

CONFIDENTIAL IN EYES ONLY
DECLASSIFIED

When PS seen a
part of briefing
pack.

D/Sec(O)/2/37/5

26 March 2002

APS/SofS

Copy to:
DPSO/CDS
PS/PUS 1/28/3
Policy Director
DCDS(C)
DG Op Pol
Legal Adviser

IRAQ: OD SECRETARIAT OPTIONS PAPER

Reference: D/Sec(O)/2/54 dated 8 March 2002 (not to all)

1. Further to my minute at reference, you asked for advice on the legality – as it might be seen in US eyes – of potential military action against Iraq and support to regime change. You also asked about the practicality of taking action against sanction breaking states.

Military Action

2. As far as the UK is concerned, there are three possible bases for military action under international law:
- (a) *self-defence under Article 51 of the UN Charter (including pre-emptive self defence) against an actual or imminent attack*;

this has been the basis for both UK and US involvement in Afghanistan

(b) *the use of force explicitly authorised by a UN Security Council Resolution under Chapter VII of the UN Charter,*

the action to expel Saddam from Kuwait was authorised under UNSCR 678 of 1990. The UK takes the view that the cease-fire resolution (UNSCR 687) suspended the authorisation to use force under UNSCR 678, although that authorisation can be revived for the limited purpose of enforcing compliance with the cease-fire conditions. This would need a UNSCR finding that Saddam is in material breach of those conditions. There was such a resolution in 1998 before Op Desert Fox, when UNSCR 1205 found Saddam to be in material breach of the WMD cease-fire conditions.

CONFIDENTIAL IN EYES ONLY
DECLASSIFIED

CONFIDENTIAL EYES ONLY
DECLASSIFIED

(c) as an exceptional measure, action to avert an overwhelming humanitarian catastrophe.

Op Allied Force and the NFZs were, as far as the UK was concerned, justified on this basis. The US has never been overly keen on the humanitarian justification, and has seen its own participation in the NFZs as founded on the original UNSCR 678 authorising the use of force in 1990.

3. From what we understand of the US perspective, if they want to take military action against Iraq, we would expect them to justify their action on the basis of UN authorisation or self-defence.

UNSCR authorisation.

4. As for UN authorisation, the clearest way forward would be to persuade the Security Council to agree a new SCR setting out the case against Iraq, the aims of the international community and specifically authorising to use military action to achieve those aims. Clearly in the current international climate, this would be difficult to achieve and anecdotally we have little evidence that the US would wish to pursue this.

5. Alternatively, the US may look to the existing Iraq UNSCRs, where differences between the US and UK over whether force is currently authorised could well be exposed. As mentioned above, the US probably considers that UNSCR 678 continues to provide authorisation for force, while the UK's position is that the cease-fire SCR suspended that authorisation. The UK has consistently held the legal view that it is for the Security Council to assess whether the cease-fire conditions have been breached, and not for member states to do so unilaterally. We would have some difficulty relying on the 1998 finding of a material breach in UNSCR 1205 to justify action against WMD. The US, on the other hand, has taken the view the assessment of breach is a matter for individual member states. Since UNSCR 687 calls for the elimination of Iraq's WMD capability, the US may well argue that from its own intelligence it judges that Iraq is in breach, and that military action as authorised by 678 is justified.

Self Defence

8. Absent a UNSCR basis for force, we assume the US would be likely to argue that military action is justified in self-defence under Article 51, as has been the case for its operations against Al Qa'eda and the Taliban in Afghanistan. Actions in self-defence must be justified on the grounds that there is either an armed attack upon a state, or such an attack is imminent; that there is no alternative to the use of force if the attack is to be averted; and the force used must be strictly limited to that which is necessary to avert the threat. When Israel attacked an Iraqi nuclear reactor near Baghdad, in 1981, it was "strongly

CONFIDENTIAL EYES ONLY
DECLASSIFIED

CONFIDENTIAL EYES ONLY
DECLASSIFIED

condemned" by the Security Council (acting unanimously) as a "military attack in clear violation of the Charter of the United Nations and the norms of international conduct". There has been no clear evidence linking Iraq to the 11 September attacks, so as to justify an attack on Iraq on the same basis as the action against AQ has been justified. Nor does it seem that there is any other imminent armed attack by Iraq on the US or the UK that could be the basis for action in pre-emptive self-defence. Collective self-defence would be available if Iraq moved on Kuwait.

9. For completeness, we consider it unlikely that the US would use arguments of humanitarian necessity to justify military action, in the absence of any evidence of recent escalations in Saddam's inhuman treatment of the people of Iraq.

Regime Change

10. A cornerstone of the UN Charter is that states are equally sovereign under international law. Of itself, regime change has no place in international law: a policy of promoting regime change in another country - be it through military action or otherwise - offends against the principle of non-interference in the internal affairs of a sovereign state. However, if military action was legally justified on any of the grounds considered above, and if regime removal was a consequence of the minimum force needed to achieve the objective that justified the use of force, then it might in principle be lawful, depending on the circumstances.

Action on Sanction breaking

11. Finally, you asked how practical is tougher action against states that continue to break sanctions referred to in the paper. As the Secretary of State knows the existing sanctions regime is broadly effective, but over time new avenues for the flow of illegal exports have opened. One of the key elements of the smarter sanctions proposals was the importance of bringing all trade between Iraq and regional/neighbouring States (UAE, Syria, Turkey, and Jordan) under the auspices of the "oil for food" programme. This would reduce considerably Saddam's access to hard cash to spend on the military. The Secretary of State may recall that at one stage the notion of UN border monitors was aired but never seriously considered.

12. All of Iraq's immediate neighbours claim that they much to lose if the illegal border trade is lost. Turkey, for example, will argue that such a move would damage their already depressed southeast region. In particular Iraq's neighbours, especially Jordan, benefit from favourable barter arrangements with Iraq that have allowed them to obtain cheap oil.

CONFIDENTIAL EYES ONLY
DECLASSIFIED

DECLASSIFIED
CONFIDENTIAL - EYES ONLY

13. Iraq's neighbours are of course bound under existing resolutions to enforce sanctions, but limited sanctions busting has arguably tolerated for economic reasons. Any serious attempt to enforce sanctions more strictly would probably require the international community (either the UN; EU; US or the richer Arab States) to compensate the neighbours for the loss of illegal trade or to cut off aid if they showed no propensity to do so. In the absence of such co-ordinated action it is difficult to envisage individual initiatives achieving much impact: demarches in the UN seem to have little effect; strengthening our contribution to the MIOPs effort would push illegal traffic onto land.

Simon Cholerton
Sec(O)1

DECLASSIFIED
CONFIDENTIAL - EYES ONLY