



Prime Minister

Foreign and Commonwealth Office

London SW1A 2AH

COP.

In substance our position is a weak one, though factually we are well placed. I think we can sustain our position for some days yet. But if

25 September 1984

Dear Charles, that doesn't produce a solution, we shall have to consider alternatives.

COP 25/4.

Situation at the Durban Consulate

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FCO telno 475 to UKMis New York (enclosed) records the main points arising from Lady Young's discussion with the South African Ambassador on 24 September. The South African Minister subsequently called at the FCO at 2200 last night and handed over a further aide memoire, the text of which I enclose. I also enclose the text of a statement which we issued late last night, in response to the South African decision to publish the texts of the written exchanges between the two Governments.

Following last night's exchanges Lady Young summoned the South African Ambassador this afternoon. I enclose a copy of the telegram reporting what transpired. The meeting was a useful opportunity to restate our view that there is no connection between the action the South Africans have taken over the Armscor case and the situation at the Consulate, and to reaffirm our position: that the six should not be required to leave the Consulate premises against their will and that it would not be right for HMG to act as an intermediary between the six and the South African Government. Dr Worrall took all this calmly and, rather surprisingly, did not press his Government's legal case. He told Lady Young in strictest confidence (but with the authority of his Foreign Minister) that if, as he put it, the situation in South Africa was relatively normal tomorrow, the South African Government would begin the process of releasing those detained during the recent disturbances. In the corridor afterwards he added that the releases could include some of the six men in the Consulate (who are, of course, among that group), but he would not be drawn further. We have no means at this stage of knowing how much weight to attach to his remarks.

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In acting as they have done over the Armscor defendants, the South African Government has put itself in a weak position; and we see tactical value in concentrating public attention on this point. That said we doubt whether it would be right to escalate the dispute at this stage. If the South Africans themselves choose to do so we would be able to delay Mr Moberly's departure for Pretoria (he plans to leave London

/on



on 7 October) or conceivably to take exemplary action against some members of the South African Embassy. But since there are few options available to us it seems best to hold these sanctions in reserve for the present.

1/E
 In your letter of 24 September you recorded the Prime Minister's concern about the legal issue. I attach a short note on this prepared by our Legal Advisers. You will see that there was some justification for our initial unwillingness to evict the six but that in current circumstances the legal case is a weak one.

The South Africans have not so far accused us of allowing the six to engage in political activities (paragraph 2 of your letter). We would not accept that this is what the six are in fact doing, even if their lawyers, who are of course beyond our control, are doing so on their behalf.

But we did not receive a legal opinion before we consulted ourselves without hindrance
 The legal arguments must of course be set in the political context. Within two hours of the six entering the Consulate we received a very large number of requests from Members of Parliament and the public that we should not hand the six over to the South African authorities. Only two weeks before this incident we had expressed our concern to the South African Government about those detained (including the six) in the period leading up to the elections. We had also subscribed to a strong statement by the Ten on 10 September about recent events in South Africa. To have compelled the six to leave the Consulate and accept detention without trial would have resulted in a considerable outcry, both in the UK and in the international community as a whole. As it is there is widespread understanding for our position and for the humanitarian motives which have underlain our whole approach to this problem. We continue to believe that our decision was the right one, and that any different course would have led to even greater difficulties. The political dilemma remains as it was on 13 September. Despite the awkwardness of the legal position, we must, in considering our policy, give due weight to the inhospitable nature of the South African system as it affects the six in the Consulate.

We shall, of course, continue the efforts we have made since the start to persuade them to leave voluntarily and without the use of force. As indicated in my letter of 24 September, we are already considering the main options open to us should the situation look like dragging on for a lengthy period.

Yours ever,
 Colin Budd

(C R Budd)
 Private Secretary

C D Powell Esq
 10 Downing Street

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OO UKMIS NEW YORK
GRS 658
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FM FCO 242000Z SEP 84
TO IMMEDIATE UKMIS NEW YORK
TELEGRAM NUMBER 475 OF 24 SEPTEMBER
AND TO IMMEDIATE PRETORIA
IMMEDIATE LILONGWE (FOR MR RIFKIND)
FOLLOWING FOR SECRETARY OF STATE'S PARTY
INCIDENT AT THE DURBAN CONSULATE

1. AS AGREED AT YESTERDAYS MEETING
WITH THE SECRETARY OF STATE, LADY YOUNG
SUMMONED THE SOUTH AFRICAN AMBASSADOR THIS AFTERNOON AND
HANDED OVER OUR AIDE MEMOIRE. TEXT OF FINAL VERSION IS IN
MIPT. WORRALL WAS ACCOMPANIED BY EVANS.
2. COMMENTING ON THE SECOND PARAGRAPH OF THE AIDE MEMOIRES DR
WORRALL SAID THAT HIS INSTRUCTIONS FOR HIS DISCUSSION WITH THE
SECRETARY OF STATE ON 21 SEPTEMBER HAD BEEN TO OBTAIN A CLEAR STATE-
MENT OF HMG'S ATTITUDE TO THE SOUTH AFRICAN AIDE MEMOIRE DELIVERED
TO THE PUS ON 20 SEPTEMBER. HE HAD TAKEN THE SECRETARY OF
STATE'S REPLY TO MEAN THAT OUR FURTHER STUDY OF THE AIDE
MEMOIRE RELATED ONLY TO THE LEGAL POINTS. BUT HE THOUGHT THAT OUR RE-
STATEMENT THAT WE COULD NOT ACT AS INTERMEDIARIES OR COMPEL THE
SIX TO LEAVE THE CONSULATE AGAINST THEIR WILL IN EFFECT CONSTIT-
CONSTITUTED OUR SUBSTANTIVE REPLY.
3. REFERRING TO THE LINKAGE BETWEEN THE SIX AND THE 'COVENTRY
FOUR' (THE ARMSCOR CASE), WORRALL SAID THAT THERE WAS A
CONNECTION HERE WITH THE LAST PARAGRAPH OF THE
SECOND SOUTH AFRICAN AIDE MEMOIRE. THE MESSAGE WHICH HE
WAS TO HAVE DELIVERED TO THE PRIME MINISTER FROM PRESIDENT
BOTHA CONSTITUTED A 'FAR REACHING AND BOLD PROPOSAL' FOR
SETTLING THE PROBLEM. HIS GOVERNMENT'S REACTION TO HIS REPORT
OF HIS MEETING WITH THE SECRETARY OF STATE NEEDED TO BE SEEN
AGAINST OUR REFUSAL TO ARRANGE A MEETING WITH THE PRIME

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/ MINISTER.

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MINISTER AT WHICH THIS PROPOSAL COULD HAVE BEEN TRANSMITTED.

4. WORRALL THEN REFERRED TO THE INCREASING PRESSURE ON HIS GOVERNMENT FROM ALL SIDES OF THE POLITICAL SPECTRUM. THE SITUATION WAS EXTREMELY DELICATE. THERE WAS TALK OF SIT-INS AT OTHER EMBASSIES AND CONSULATES. IT WAS UNLIKELY THAT THE NATAL SUPREME COURT WOULD HAND DOWN ITS DECISION TODAY. IF THE COURT CONCLUDED THAT THE DETENTION ORDERS WERE INVALID, THIS MIGHT 'LUBRICATE' THE SITUATION. IF NOT, FURTHER PROBLEMS WOULD BE CREATED. IN THIS SITUATION THE SOUTH AFRICAN GOVERNMENT'S POSITION LOOKED WEAK. THE FOREIGN MINISTER HAD MADE IT CLEAR THAT THEY WOULD NOT CLOSE DOWN THE CONSULATE BUT EQUALLY THEY WERE VERY RELUCTANT TO ENTER IT BY FORCE. WORRALL ADDED THAT ALTHOUGH HE HAD EXPLAINED THE GENESIS OF THE DECISION OVER THE COVENTRY FOUR, HE EXPECTED THAT THE LEGAL REASONING IN JUSTIFICATION OF THIS STEP WOULD BE SENT TO HIM SHORTLY. THE DECISION, HE SAID, HAD NOT BEEN TAKEN LIGHTLY AND HE PERSONALLY THOUGHT IT UNLIKELY THAT HIS GOVERNMENT WOULD RECONSIDER.

5. LADY YOUNG TOOK NOTE OF THESE REMARKS. SHE RESTATED OUR POSITION, EMPHASISING THAT THE SITUATION WAS NOT OF OUR MAKING. WE WOULD LIKE TO SEE CONDITIONS CREATED UNDER WHICH THE SIX WOULD BE PREPARED TO LEAVE THE CONSULATE OF THEIR OWN ACCORD. AS FAR AS THE MEETING WITH THE PRIME MINISTER WAS CONCERNED, THE SECRETARY OF STATE HAD CLEARLY EXPLAINED OUR POSITION.

6. EVANS REFERRED TO OUR REJECTION, AT PARAGRAPH THREE OF OUR AIDE MEMOIRE, OF THE ALLEGATION THAT OUR ATTITUDE AMOUNTED TO AN OBSTRUCTION OF THE ENFORCEMENT OF SOUTH AFRICAN LAW. HE ASKED HOW THIS COULD BE RECONCILED WITH OUR STATEMENT THAT WE WERE STILL GIVING CAREFUL STUDY TO THE FIRST SOUTH AFRICAN AIDE MEMOIRE: AND WITH OUR POSITION UNDER THE VIENNA CONVENTIONS. WE POINTED OUT THAT THE FACT THAT WE HAD EXPRESSED A VIEW ON ONE POINT WAS NOT INCONSISTENT WITH OUR STATEMENT THAT WE WERE STILL CONSIDERING THE COMPLETE TEXT. JOHNSON ADDED THAT WE THOUGHT THE SOUTH AFRICAN GOVERNMENT WAS QUITE WRONG TO SEEK TO

/justify.

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JUSTIFY UNILATERAL ACTION OVER THE COVENTRY FOUR BY REFERENCE TO THE SECRETARY OF STATE'S INTERIM RESPONSE.

7. IN CONCLUSION, WORRALL SAID THAT HE WAS ACUTELY CONSCIOUS OF THE ADVERSE EFFECT WHICH THE INCIDENT COULD HAVE ON OUR BILATERAL RELATIONS AND WAS TRYING TO MINIMISE THIS. LADY YOUNG AGREED AND SAID THAT THAT WAS WHY WE WERE ANXIOUS NOT TO WIDEN THE DISPUTE OR TO PUBLICISE IT.

HOWE

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AIDE MEMOIRE

The South African Government has noted the contents of the British Government's Aide Memoire of 24 September 1984.

The South African Government finds it incomprehensible that the British Government can conclude that its refusal to either surrender the six persons in the British Consulate in Durban to the South African authorities or to allow the authorities to enter the Consulate in order to take them into custody, does not amount to an obstruction of the enforcement of law in South Africa. Furthermore, the British Government does not even attempt to justify its position or to address the arguments that have been advanced in the South African Aide Memoire of 20 September to the effect that the attitude of the British Government is clearly in conflict with customary international law as codified by the Vienna Convention on Consular Relations.

The South African Government fails to understand how the British Government can refer to the South African Government's Aide Memoire of 21 September as "purporting" to describe the British Government's position. If the description of the British Government's position is in any way inaccurate it would be reasonable to expect a substantiated statement of the reasons for any implied inaccuracy. The British Government's Aide Memoire contains no such statement.

As regards the South African Government's decision concerning its undertaking that the four South African nationals charged with infringing British Customs and Excise legislation would return to the United Kingdom to stand trial, it should be noted that the British Government's attitude in respect of the South Africans in the British Consulate has forced the South African Government either to enter the Consulate and take the men into custody, or to take action similar to that of the British Government and designed to reflect the South African Government's displeasure with the British Government's actions. The South African Government decided on the latter course.

The South African Government trusts that the British Government will seriously ponder over the consequences which its attitude might have on saboteurs and terrorists who in future might be encouraged to seek refuge from law-enforcement agencies in embassies and consulates around the world.

In the final paragraph of their Aide Memoire, Her Majesty's Government refer to the South African Ambassador's request, on the instruction of the South African State President, for an appointment with the British Prime Minister; and offers the assurance that the relevant message would have been conveyed to the British Prime Minister forthwith had it been delivered to her Private Secretary.

The South African Government does not doubt that the message would have been promptly conveyed, but Her Majesty's Government seem to miss the point. The South African Ambassador had instruction to seek an urgent and personal interview with the British Prime Minister, a meeting which in the opinion of the South African State

President was necessary in view of the urgency and gravity of the matter to be discussed. The nature of these matters, as stressed on two occasions by the Ambassador, was such that elaboration and elucidation would have been required, and the Ambassador would have been in a position to provide this.

The Foreign and Commonwealth Office will know that it is accepted practice in the conduct of international relations for a Head of Government to receive the Ambassador of another country when the assurance is given that the matter to be discussed warrants such a meeting. The South African Government has seldom, if ever, availed itself of this facility, but British Ambassadors to South Africa have often done so. In such circumstances the South African Government has never questioned the British Government's assessment of the urgency or gravity of the matters to be discussed.

In view of these considerations the South African Government considers the contents of the British Government's Aide Memoire of 24 September to be wholly unacceptable.

Regarding the South African Government's undertaking to a court in the United Kingdom, the South African Government wishes it to be known that it was at all times willing to meet its obligations in this respect until the British Government repudiated its own obligations in terms of international law and made it clear that it was not prepared to allow the enforcement in South Africa of legal provisions passed by the South African Parliament.

In any event, out of respect for British justice, the South African Government intends to explain fully to the relevant

court in the United Kingdom why it was compelled to consider itself absolved from its undertaking.

LONDON

24 September 1984

Statement by FCO spokesman : 25 September 1984

Since 20 Sept there have been a number of exchanges, initiated by the South African Government (SAG), about the situation in the Durban Consulate.

The position of the British Government throughout this incident has not changed: the six should not be required to leave the Consulate premises against their will and it would not be right for HMG to act as an intermediary between the six and the SAG.

The British Govt cannot accept that there is any justification for the action taken by the SAG over the four defendants in the Armscor case and HMG deplore the decision of the SAG, which involves going back on a clear undertaking given to a British court. Nor is there any link between this case and the situation at British Consulate in Durban.

HMG take the view that the best way to resolve that difficult problem is through negotiations between the six and SAG so that conditions are recreated whereby the six can leave the Consulate voluntarily.

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Mr Johnson

PS

PS/Lady Young

PS/PUS

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OUT TELEGRAM

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GRS
CLASS
CAVEATS
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TEL NO

1 ZCZC
2 GRS
3 CONFIDENTIAL
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6 FM FCO
7 IMMEDIATE UKMIS NEW YORK
8 TELEGRAM NUMBER
9 IMMEDIATE PRETORIA
10 FOLLOWING FOR SECRETARY OF STATE'S PARTY: SITUATION AT THE
11 DURBAN CONSULATE
12 1. Lady Young summoned the South African Ambassador at 4.30 pm
13 local time today. She told Dr Worrall that we had carefully
14 studied the further aide memoire delivered by his Minister
15 and the statement issued at the same time by his Foreign
16 Minister. She reiterated our view that there could be
17 no connection between the case of the Durban Consulate and
18 the Armscor case. We looked to the South African Government
19 to honour its undertaking to return the four defendants to
20 the UK in October as they had committed themselves to do.
21 2. ~~Lady Young said that~~ We were also concerned that the
22 South African Government had decided to publish the four
23 aide memoires. We could not prevent the South African
24 Government from publishing its own aide memoires though we
25 deplored this, but we took particular exception to the fact that

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File number	Dept SAFD	Distribution Southern Africa Standard SAFD PS/No 10 OADs MCAD UND NAD WED ECDs Soviet D EED Mr Johnson Cabinet Office
Drafted by (Block capitals) A Reeve		
Telephone number 233 5189		
Authorised for despatch <i>CRB</i> 2579		
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OUT TELEGRAM (CONT)

Classification and Caveats

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IMMEDIATE

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2 they had published ours. This action was bound to be unhelpful.

3 We hoped that the situation could be contained but the

4 prospects had been damaged by these unilateral actions.

5 ~~the South African Government~~ *For example, he did not mention the layout*

6 3. Worrall was at pains to be conciliatory. *arguments.* He said that

7 he was not aware that our own aide memoire had ~~in fact~~ been

8 published. The South African action had to be seen in the

9 context of recent Cabinet discussions in which some Ministers

10 had been critical of the Government's foreign policies.

11 It had been necessary to react to these pressures.

12 The latest aide memoire had made clear that the South African

13 authorities did not intend to enter the Consulate. As

14 to our ^{quote} demand ^{unquote} for the return of the Armscor defendants,

15 he accepted Lady Young's point that this was primarily a

16 matter for the courts and undertook to pass ~~this~~ ^{his request} on to his

17 Government.

18 4. Worrall also said that Pik Botha would make a statement

19 this afternoon to "defuse the issue". (In fact, Botha's

20 remarks, as reported on the BBC, seem likely to have

21 the opposite effect.)

22 5. The most interesting point made by Worrall, which he said

23 he had been authorised ^{by his Minister} to pass on in the strictest confidence,

24 was that the South African authorities would tomorrow begin

25 the process of releasing some of those detained during

26 the recent disturbances "if the situation in South Africa

27 is relatively normal". When pressed by Johnson afterwards,

28 Worrall said that those released could include some of those

29 in the Consulate. He would not be drawn further and we have

30 no means of knowing whether this message is intended to

31 indicate that a possible concession to the six (and to HMG)

32 is in the offing.

33 6. On the appeal by the six, Worrall said that the verdict

34 could be handed down as early as tomorrow. Clearly, however, the

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Catchword

bench

OUT TELEGRAM (CONT)

Classification and Caveats

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IMMEDIATE

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2 bench felt that this case was a "water mark". There was
3 no means of knowing what the verdict would be though ~~the~~
4 State counsel had expressed optimism.

5 7. On the Armscor case, Worrall hinted that the evidence
6 might suggest that the four South African defendants had been
7 victims of entrapment. Lady Young ^{commented only} ~~merely said~~ that
8 they would, of course, be assumed innocent until proved
9 guilty.

10 8. Worrall afterwards confirmed to Johnson that Pelser,
11 the First Secretary, who had waived his immunity to stand
12 surety for the four defendants, had left the UK. ^{Worrall believed that he} ~~she~~ would ~~be~~
13 return ~~ing~~ shortly.

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15 HOWE

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Catchword

The Legal Aspects of the Situation at the Durban Consulate

1. Although the six men have not formally sought asylum (their lawyer has referred to 'sanctuary') and we have avoided using the word ourselves, we are harbouring our unwanted guests who have sought refuge in reliance on the inviolability of the consular premises. The inviolability of the premises is recognised as a factor both by ourselves and the South Africans. The situation as a matter of substance cannot therefore be distinguished from diplomatic asylum which "withdraws the offender from the jurisdiction of the territorial state and constitutes an intervention in matters which are exclusively within its competence" (I.C.J. in the Asylum case).
2. The law applicable in the present situation is therefore based on the same concepts as the law relating to diplomatic asylum (but see paragraph 7 below).
3. There is no general right to seek or grant asylum in diplomatic or consular premises. Exceptions may exist under treaty or local custom, neither of which is relevant in the present instance, or where there are extreme humanitarian grounds (where life, person or liberty is seriously and imminently imperilled in some extra-legal manner). There is some margin for appreciation in this last case but the existence of such circumstances was not, so far as we are aware, alleged by the six at the time they entered the consulate.
4. At the time the six entered the consulate, they did not ask for asylum (the request for sanctuary came later in the day). The situation therefore was not one on which the rules set out above would immediately apply. It was not unreasonable to refrain from evicting them, particularly having regard to the human rights aspects. With the passage of time, however, in particular when their refuge in the consulate became an issue with the South Africans, it has become increasingly difficult to contest the application of the general rule as to asylum.

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5. Asylum, if granted, is only temporary and once the circumstances justifying the grant of asylum have ceased to exist, there is no legal excuse for further protecting the refugee.

6. The ability to give asylum is a consequence of the inviolability of the premises concerned. If the asylum cannot be justified, the granting of refuge (which is no part of a diplomatic or consular function) is an abuse of the inviolability. An abuse of inviolability does not necessarily give the authorities of the receiving state the right to disregard the inviolability.

7. However, there is a distinction between the inviolability of the premises of a diplomatic mission, which is unqualified, and that of a consulate which (according to Art 31 of the Vienna Consular Convention) is limited, the authorities of the receiving state being restricted from entering "the part of the consular premises which is used exclusively for the purpose of the work of the consular post". Although we would not accept that the authorities of the receiving state are competent to decide for themselves which part of consulate premises are so used, the qualification of the inviolability gives them the possibility of effecting an entry to parts of the consular premises and at the same time denying any infringement of inviolability.