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Foreign &
Commonwealth Office

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Telephone:
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Dear Iain

IRAQ: SECOND RESOLUTION

1. I hope that by now you will have received from UND the possible elements for a second resolution dealt with by Elizabeth Wilmshurst in my absence last week. The legal position on these resolutions is as follows, and is without prejudice to the separate question of whether a second resolution is legally required.
2. As regards whether an implicit resolution would be sufficient to authorise the use of force, the position is that it may be argued that where the Security Council determines that Iraq has committed a sufficiently serious breach of the conditions of the cease fire imposed by resolution 687 (1991), the authorisation in resolution 678(1990) revives. It is not essential that the Council's finding of a material breach should be contained in a resolution as opposed to a Presidential statement. The critical element is that there has been a finding, in whatever form, by the Council itself (of course this may be an academic issue given the need to obtain consensus for a Presidential statement).
3. An implicit in terms such as the draft which has been sent to UKMIS would be sufficient to revive the authorisation to use force in resolution 678 (1990). Clearly the text will change in any discussions with the US. However, the key elements of any resolution would be a reference back to resolution 1441 (2002), particularly paragraphs 12 and 13, to establish that the Council is reacting to a failure by Iraq to take its final opportunity and that serious consequences will now follow.

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4. As regards proposals for a further ultimatum, any such ultimatum would need to be expressed in very clear terms, so that there would be no room for doubt as to whether or not Iraq had met the Council's demands. Otherwise there would be a risk of opening up a debate about whether there is a need for a further determination by the Council that Iraq has failed to comply with the new ultimatum.
5. Finally, the position is that the second resolution authorising the use of force, whether explicit or implicit, would not give an unlimited right to use force against Iraq. The scope of the authorisation would have to be interpreted in the context of the object of the resolution and resolution 1441 (2002) as a whole, namely Iraqi compliance with disarmament obligations which the Security Council has already determined, in resolution 687 (1991) and subsequently, as being the necessary requirements restoring international peace and security in the area. Any use of force would have to be directed towards the objective of securing compliance with those disarmament obligations and would have to be limited to what was necessary to enforce those obligations and be a proportionate response to Iraq's breach.

Best Wishes

John Grainger

John Grainger
Legal Counsellor

cc: Michael Wood
Elizabeth Wilmshurst
Stephen Pattison
Charles Gray

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