

declassified.

~~CONFIDENTIAL~~



THE LEGAL SECRETARIAT TO THE LAW OFFICERS
ATTORNEY GENERAL'S CHAMBERS
9 BUCKINGHAM GATE
LONDON SW1E 6JP

General enquiries:
Direct line:
Fax:
E-mail:

Huw Llewellyn
Legal Counsellor
Foreign and Commonwealth Office
King Charles Street
LONDON SW1A 2AH

9 June 2003

Dear Huw

IRAQ: EFFECT OF SECURITY COUNCIL RESOLUTION 1483 ON THE AUTHORITY OF THE OCCUPYING POWERS

1. Thank you for your letter of 21 May 2003 requesting the advice of the Attorney General on whether the draft Security Council resolution on post-conflict Iraq would authorise the Coalition to undertake action going beyond the scope of their authority as Occupying Powers. I am writing to record the Attorney's views.

Summary: Resolution 1483 confers a clear mandate on the Coalition working with the Special Representative of the Secretary General (SRSG), to facilitate a process leading to the establishment by the people of Iraq, first, of an Iraqi interim administration and subsequently of an internationally recognised representative government. The resolution clarifies the legitimate scope of activity of the Occupying Powers and authorises them to undertake actions for the reform and reconstruction of Iraq going beyond the limitations of Geneva Convention IV and the Hague Regulations. In some cases such actions must be carried out in coordination with the SRSG or in consultation with the IIA.

2. The draft resolution was adopted on 22 May by the Security Council as resolution 1483. The advice which follows is based on the final text of the resolution (but this appears to be in substantially the same terms as the draft attached to your letter).

3. The Attorney considers that, in analysing the legal effect of the resolution, account can be taken, not only of the terms of the resolution itself, but also of the letter dated 8 May from the UK and US Permanent Representatives to the United Nations to the President of the Security Council. In that letter, the Coalition Partners described the actions which they were taking and intended to take, in accordance with their obligations under international law, in order to meet the objective of the complete disarmament of Iraq of weapons of mass destruction. Although the Fourth Geneva Convention and the Hague Regulations ("occupation

law") are not explicitly mentioned, the reference to international law obligations must in the circumstances be taken as referring principally to these instruments. It follows that the 8 May letter amounts to an assertion by the US and UK Governments that the catalogue of activities mentioned in the letter may lawfully be carried out under the terms of occupation law. In preambular paragraph (PP) 13 of resolution 1483, the Security Council notes the letter of 8 May and recognises "the specific authorities, responsibilities and obligations under applicable international law of [the Coalition] states as occupying powers under unified command". The Attorney considers that it can be argued on the basis of this paragraph that the Security Council has effectively endorsed the Coalition's view that the catalogue of activities contained in the 8 May letter constitute legitimate activities for an occupying power. This endorsement by the Security Council therefore provides helpful, although not conclusive, clarification of the legitimate scope of activity of the Coalition.

4. Your letter identifies two areas in which the resolution develops the previous legal position as reflected in the Attorney's advice of 26 March: the political process; and reconstruction work.

Political process

5. As noted in your letter, resolution 1483 has a number of provisions which deal with the political process. There are two main themes running through all these provisions:

- recognition of the rights of the Iraqi people freely to determine their political future (see PP4, OP4); and
- encouragement towards the establishment of a representative government in Iraq (see PPs 5-7, OP8(c), OP9).

It is argued that these provisions of the resolution collectively amount to a mandate to the Iraqi people to establish a representative government and therefore their choices in determining their political future have been limited by the Security Council. The Attorney is not convinced that this is a correct reading of the effect of the resolution, as it is hard to square this analysis with the stress laid on the rights of the Iraqi people freely to determine their political future. Moreover, he considers that the resolution must be interpreted consistently with the purposes and principles of the United Nations, which include in Article 1(2) of the Charter, "respect for the principle of equal rights and self-determination of peoples". The Attorney considers that it is difficult to see how it is compatible with the Iraqi people's right of self-determination to argue that the Security Council has to some extent pre-determined the outcome of the political process. The Attorney acknowledges that the resolution places considerable emphasis on the establishment of a representative government in Iraq, which is clearly the desired outcome of the Security Council. The resolution therefore constrains what the Coalition can help the Iraqi people to do. But the Attorney considers that it goes too far to argue that the resolution constrains the rights of the Iraqi people themselves in this respect.

~~CONFIDENTIAL~~
DeWitt

6. As for the powers of the Coalition, the Attorney considers that the provisions in PPs 5-7, operational paragraph (OP) 8(c) and OP9 constitute a clear mandate for the Coalition, working with the Special Representative of the Secretary General (SRSG), to facilitate a process leading to the establishment by the people of Iraq, first, of an interim Iraqi administration (IIA) and subsequently of an internationally recognised representative government. The Attorney agrees, however, that the resolution does not give the Coalition any authority to control the political process nor engineer the outcome.

7. The Attorney notes the fact that the IIA is likely to be under the control of the Occupying Powers in the initial phase of its existence. The Attorney agrees that if the IIA were to be structured so that it does in fact operate under Coalition control, then its scope of authority would not extend beyond that of the Coalition under occupation law and such further powers as conferred on the Coalition by the resolution.

8. The Attorney notes, however, that it might be argued that such an outcome is incompatible with OP9 of the resolution which states that the Council supports "the formation by the people of Iraq with the help of the [Coalition] and working with the Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognised representative government is established by the people of Iraq and assumes the responsibilities of the [Coalition]". The underlined words could be read as indicating that the Council intended the IIA to have at least some degree of independence from the Coalition. On the other hand, the paragraph clearly envisages that the Coalition will retain their role (and authority) as Occupying Powers until the establishment of an internationally recognised Iraqi government. The Council cannot therefore have intended that the Coalition should hand over executive authority to the IIA immediately it is established. Moreover, OP13 provides for the IIA to have an advisory rather than an executive role in relation to the disbursement of funds from the Development Fund for Iraq (DFI). In these circumstances, the Attorney considers that there are reasonable grounds for maintaining that a progressive transfer of power from the Coalition to the IIA is compatible with OP9 of the resolution.

9. The Attorney has seen recent reporting which indicates that the political process may develop in a rather different way to that envisaged in paragraph 6 of your letter. John Sawers' latest report (Iraqrep telno 28 of 1 June) suggests that the IIA will be a framework rather than a single body, which will comprise a Political Council, a Council of Interim Ministers and a number of Commissions to carry out specific tasks. It appears that the idea of a national conference has been put on ice. The Attorney considers that these proposals raise a number of questions regarding their compatibility with resolution 1483:

- (a) OP9 of the resolution envisages the "formation by the people of Iraq ... of an Iraqi interim administration". It is not clear from the reporting how and by whom all the elements of the proposed IIA will be established, but it appears that the Political Council will be in effect self-appointed. The question

~~CONFIDENTIAL~~
Declassified.

therefore arises as to whether this is compatible with OP9. Clearly the views of the UN Special Representative will be critical on this issue if the Coalition wishes to be able to maintain the view that these arrangements are in line with what was envisaged in the resolution.

- (b) The establishment of an IIA in accordance with OP9 of the resolution is also important because OP13 and OP16 of the resolution authorise the Coalition to undertake certain action in consultation with the IIA. These paragraphs must be interpreted as referring to an IIA constituted in accordance with OP9. Questions therefore may be raised about the legitimacy of Coalition action under OPs 13 and 16 if there is no IIA, or if it appears that the body which has been established is not an IIA as envisaged in OP9.
- (c) If the IIA is to be a framework, rather than a single institution, the question arises as to which element of the IIA should be consulted under OPs 13 and 16.
- (d) It appears from the reporting that the Commissions will undertake activities going beyond the scope of authority of an Occupying Power and yet these Commissions will be subject to the control of the Coalition. As discussed in paragraph 7 above, if they remain under Coalition control, the Commissions will not be entitled to exercise greater authority than the Coalition itself has under occupation law and resolution 1483. It will therefore be important to ensure that the Commissions operate within these constraints. However, The Attorney agrees with your analysis that once an IIA is established in accordance with OP9, to the extent that it acquires executive authority independent of the Coalition, its actions will no longer be governed by occupation law.

Reconstruction

10. The Attorney considers that the key provisions of the resolution in assessing its effect on the Coalition's powers in areas other than the political process are PP13 and OPs 4, 5, 8 and 14.

11. As discussed in paragraph 3 above, the effect of PP13 is to endorse (and legitimise) the Coalition's own description of the scope of authority of an Occupying Power. OP5 of the resolution, which calls on all concerned to comply with their obligations under the Geneva Conventions and Hague Regulations therefore has to be read in this context. OP4, which calls upon the Coalition, consistent with the Charter and other relevant international law, to establish "effective administration" in Iraq does not add much to the Coalition's existing obligations in this respect.

12. However, the Attorney considers that OP8 does appear to mandate the Coalition to engage in activity going beyond the scope of authority of an Occupying Power. OP8 is principally directed at the SRSG, but the activities set out in sub-paragraphs (a)-(i) which he is directed to conduct are to be carried out "in coordination with the [Coalition]", which must be read as implied recognition of the Coalition's authority to engage in such activities. The Attorney considers

~~CONFIDENTIAL~~

Declassified

that paragraphs (e) (promote economic reconstruction and the conditions for sustainable development), (g) (promote the protection of human rights) and (i) (encourage international efforts to promote legal and judicial reform) in particular could encompass activity going beyond the limits of occupation law. However, to the extent that the Coalition's involvement in activities falling under these headings is not otherwise authorised elsewhere in the resolution or under occupation law, then there is a clear requirement that the Coalition's action should be undertaken only in coordination with the SRSG.

13. OP14 of the resolution authorises the Coalition, in consultation with the IIA, to disburse funds from the DFI in support of a wide range of reconstruction activities. The Attorney agrees that the general references to "economic reconstruction" and "other purposes benefiting the people of Iraq" mean that the scope of activity authorised by this paragraph is potentially very broad. The extent to which OP14 authorises activity going beyond occupation law is a debatable, but moot, point now that the resolution has been adopted.

14. On the face of it, the Attorney also agrees that the resolution leaves it to the Coalition to decide whether or not a project to be funded under the residual category will in fact benefit the Iraqi people. But he considers that the Coalition is likely to need to provide some objective reasoning for that assessment if they are to satisfy the International Advisory and Monitoring Board established by OP12 and are to avoid criticism that they are abusing these powers. (The Attorney does not agree with the suggestion he has seen in one report that the IAMB's sole function should be to appoint the auditors of the Fund. He does not consider this to be a tenable interpretation of OP12. The name of the Board alone suggests that it is intended to have a broader remit including monitoring of the Coalition's actions in relation to the Fund.) The Attorney also agrees that once the IIA is established, it would be desirable to ensure full consultation in relation to disbursements from the Fund even in cases where this is not a requirement of the resolution.

15. In connection with OP13, the Attorney also notes that the resolution clearly imposes joint US/UK responsibility for disbursements from the DFI. It is therefore important to ensure that the US Government does not take actions in relation to the Fund which are incompatible with the resolution. The fact that the resolution imposes joint responsibility gives the UK a locus to argue with the US that we should be fully involved in the decision-taking process. Anything less would be legally risky.

16. In conclusion, the Attorney considers that resolution 1483 authorises the Coalition to engage in the reconstruction and reform of Iraq to a greater degree than would be permissible under occupation law alone, although in some cases the resolution requires that such activity be carried out in consultation with the IIA or in coordination with the SRSG. However, it is clear that the resolution does not grant the Coalition full legislative and executive authority in Iraq, so there is still a need to consider the legality of specific proposals against the requirements of occupation law and the terms of the resolution.

~~CONFIDENTIAL~~
Declassified.

Yours

Cathy

CATHY ADAMS