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cc Jonathan
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From Sir Jeremy Greenstock GCMG

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Rome Russia
To be aware that Jeremy is in debate with the AG.

Sir David Manning KCMG
No 10 Downing Street

FROM THE PERMANENT REPRESENTATIVE

Dear David

1. I duly called on the Attorney General on 23 January and we went carefully over his draft Note of Advice, copied to you under Cathy Adams's letter to me of 21 January.

2. I shall not attempt to record the discussion, as it is not for me to try to represent the Attorney General's arguments. He made certain telling points. The central issue which we debated was whether the wording of OP 4, and particularly the words "and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below", meant that the Council had something substantive to do in the second stage (viz determining that a breach was material and deciding on consequent action) before action could be taken on the further material breach; or whether further discussion/consideration in the Council (ie without a substantive outcome) sufficed to meet the 1441 requirements. See below.

3. The AG focussed on the word "assessment" as indicating that the Council had to do more than convene and have a discussion. Who else could determine that a material breach had occurred? I went in some detail through the negotiating history. The autumn negotiation had settled the wording of Ops 11-13 before a draft OP 4 was ever proposed. In the tussle over 11-13, the French/Russians/ Chinese lost, and knew they had lost (their Explanations of Vote (EOVs) were indicative in this respect), an explicit requirement for a new decision by the Council. These paragraphs were not reopened during the later exchanges over OP 4. I said that the US, having come to the General Assembly on 12 September and set out a challenge for the UN, was in OP 12 agreeing to

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give the Security Council a further opportunity to be the channel for action. The intention of the sponsors was that the fact of a further material breach would be established in a report from the Inspectors. I argued that the AG's draft took insufficient account of the alternative routes to OP 12 ("in accordance with paragraphs 4 or 11 above"), or of the possibility of establishing that Iraq was in breach either through OPs 1 and 2 (the original breach unremedied) or through OP 4 (a further, new breach). The fact that OP 4 was a late addition was an indication that the route through OPs 1, 2, 11, 12 and 13 had separate validity.

4. I described the negotiations on OP 4, late in the eight-week saga. The French wanted "... further material breach, **when assessed**"; and accepted with difficulty the final wording. This suggested that they saw the difference between the two, pace the AG's arguments in para 11 of this draft. There was no later attempt in the negotiations to insert "assessment" into OP 12. I mentioned that the US and the UK had even considered omitting OP 4 altogether, in order to allow OP 12 to govern the process more clearly; but Washington wanted "further material breach" in there somewhere. There was no question in the co-sponsors' minds of paying for that by conceding that the Council had to assess what was a breach. No EOV or political commentary after adoption of the resolution tried to re-establish that line. The natural interpretation of "assessment", therefore, if it was to be more than a "procedural formality" (a phrase in the AG's draft), was that the Council would assess the options for next steps (ie "consider the situation" as in OP 12), after a material breach had occurred. This fitted with Bush's intention to give the Council a further opportunity, but not one which left no other option if the Council failed to produce an effective result. The AG argued the opposite case, that the late addition of "assessment" in OP 4 must add something significant. But he undertook to reconsider his draft in the light of this negotiation history.

5. I also took issue with the draft's characterisation (at the end of para 4 of the draft) of OP 13 ("OP 13 makes clear that "serious consequences" will follow a further failure to comply"). This was not what OP 13 said ("... will face serious consequences as a result of continued violations of its obligations"). Iraq could violate its obligations by failing to remedy its previous non-compliance with its disarmament obligations under relevant Resolutions of the Council (not just 1441): this was what OP 2 of 1441 laid out.

Same pt as the OP4 OP11 distinct

6. I accepted that 1441 did not on its own confer automatic authority for the use of force. The US and UK EOVs on 8 November acknowledged that. But neither did it lay down the need for a further decision. Para 13 of the draft Note of Advice jumped from one to the other without properly examining whether there was an intermediate interpretation, whereby the fact of a material breach,

? Para 13 is not looking at express authori.

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particularly if reported by the inspectors as directed in OP 11, automatically brought the final opportunity to an end. This interpretation was, in my view, given weight by the absence of clear wording in OP 12 on the need for a further decision. And it had a close precedent in US/UK action on 16 December 1998 when Butler's report of Iraqi non-compliance made clear that Iraq had failed to meet the demand for cooperation in OP 2 of SCR 1205 (5 November 1998), SCR 1205 having already decided that Iraq was in flagrant violation. US/UK military action was widely resented in the Council at the time; but no other delegation attempted to push through a decision of the Council that it was illegitimate. I recommended a close reading of FCO telno 1066 of 13 November 1998 and of my statement in the Council of 16 December 1998. I also referred to Professor Greenwood's October 2002 Memorandum on the Legality of Using Force against Iraq (para 19 and the conclusions in para 31 are especially relevant). The AG and Cathy Adams took careful note, having not, I think, been through these documents in details.

7. In summary, my analysis was that the draft Note of Advice came to too categorical a conclusion in its para 13, and one which was inconsistent with the intention of the co-sponsors, the negotiating history, the observations of the principal other delegations in the negotiations and the precedent of SCR 1205. In my lay view, the authorisation to use force contained in SCR 678 could be revived through 1441 if Iraq was credibly demonstrated either to have failed to take the final opportunity offered in OP 2 of SCR 1441 or to have committed a further material breach.

8. I suggested to the AG, by the way, that he/his team should swap notes/views with their American opposite numbers, given that we were the co-sponsors and co-negotiators of the text.

Yours ever

Jeremy

Jeremy Greenstock

cc: Attorney General, Attorney General's Chambers, 9 Buckingham Gate

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