Foreign Secretary f.i. ~~SECRET~~
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6 February 2003

Foreign &
Commonwealth
Office
Private Office

London SW1A 2AH

from The Foreign Secretary

Dear Attorney General

Iraq: Second Resolution

At the Prime Minister's meeting on asylum last week you asked me if I had seen the draft of your opinion about Iraq and a second Resolution. I had, but I had not had a chance to study it in any detail. This I have now done. I would be very grateful if you would carefully consider my comments below before coming to a final conclusion and I would appreciate a conversation with you as well. As you will be aware, I was immersed in the line-by-line negotiations of the Resolution, much of which was conducted capital to capital with P5 Foreign Ministers. (We worked seamlessly with Jeremy Greenstock in New York, but such teamwork was less evident among some other P5 members.)

It goes without saying that a unanimous and express Security Council authorisation would be the safest legal basis for the use of force against Iraq. But I have doubts about the negotiability of this in current circumstances. We are likely to have to go for something less. You will know that the UK attaches high priority to achieving a second Resolution for domestic political reasons and to ensure wide international support for any military action. This was the case the Prime Minister was making in Washington. We are

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working hard to achieve it. I have seen your office's helpful letter of 30 January to Elizabeth Wilmshurst confirming that both the 'explicit' and 'implicit' versions of the draft we have developed would provide the necessary legal authority for military advice.

(My personal preference would be for a Resolution which at a minimum both declared a further material breach (OP4) and the consequential serious consequences (OP13) of this further material breach, but we might have to settle on material breach alone).

Let me now turn to the gravamen of your letter, namely the separate issue of whether a second Resolution or other decision is a legal necessity.

You say in your paragraph of conclusion (13) that "the difference between this view [ie yours] of the Resolution (1441] and the approach which argues that no further decision is required is narrow, but key".

Before getting on to my detailed argument I might just add this. I have been very forcefully struck by a paradox in the culture of government lawyers, which is that the less certain the law is, the more certain in their views they become. I touched on this in the minute to Michael Wood which I copied to you (further copy attached for ease of reference). On the one hand, in well-rehearsed areas of domestic law the advice I am offered has usually been acute, but also admitted to a range of possibilities. On the other hand, in issues of international law, my experience is of advice which is more dogmatic, even though the range of reasonable interpretations is almost always greater than in respect of domestic law.

Jeremy Greenstock has given you the negotiating history of OP4 and of how the words "for assessment" were included.

It is crucial to emphasise, as Jeremy spelt out, that the overwhelming issues between US/UK and the French/Russian/ Chinese (F/R/C) was whether a second Resolution was required to authorise any use of force, or not. As Jeremy told you, the F/R/C lost on this, and knew they had lost. To achieve this, however, we had to show that the discussions on the first Resolution would not be the end of the matter. So the trade-off, as it were, for the F/R/C defeat on the substantive issue of a second Resolution was some procedural comfort - provided in OPs 4, 11 and 12. If there were a further material breach this would "be reported to the Council for assessment in accordance with paragraphs 11 and 12 below" (my emphasis).

You say in your letter of 21 January (para 11) that you "do not find much difference" between the French proposal "shall constitute a further material breach when assessed by the Security Council" and the final wording. With respect, there is all the difference in the world. The final wording of 1441 in substance defines "material breach" and indicates that the material breach as so defined will be passed to the Council for "assessment" under OPs 11 and 12. The French text, by contrast, would have given the Security Council, at its OP12 meeting, the exclusive right to determine whether there had been an OP4 further material breach. We resisted that because it automatically bound us into a second Resolution to authorise the use of force. You say in your paragraph 9 that "Someone must assess whether or not the breach is "material" and then you assert that this "someone" must be the Council. But this is to ignore both the negotiating history and the wording. We were deliberate in not specifying who would determine that there had been a material breach.

I was open about this in my speech in the debate on 25 November 2002, to which you make reference elsewhere in

your letter (and the wording of which in these respects was explicitly cleared with our Legal Advisers). I said that if there was evidence of a further material breach under OP4 "it can be reported to the Security Council as a further material breach either by a Security Council member or by the inspectors". In other words, the establishment of a further material breach was brought back a key stage in time and process, compared to the French proposal for this to be assessed by the Council.

There is, next, the issue on which your draft advice turns, namely what is meant by the words "for assessment". In fact, however, we need look no further than OP4 itself which offers meaning by the following words "in accordance with paragraphs 11 and 12 below". Paragraph 12 then has the Council deciding to convene immediately "... in order <u>to consider</u> the situation and the need for full compliance (etc)". What the Security Council agreed to do was exactly that - "to consider the situation". We did not agree, as earlier wording had proposed, that the Council would "decide"; if we had wanted that to be the sense that would have been the verb used. Instead we chose the verb "consider" precisely because it covers a range of possibilities from "look at thoughtfully" to "contemplate doing something" [Chambers]. Significantly, in the dictionaries I have consulted, definitions of "consider" stop short of "decide".

You say in response to this that such an approach "would reduce the Council's role to a procedural formality". First, I have to ask, what if the language does do that - is that not a matter for the Council? But, second, I believe that this is to misunderstand what was in contemplation when this wording was agreed. Not a procedural "formality", which is to parody what we had in mind; but certainly a process in which the outcome was quite deliberately at large. You should not ignore the process here - what F/R/C got was further

discussions and time, further reports - and an ability to influence events, in return for no automatic second Resolution being necessary. And in return - a major US concession - the US/UK agreed not to rely on 1441 as an authorisation for the use of force immediately after its adoption (so called "automaticity").

All this, may I add, is complementary to the important arguments put forward by Sir Jeremy Greenstock in his letter of 24 January to Sir David Manning (copied to you) about the "final opportunity" under OP2, and the precedent of UNSCR 1205.

Putting all this together, I think the better interpretation of the scheme laid out in 1441 is that (i) the fact of a material breach, (ii) (possibly) a further UNMOVIC report and (iii) "consideration" in the Council together revive 678. At the very least, this interpretation, which coincides with our firm policy intention and that of our cosponsors, deserves to be given the same weight as a view which in effect hands the F/R/C the very legal prize they failed to achieve in the negotiation of 1441.

Yours sincerely

Simon McDonald

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JACK STRAW

(Approved by the Foreign Secretary and signed in his absence by the Private Secretary)