution was required (even if that was not made expressly clear).

- So we are left with a text which is unclear and statements made on adoption of the resolution which indicate that there were differing views within the Council as to the legal effect of the resolution.

✱ - In these circumstances, I remain of the view that the safest legal course would be to secure a further Council resolution. I have already advised the FCO that this need not authorise the use of force explicitly. The key point is that it should make clear that the Council has concluded that Iraq has not taken its final opportunity, as in the draft which has already been tabled.

✱ - Nevertheless, having regard to the further information on the negotiating history which I have been given and to the arguments of the US Administration which I heard in Washington, I am prepared to accept - and I am choosing my words carefully here - that a reasonable case can be made that resolution 1441 is capable of reviving the authorisation in 678 without a further resolution if there are strong factual grounds for concluding that Iraq has failed to take the final opportunity. In other words, we would need to demonstrate hard evidence of non-compliance and non-cooperation.

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- You must recognise, however, that this is not to say that if the matter ever came before a court, I would be confident that the court would agree with this view. I think that, having regard to the arguments on both sides, and considering the resolution as a whole in the light of the statements made on adoption, a court might well conclude that OPs 4 and 12 do require a further Council decision in order to revive the authorisation in resolution 678. But the counter view can reasonably be maintained. And I am conscious of the fact that on a number of previous occasions the Government has engaged in military action on the basis of a legal basis which was no more than reasonably arguable.]

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What about an unreasonable veto?

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- The analysis I have set out applies whether a second resolution fails to be adopted because of a lack of votes or because it is vetoed. I do not see any difference between the two cases.

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- My view remains that there is no basis in law for arguing that there is any condition of reasonableness which can be read into the power of veto conferred on the permanent members of the Security Council by the UN Charter.

- In any event, if the majority of world opinion remains opposed to military action, it is likely to be difficult on the facts to categorise a French veto as "unreasonable".

It is of course important that in the course of negotiations on the second resolution we do not give the impression that we believe it is legally required. That would undermine our case for reliance on resolution 1441.

CA.

CATHY ADAMS

27 February 2003

What are you going to do with me?

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