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① Iraq

FAC: IRAQ: INTERNATIONAL LAW

1. I have now read the transcript of the FAC on 25 September, in which the Foreign Secretary was pressed hard on whether there would be any legal basis for the use of force against Iraq in the absence of a further Security Council resolution (see in particular paras 21-27 and 31-32).

2. For the most part, the Foreign Secretary stuck to the line that it would all depend upon the circumstances at the time. He declined to get into what legal advice had been given. At one or two points, however, he appears to have gone further. In paragraph 22, he said that:

"we do not regard it as absolutely essential that there should be another Security Council resolution. We do regard it as desirable."

This could be read as a reference to the inherent right of individual or collective self-defence.

4. More troublesome is the statement in paragraph 24 that:

"we do not regard [the existing SCR] as an inadequate basis. We think it is desirable, not least politically, to have a clear, new resolution, but if you go through the existing resolutions, there is ample power there and also ample evidence of a material breach..."

Legal advice that the Law Officers have given in the past is to the effect that the revival of the authorisation to use force in SCR 678 requires a further decision from the Council, such as a finding of "material breach". The last such finding was nearly four years ago,

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and our advice is that this cannot be relied upon so long after the event when so much water has passed under the bridge. (This was all set out in some detail in the paper that went to No 10 in April – attached.) If force is to be used, therefore, then some new finding from the Security Council will be needed, unless the facts are such as to justify action in self-defence. As I have said before, I am aware of no such facts at present.

5. Another important point (not arising out of the FAC) is that the extent of the use of force used will be critical to its legal justifiability. Force may only be used if and to the extent that it is necessary and proportionate to achieve the objective, which is likely to be compliance with the WMD requirements of the SCRs. The nature and extent of any force used will need to be related to the breach. Any military planning that may be going on now (of which I have no knowledge) will need to be tailored to the particular circumstances.

6. Finally, the law and practice of the United Nations is quite clear that the fact that a Security Council resolution is adopted under Chapter VII, and is therefore mandatory, does not mean that States are thereby authorised to use force to ensure compliance with it. The use of force requires express authorisation.

[signed]

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