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From: Michael Wood
Legal Adviser

Date: 6 November 2002

cc: PS/Mr O'Brien
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MED,
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AG
This is the minute Michael
referred to yesterday.

CA.
6/11

PS

IRAQ: LEGAL BASIS FOR THE POSSIBLE USE OF FORCE

1. The Secretary of State may like to have a note of my view of the legal considerations, as they stand at present, in advance of the call by the Attorney General tomorrow.
2. With the adoption of an SCR likely this week, it is important that anything HMG says in public (or indeed in private to the Americans and others) is not incompatible with the position under international law. Public statements and lines to take which touch on legal aspects of the matter should be seen by the Legal Secretariat to the Law Officers. This will be the case with our Explanation of Vote in the Security Council, any statement in Parliament, and supplementaries or press lines used in London (by No 10, FCO, MOD and anyone else) and in New York. The most difficult question, on which doubtless we shall be pressed, is what the legal position would be if the Council "fails to act" at a second stage.
3. The first resolution (as in telnos. 2112 and 2113) does not itself authorise the use of force, or revive the authorisation to use force given in SCR 678. Although OP1 decides that Iraq has been and remains in material breach of the cease-fire resolution, the remaining paragraphs (and in particular OP11 and 12) indicate that the Council has decided to take action itself if the breach continues or if there are further violations. This is the case even though OP4 remains in the resolution.

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4. If at a second stage the Council authorises the use of force, or uses language which revives the authorisation given by SCR 678 (whether by resolution or Presidential statement), the position will be relatively straightforward.

5. If, however, the Council is unable to take a decision at the second stage, whether because there are insufficient votes for another resolution, or a resolution is vetoed, there will be nothing to point to by way of revival of the authorisation to use force given in SCR 678. We have previously noted that this is not a judgment to be made unilaterally by individual Member States.

6. The position that could arise if the Council "fails to act" was in fact addressed, in hypothetical terms, by the then Law Officers in November 1997. After concluding that in the circumstances then prevailing an essential precondition for the use of force was appropriate action by the Council, the Law Officers went on to say that they did not "exclude the possibility" (though they reached no firm conclusion) that exceptional circumstances could arise in which it was generally accepted by the international community as a whole that Iraq had in effect repudiated the cease-fire and that a resort to military force to deal with the consequences of Iraq's conduct was the only way to ensure compliance.

7. Too much should not be read into this. On past occasions when the UK has used force against Iraq it has been on the basis of SCR 678 (Desert Storm), individual self-defence (NFZs), or the "revived" SCR 678 following a resolution or Presidential statement (Desert Fox). The possibility raised in 1997 has not been relied upon and is not based on authority or precedent. In any event, the situation envisaged was a very narrow one where the international community as a whole favoured action but Council failed to act.

8. In conclusion, to restate the obvious, the Attorney General's advice will be required, taking account of the situation at the time, before HMG takes any decision on the use of force.

M. C. Wood

M C Wood
Legal Adviser