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cc Elizabeth Williams,

back to me.

24 September 2002

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Dear Cathy,

IRAQ: USE OF FORCE

1. I enclose a draft Security Council resolution on Iraq which has now been largely agreed with the US Government, and will soon be shown to other members of the P5. The Attorney General will be aware of the context and background to this issue. Past instances of the use of force against Iraq in legally analogous contexts were summarised by John Grainger in his letter to David Brummell of 23 July.

2. The first operative paragraph of this draft resolution affirms that Iraq is still, and has been for a number of years, in material breach of its obligations under relevant resolutions, including resolution 687 (1991), in particular through its failure to cooperate with UN Inspectors and the IAEA. Paragraphs 2 to 7 of the draft resolution decide that the Government of Iraq should provide a declaration of its weapons of mass destruction programmes to the Security Council; that it should provide unconditional access to UNMOVIC and the IAEA and submit all outstanding declarations; that revised procedures provided by the Council will be binding on Iraq; that Iraq shall not take or threaten any hostile actions against the personnel of the UN or any Member State acting pursuant to any Council resolution; and that Iraq shall notify its acceptance of these provisions to the Secretary-General within 7 days of notification. Under paragraph 9 UNMOVIC and the IAEA are to report immediately to the Council any failure by Iraq to cooperate. Operative paragraph 10 then goes on to provide that any false statement or omission in the declaration submitted by Iraq to the Council, and that any failure by Iraq to comply and cooperate fully in accordance with the provisions of this resolution, shall constitute a further material breach of Iraq's obligations, and any such breach authorises member states to use all necessary means to restore international peace and security in the area.

3. There are a number of possibilities which may result from the negotiation of this resolution (which so far has only been discussed between ourselves and the United States Government). One possibility is that the resolution is adopted as currently drafted. I attach a copy of an

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internal minute of 23 September setting out our views on the construction of a previous version of the resolution in substantially similar terms. Paragraph 3 of that minute sets out our understanding of the "all necessary means" provision currently in operative paragraph 10.

4. A second possibility is that the resolution would be adopted along the lines currently drafted but without the "all necessary means" reference in operative paragraph 10. Instead, there might be a reference to "serious consequences" for Iraq in the event of such a further material breach. Another possibility would be a resolution along the current lines, with operative paragraph 1 intact but operative paragraph 10 removed in its entirety.

5. The issue then would be whether, in the absence of "all necessary means" language, the resolution would provide a legal basis for the use of force on the ground that it revived the authorisation to use force contained in resolution 678(1991). The issue has been extensively discussed by previous Law Officers and unless the Attorney would like us to do so it would not seem necessary to repeat the argument. A useful statement of the then Law Officers' views on the law is contained in John Morris' minute to the Prime Minister of 14 November 1997. That minute stressed that "an essential precondition to the renewed use of force to compel compliance with the ceasefire conditions is that the Security Council has, in whatever language – whether expressly or by implication, – stated that there has been a breach of the ceasefire conditions and that the Council considers the breach significantly grave to undermine the basis or effective operation of the ceasefire".

6. The Government last relied upon this legal basis for the use of force in 1998, following adoption by the Security Council of resolution 1205(1998), which condemned the decision by Iraq to cease cooperation with the United Nations as a flagrant violation of the ceasefire resolution. The passage of time has not changed the principle underlying that legal basis. In my view if we can achieve a resolution which contains an amended version of operative paragraph 10 with "serious consequences" language it would be an adequate legal basis for the use of force, subject to the points made in paragraph 3 of John Grainger's minute of 23 September. If however the resolution as adopted contained only the material breach finding in operative paragraph 1, we are concerned that the legal basis could be insufficient, in that the resolution looks forward to a number of steps to be taken by Iraq for implementation rather than to enforcement action by Member States.

7. A further possibility is that no resolution is adopted, or that a resolution is adopted without the provisions currently in operative paragraphs 1 or 10. In my view there would in those circumstances be no Security Council authorisation for the use of force against Iraq; and I am not at present aware of circumstances which would provide a basis for the use of force in exercise of the right of individual or collective self-defence.

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8. I would be grateful for any advice which the Attorney General may wish to give on the resolution as currently drafted, or on any of the possible outcomes mentioned above. I should of course be happy to come over and discuss the matter.

Yours ever

Michael

MC Wood

cc: Peter Ricketts
Edward Chaplin
Charles Gray
Stephen Pattison
John Grainger

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