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Scuff
15/11

From: Michael Wood
Legal Adviser

Date: 17 October 2002

cc: PS
PS/Mr O'Brien
~~PS/PWG~~
Elizabeth Wilmshurst
Peter Ricketts
William Ehrman
John Grainger
Heads: UND
MED
Press Office
~~John Grainger~~

PS

Minute below

Edward Chaplin

(E 17/11)

IRAQ: PRIME MINISTER'S PHONE CALL WITH BUSH, 14 OCTOBER

1.

The background appears to be the assumption that in the (first) Security Council resolution currently under negotiation there would have been a reference to Iraq's material breach of its obligations in OP1, and language on a further Council meeting in OP10.

2.

It has previously been made clear that the conditions which provided the legal justification for action in relation to Kosovo (an overwhelming humanitarian catastrophe which was well-documented and which could not be prevented by any other means) are not currently present in Iraq. The "Kosovo model" is no authority for a proposition that action would be legally justified if authority from the Security Council had been sought but without success. On the information available to me, the facts do not justify action in self-defence. The use of force would, therefore, be unlawful unless authorised by the Security Council.

3. There is currently no express authorisation to use force against Iraq, nor would a resolution on the lines discussed on 14 October give an implied authorisation based on the revival of the authority to use force contained in resolution 678 (1990). Subject to consideration of a final text (and the

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circumstances of its adoption), a finding of material breach in OPI of the current text, followed by a long list of provisions detailing the action which the Council expects Iraq to take, together with a final paragraph which indicates that the Council would need to meet in the case of a further breach by Iraq, or some such, would not permit the revival argument. Rather, it would point to further action to be taken by Iraq, and then by the Council if Iraq were not to co-operate.

4. In my view, we need to write urgently to No 10 recalling the legal position. (The Prime Minister should be aware of the background, including from the papers that were sent to No 10 in April.) I should be happy to assist with/consider a draft.

M. C. Wood

M C Wood
Legal Adviser

PS

cc as above

LEGAL: LEGAL POSITION

I have discussed with Michael Wood. His concern is well-founded: see, for example, Matthew Rycroft's letter of 17 October which again suggests that US/UK military action could take place without a second SCR.

But as Mr. Ricketts ^{said} ~~has pointed out~~, we have already pointed out to No 10 that the Kosovo precedent does not work for Iraq (his minute of 3 Oct - attached - which was copied to Sir D. Manning). ^{minor redaction:} ~~not relevant information to request.~~ _{redacted}

So Mr Wood & I think it would be sufficient for you to remind Sir D. Manning of this advice, say that it is strongly endorsed by the legal advisers, and ask him to make this clear to the Prime Minister.

Chris Hughes