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AS's notes for Cabinet on 17/3

[DATED C. 16/03/03]

Report to Cabinet

I should start by reminding colleagues that in this capacity I act as adviser. So my advice is given confidentially and would not, save exceptionally, be disclosed publicly. Because of the circumstances, you have a document which sets out my view as to the legal basis for the use of force against Iraq without a second resolution. I propose to provide this by way of written answer today.

You will see that in my view there is a sound legal basis that there is authority which is to be found in the combined effect of resolutions 678, 687 and 1441. All of these are made under Chapter VII of the UN Charter which allows the use of force for the express purpose of restoring international peace and security.

The essential basis is that determinations by the Security Council that Iraq is in material breach of its obligations under the ceasefire conditions set out in Resolution 687 revive the legal authority to use force in Resolution 678. That resolution authorised the use of force both to liberate Kuwait and to restore peace and security in the region. A key part of the conditions for restoring peace and security were the disarmament obligations under international supervision imposed on Iraq. Iraq has never fully complied with these. Resolution 678 was never cancelled; the authority to use force was only suspended on the conditions imposed in Resolution 687.

Successive UK administrations have accepted that the authority to use force revives where there is a material breach of those conditions. In particular this was the basis for use of force in 1993 and again in Operation Desert Fox in 1998.

There is a determination by the Security Council in the first paragraph of Resolution 1441 that Iraq is and remains in material breach of those obligations. There is also a clear statement that if it fails at any time to comply with and cooperate fully in the implementation of resolution 1441 that will constitute a further material breach. Iraq has incontrovertibly so failed. Therefore the authority to use force in resolution 678 has revived.

That leaves the question whether Resolution 1441 requires an express further decision to authorise force before it can be used. In my opinion, it would in terms have provided that a further decision of the sanction force was required if that had been intended. France sought such a provision in resolution 1441 but it was rejected. So all that resolution 1441 requires is reporting to and discussion by the Security Council. That has plainly taken place.

Of course, all action must be proportionate and no more than necessary to meet the objective of disarming Iraq. And we must strictly comply with the requirements of international humanitarian law.

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If asked: is there not controversy on that view.

I am aware there are other arguments and that there exist other views. Having carefully considered the arguments and the material I have come to a clear view of what I consider the better view to be.

Could you be wrong?

[I do not believe that I am wrong.] I have stated what I consider the better view to be, having carefully considered the arguments and the materials including the detail of the negotiations with some of those directly involved in the negotiations. There are others who take a different view.

Are you confident that your view is the right one?

As I have said, there are other arguments and there are those who would prefer them. But having considered the arguments and the materials including the detail of the negotiations with some of those directly involved in the negotiations I have come to a clear view that the argument I have set out is the better view.

Could we be taken to court over this decision?

I consider it very unlikely that any successful challenge could be made before any court able to enforce any order against us although there can be no real doubt that challenges will be attempted.

The domestic courts are extremely unlikely to accept jurisdiction. The International Criminal Court does not have jurisdiction over the legality of war in these circumstances although it does have jurisdiction over war crimes committed in the course of any war. No doubt our conduct in terms of the conduct of bombing campaign and troop action will be very closely scrutinised.

Iraq has not accepted what is known as the compulsory jurisdiction of the International Court of Justice and so could not take a case against us on the legality of military action under international law. An attempt might be made to bring an application for interim measures (an injunction) under the terms of the Genocide Convention once the campaign has started. That is what happened in relation to Kosovo. But the advice is that we could see off such a challenge on the grounds that there is no case here of genocide (assuming a proportionate use of military force).

It would be possible for a majority in the General Assembly to ask the International Court of Justice to give an advisory opinion on the question of the legality of military action. But that could not result in a binding decision or any order against us.

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