

CONFIDENTIAL
DECLASSIFIED

From: John Grainger
Legal Counsellor
Date: 11 October 2002

cc: Mr Wood
Mr Ricketts
Mr Ehrman
Mr Pattison, UND
Mr Gray, MED
Mr Dowse, NPD

Mr Chaplin

IRAQ: LATEST US COMPROMISE

1. You asked for my views on the latest US compromise language for OP10 of the draft resolution. The latest version, which appears in UKMIS Telno 1950, and which appears to have been rejected by France (at least in New York), is as follows:-

OP10 Decides that all provisions of this resolution shall be binding upon Iraq from the moment of its adoption and stresses that, in the event Iraq fails to comply fully with its disarmament obligations under the relevant resolutions, including its obligations to facilitate UNMOVIC and IAEA inspections, Iraq will bear full responsibility for the serious consequences that follow.

2. In my view this provision, even read in the context of the rest of the draft as it stands, would not in itself authorise the use of force. The first part of the draft (resolution to be binding upon Iraq) simply reflects that the resolution would be adopted under Chapter VII of the Charter. The second part of the paragraph does not explicitly authorise the use of force (ie does not use "all necessary means" language), nor does it implicitly authorise the use of force by reviving the authorisation in resolution 678(1990). On previous occasions when the Council went down this route it declared that Iraq had been in material breach (or at least in flagrant violation) of its obligations under resolution 687 (1991), the cease-fire resolution, and warned of serious consequences. This new draft does warn of serious consequences, but does not use the language of material breach of resolution 687 (1991). This point is crucial, as it is only a material breach of the cease-fire terms which permits the revival argument.
3. If our objective is that this resolution in itself authorises the use of force against Iraq (if it does not comply) we would need to add wording such as "be in material breach

CONFIDENTIAL
DECLASSIFIED

CONFIDENTIAL
DECLASSIFIED

of its obligations under resolution 687(1991) and" between "Iraq will" and "bear full responsibility". Even then the resolution would need to be looked at as a whole (ie we would need to ensure that the rest of its terms did not contradict the revival argument), and in the light of any statements made by the Council members on its adoption (ie if a significant number of them stated in the Council that they did not consider that they were authorising the use of force, the argument that the Council is intended to do so would become very weak).

4. [Paragraph redacted]

[Mr Grainger also raised a question about whether the finding that Iraq was in material breach in OP1 of the draft resolution could be relied on "in current circumstances" to justify the use of force. That would be "difficult to maintain when the [other] provisions ... indicate that the Council is itself taking the responsibility of setting out the steps Iraq must follow to remedy those breaches".]

5. In paragraph 5 of UKMIS telno 1950 Sir J Greenstock proposed an OP11 to the effect that the Council decides to remain fully seized of its responsibility to act to restore international peace and security. I am not sure why this would be a possible fudge, or why, if so, it would be helpful. In my view this would make it even clearer that the Council was not authorising the use of force (ie it would be emphasising its own responsibility to act). A more neutral formula along the lines of paragraph 6 of SCR1205(1998) would be preferable.
6. Finally, I note that in OP6 of FCO telno 530 the Foreign Secretary indicates that if a resolution with these provisions were adopted, and if a second resolution authorising the use of force were vetoed, we would have to follow others means. What we say to the French as a tactical ploy is one thing, but we should be under no illusion that the use of force solely on the basis of the first resolution as currently drafted would be unlawful.

John Grainger

John Grainger

Tel:

Fax:

CONFIDENTIAL
DECLASSIFIED