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**IRAQ: NOTE OF TELEPHONE CONVERSATION BETWEEN THE
FOREIGN SECRETARY AND THE ATTORNEY GENERAL
ON TUESDAY, 12 NOVEMBER 2002**

1. The Foreign Secretary telephoned the Attorney General following the recent adoption by the UN Security Council of Resolution 1441. The Foreign Secretary suggested that the Resolution made life easier for HMG. The Attorney agreed that this was an excellent achievement and that congratulations were due to all those involved in negotiating it especially the Foreign Secretary himself. He said that he would need to study the Resolution, together with the report of the debate and the statements made by the various members of the Council at the time of its adoption.
2. The Attorney referred to the telephone conversation he had with Jonathan Powell the previous day, when he had mentioned the possibility of Iraq finding itself in breach of Resolution 1441 at some future stage but with no second Security Council Resolution. The Attorney had mentioned the "Chinese whispers" that had come to his attention in this regard, which suggested that he took an optimistic view of the legal position that would obtain if such a situation arose, whereas he was in fact pessimistic as to whether there would be a sound legal basis in such a situation for the use of force against Iraq. JP had indicated that No. 10 were under no illusion as to the Attorney's views on this issue but thought that, as it was most unlikely that Iraq would not in the first instance accept Resolution 1441, this was an issue which did not need to be considered right now. JP had suggested that there would be a meeting before Christmas to discuss this further. The Attorney indicated to the Foreign Secretary that he would propose to give a more definitive view on this issue at that stage.
3. The Foreign Secretary agreed that, in the Government's assessment, it was extremely unlikely that Iraq would not accept Resolution 1441. The Foreign Secretary suggested that there were two particular issues that warranted further consideration in this connection. First, he referred to the negotiating history of the Resolution. This had culminated in France and Russia insisting that, in the event of Iraq being in breach of Resolution 1441, the matter should be referred back to the Security Council for further consideration before military action was decided upon. However, the UK's current understanding was that it was unlikely that, if it came to a vote, there would be any veto by France of military

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action. If there were to be any veto exercised, this was likely to be only by Russia. L

4. Secondly, the Foreign Secretary said he would be interested to know the Attorney's views as to the effect of a resolution being adopted by the House of Commons. This would be a resolution, following the contemplated debate on Iraq, which would in terms endorse UN Security Council Resolution 1441. There was a further possibility, namely that this HoC resolution would include an acknowledgement that there would inevitably be military action if peaceful resolution of the issue were not possible. The Foreign Secretary indicated that of these two options he preferred the former, simpler option (ie. with just a straight endorsement of Resolution 1441). The Attorney's initial view on this - leaving aside the evident political benefits which would flow from the adoption of such a resolution by the House of Commons - was that this would not have any bearing on the position in international law as regards the lawfulness of using force against Iraq. It **might** be that a case could be constructed seeking to justify such action, if a number of other Parliaments in the other countries who are members of the Security Council were also to adopt such a resolution. But he thought that this would be a rather subtle and speculative argument.
5. The Foreign Secretary indicated that it appeared that military action was some way further down the track. However, he thought that, if Iraq were to be found in breach of Resolution 1441, it was essential that we act pretty swiftly to take military action. One of the arguments in favour of this was that there might well be a need for less military force if we were to act swiftly. The Foreign Secretary acknowledged that this was of course primarily a military/political judgement. The Attorney commented that, from the point of view of legality, the key question would be whether Iraq's non-compliance with Resolution 1441 amounted to a material breach and who was to make this determination. The Foreign Secretary pointed out that it was clear to him that the US - despite its bellicose rhetoric - would not wish to go to war for nothing.
6. The Foreign Secretary also mentioned that, reading Resolution 1441 again as a layman, it was pretty clear that the Security Council were basically telling Iraq - "Comply or else". The Attorney noted this, but again said that the question was who was to decide the "or else". The Foreign Secretary pointed out that the Resolution could have said in terms that it was for the Security Council to decide whether there was a material breach and what action would then ensue. However, SC

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Resolution 1441 did not in the end say this. France and Russia had accepted the US/UK argument that this should be left open and that, while it was preferable, it was not essential for the Security Council to adopt a second resolution.

7. The Attorney General said that it was very clear from Resolution 1441 that, in the event of Iraq's non-compliance, there would have to be further discussion in the Security Council. It seemed implicit in Resolution 1441 that, in that eventuality, it would be for the Security Council to decide whether Iraq were in fact in material breach. The Foreign Secretary suggested that the reality was that the members of the Security Council had had to agree and "coalesce" around a particular form of words. This was to the effect that, if there were to be a breach, it would be for the Security Council to meet to discuss and consider what should be done. This in turn allowed for "a range of possibilities" including:-
 - (i) the possibility that there would have to be a second resolution;
 - (ii) the possibility that there might be a general consensus or desire in P.5 for military action, but a preference (in particular by Russia) that there should be no second resolution which Russia would either have to support (or, at any rate, concur with) or, alternatively, veto.
8. The Foreign Secretary again suggested that in this connection it was necessary to look at the negotiating background. For example, in the final paragraph of the Resolution, Chirac had originally insisted on there being a "lock" against the use of force unless this had been authorised by the Security Council by a second resolution. But this approach - with such an explicit caveat - did not appear in the Resolution in the form in which it was finally adopted. The Foreign Secretary suggested that what France and Russia were virtually saying was that they understood that there might well be a breach, but that while they would in fact support the need for military action, they would not be able to support a resolution in terms authorising the use of force.
9. The Attorney's comment on this was that the position remained that only the Security Council could decide on whether there had been a material breach (and whether the breach was such as to undermine the conditions underpinning the cease-fire) and/or whether all necessary means were authorised. The question of whether there was a serious breach or not was for the Security Council alone. It was not possible to say that the unreasonable exercise of the veto by a particular member of

the Security Council would be ineffectual to prevent the Security Council from adopting such a resolution.

10. The Foreign Secretary then said that there would be a danger in going for a second resolution, in that, if it were not obtained, then we would be in a worse position. The Foreign Secretary wondered if there was any alternative option as between a general discussion in the Security Council on the one hand and the adoption of a resolution determining material breach on the other. The Attorney said that it could be possible for a valid determination of a material breach to be made by means of a Presidential statement. It was agreed that these different options should be explored.
11. On timing, again the Foreign Secretary thought that Iraq would accept Resolution 1441 (pursuant to the demand in OP.9) and would initially comply with the terms of the Resolution. But he thought that the crunch-point would come soon after 8 December (the 30-day deadline prescribed by OP.3), by when Iraq were to produce a declaration as to all its WMD programmes, sites etc. There was a high likelihood/probability that Iraq would produce only a "partial declaration", with the likelihood that soon after 8 December a report of Iraq's inadequate/incomplete/inaccurate declaration would be made to the Security Council (pursuant to OP.4).
12. It was agreed that the Foreign Secretary would arrange for all details of the negotiating history to Resolution 1441 to be sent to the Attorney General, so that the Attorney could consider further the legal position in the event that Iraq were (as expected) sooner or later to fail to comply with Resolution 1441 and there were to be no second resolution. The Attorney for his part indicated his movements over the next 7-10 days. He would be back in the office on Thursday, 14 and Friday, 15 November and would if possible endeavour to look at this question further in the light of the negotiating history, assuming the relevant material were of course provided to him by then. Alternatively, following his visit to the Commonwealth Law Ministers Conference, he would be back in the office again with effect from Monday 25 November.

David Brummell
12 November 2002