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*Note approved
by AC*

**IRAQ: LEGAL BASIS FOR USE OF FORCE -
NOTE OF DISCUSSION WITH ATTORNEY GENERAL
THURSDAY, 13TH MARCH 2003**

1. The Attorney General told me that he had been giving further careful consideration to his view of the legal basis for the use of force against Iraq, on which he had advised in detail in his note of 7 March to the Prime Minister. It was clear to the Attorney that there was a sound basis for the revival argument in principle (that a finding by the Security Council of a material breach of resolution 687 operated to revive the original authority to use force in resolution 678). The revival argument had been relied on by HMG in 1993 and 1998.
2. The question was whether the conditions for the operation of the revival doctrine applied in this case. The Attorney confirmed that, after further reflection, he had come to the clear view that on balance the better view was that the conditions for the operation of the revival argument were met in this case, i.e. there was a lawful basis for the use of force without a further resolution beyond resolution 1441.
3. There was a clear finding by the S.C. of material breach in OP. 1 of resolution 1441. The "fire-break" provision in OP. 2 (which prevented the revival of the right to use force under resolution 678 being triggered) gave Iraq a final opportunity to disarm and warned Iraq of the serious consequences it would face if it failed to do so. He had also considered the effect of OP. 4 (prior determination by the S.C. that any future non-compliance/non-cooperation would amount to a material breach), coupled with OPP. 11 and 12.
4. There was a question as to what was meant by OP.12. But the crucial point here was that OP. 12 did not stipulate that there should be a further decision of the S.C. before military action was taken, but simply provided for reports of any further breaches by Iraq to be considered by the S.C. In the absence of a further decision by the S.C., the Attorney General thought that the better view was that resolution 1441 itself revived resolution 678 and provided the legal basis for use of force. (It was, moreover plain that Iraq had failed to take the final opportunity afforded to it and continued to be in material breach: not a single member of the S.C. considered that Iraq had complied).

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5. The Attorney made it clear that he had fully taken into account the contrary arguments. In coming to his concluded view that a further resolution was not legally necessary, he had been greatly assisted by the background material he had seen on the history of the negotiation of resolution 1441 and his discussions both with Sir Jeremy Greenstock and the US lawyers he had met during his visit to Washington in February.
6. It was apparent from this background material that members of the Council were well aware that a finding of material breach by the S.C. was tantamount to authorising the use of force (through the operation of the revival doctrine). It was for this very reason that the French had been keen to avoid the finding of a material breach and had argued for the fire-break provision in OP. 2, so as to prevent *automaticité*. And in relation to OP. 12 it was evident that the French, who had pressed hard for a reference to a "decision" (as a pre-condition to use of force), appreciated that, as the final text provided only for the S.C. to "consider" Iraq's further breaches, the way was left open for the operation of the revival argument in the event that the S.C. did not come to any decision.
7. The Attorney explained that in his minute of 7 March he had wanted to make sure that the Prime Minister was fully aware of the competing arguments. He was clear in his own mind, however, that the better view was that there was a legal basis without a second resolution. He had come to this concluded view earlier in the week.
8. I said that I thought it was perfectly proper for the Attorney General to have advised the Prime Minister in the terms of his minute of 7 March and to have come to the view set out above (with which view I personally concurred). We agreed that it would be proper for me to confirm to Martin Hemming (MoD Legal Adviser) that the proposed military action in Iraq would be in accordance with national and international law. We also agreed that it would be necessary to prepare a statement setting out the Attorney's view of the legal position which could be deployed at Cabinet and in Parliament the following week.
9. Finally, the Attorney's note to the Prime Minister of 7 March had commented on the possibility of legal challenges to a decision by the UK to take military action against Iraq. It was agreed that it would be worth seeing if Christopher Greenwood QC could be instructed now, for the purpose of assisting in the development of the legal arguments in support of the view that there was a sound legal basis for the use of force without a second resolution. This would be useful both in terms of

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preparing the public statement of the legal position and in terms of being ready to meet any legal challenge at short notice.

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David Brummell
LSLO
13 March 2003

Further Note

Later that morning the Attorney General spoke to Christopher Greenwood by telephone. CG, who had been following recent events very closely, confirmed that he very much shared the Attorney's analysis of the legal position and that he also considered that the better view was that a second resolution was not legally necessary. CG confirmed that he would be pleased to assist in the way outlined by the Attorney. It was agreed that it might be worth also retaining David Bethlehem and Sam Wordsworth to provide further assistance should this prove necessary.

De

DB
13.3.03

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