No. 15-15098

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUNDUS SHAKER SALEH
on behalf of herself and those similarly situated,

Plaintiff-Appellant,

v.

GEORGE W. BUSH, *et al.,*

Defendants-Appellees.

Appeal From The United States District Court
For The Northern District Of California,
No. 3:13-cv-01124 JST (Honorable Jon S. Tigar)

PLAINTIFF-APPELLANT'S MOTION FOR JUDICIAL NOTICE OF EXCERPTS FROM THE CHILCOT REPORT

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MOTION FOR JUDICIAL NOTICE

Pursuant to Federal Rule of Evidence 201, Plaintiff-Appellant Sundus Shaker Saleh (hereinafter "***Appellant***"), respectfully requests that this Court take judicial notice of the following in support of Appellant's Opening Brief ("***AOB***"):

1. At Exhibit 1A, the Executive Summary of the twelve volume report of the Iraq Inquiry (the "***Chilcot Report***") issued by the government of the United Kingdom's Iraq Inquiry (the "***Iraq Inquiry***"), which considers the U.K.'s involvement in the run-up to the Iraq War, the military action and the war's aftermath during the period from the summer of 2001 to the end of July 2009;

2. At Exhibit 1B, Section 5 of the Chilcot Report, *Advice on the Legal Basis for Military Action, November 2002 to March 2003*, providing an analysis of the changing legal bases used to justify the invasion of Iraq;

3. At Exhibit 2, excerpts of U.K. government documents and transcripts relied on by the Iraq Inquiry in writing the conclusions contained in the Chilcot Report, particularly:

- Extracts from statements made to the Iraq Inquiry by U.K. government officials – Foreign and Commonwealth Office ("***FCO***") legal advisors, Sir Michael Wood and Elizabeth Wilmshurst, and the First Secretary for the Middle East at the U.K. Mission to the United Nations, Carne Ross –

confirming Appellant's allegation that Defendant-Appellees' invasion of Iraq was illegal under international law (and, thus, illegal under U.S. federal common law).

- Excerpts of letters from former Prime Minister Anthony Blair to Defendant-Appellee Bush (dated Oct. 11, 2001, Dec. 4, 2001, and Jul. 28, 2002), confirming that Defendant-Appellees' intended to invade Iraq at least as early as July 2002 and "fix" intelligence around its invasion. Excerpt of Record (hereinafter "***ER***") 79-80, Complaint ¶¶ 61-64.

4. At Exhibit 3, conclusions of international law submitted by legal experts, specifically, Professor Philippe Sands of the Queen's Counsel ("***QC***"), Professor Maurice Mendelson QC, Lord Alexander of Weedon QC, Professor Nicholas Grief, and Dapo Akande, Co-Director of the Oxford Institute for Ethics, Law and Armed Conflict, at the request of the Iraq Inquiry for expert analysis of the arguments U.K. government officials had relied upon as the legal basis for the 2003 invasion of Iraq.[1]

Prior to the filing of this motion, counsel for Defendant-Appellees indicated that they intended to oppose this motion. See Ninth Circuit Rule 27-1.2.

[1] *See International Law Submissions*, THE IRAQ INQUIRY, http://www.iraqinquiry.org.uk/other-material/submissions-international-law/ (last visited Jul. 13, 2016). Appellant notes that the Iraq Committee did not cite to these experts or otherwise make any legal findings related to the legality of the Iraq War or the legal culpability of U.K. government leaders. However, the Iraq Committee "used these submissions to inform its consideration of legal issues." *Id.*

THE CHILCOT REPORT

On June 15, 2009, former British Prime Minister Gordon Brown announced that the United Kingdom would commence a public inquiry into the events leading to the Iraq War. 15 Jun. 2009, Parl Deb HC (2009) col. 21-38 (UK), *at* http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090615/debtext/90615-0003.htm (last visited July 21, 2016). Known as the "***Iraq Inquiry***," this inquiry took the form of a committee (the "***Iraq Committee***") composed of "Privy Counsellors," specifically, Sir John Chilcot, Sir Lawrence Freedman, Sir Martin Gilbert, Sir Roderic Lyne and Baroness Usha Prashar. Privy Counsellors have no analogue in the U.S., but under the British constitution, are individuals who directly advise the sovereign. MICHAEL EVERETT, THE PRIVY COUNCIL, HOUSE OF COMMONS LIBRARY BRIEFING PAPER CBP7460, at 3 (2016), *at* http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7460.

As a committee of Privy Counsellors, the Iraq Committee is considered a non-statutory *ad hoc* form of inquiry under the British constitution. However, the Iraq Committee varies from this traditional form of inquiry and is considered a "special and prestigious body." OONAGH GAY & CHRIS SEAR, INVESTIGATORY INQUIRES AND THE TRIBUNALS OF INQUIRY (EVIDENCE) ACT 1921, HOUSE OF COMMONS LIBRARY STANDARD NOTE SN02599, at 13 (2012), *at* http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN02599. In

particular, the Iraq Committee was entitled to see security information that the government would usually not make available. *Id*. at 13, 15-16.[2] And while established by the U.K. government – Prime Minister Brown appointed its members, and the House of Commons endorsed it – the Iraq Committee is independent. Sir John Chilcot, Remarks at the Iraq Inquiry Launch News Conference, (Jul. 30, 2009) (hereinafter "***Chilcot's 2009 Remarks***") (transcript available at The Iraq Inquiry website), http://www.iraqinquiry.org.uk/the-inquiry/news-archive/2009/2009-08-05-transcript/2009-07-30-transcript-of-iraq-inquiry-launch-news-conference-on-30th-of-july-2009/ (last visited July 20, 2016).

The Iraq Committee conducted its own independent investigation related to the conduct of the British government prior to and through the commencement of the Iraq War. 15 Jan. 2009, Parl Deb HC (2009) col. 23 (UK). The investigation spanned more than six years and covered nearly a decade of public policy. *Iraq Inquiry: Why Has the Report Taken So Long?*, BBC NEWS (May 9, 2016), http://www.bbc.com/news/uk-politics-36024725 (last visited Jun. 29, 2016). The Iraq Committee examined more than 150,000 government documents concerning the U.S. and U.K.'s involvement in the Iraq War, including documents in U.S. and

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[2] *See generally Iraq Inquiry Will Tell 'Whole Story' Insists Heywood*, BBC NEWS (Sep. 9, 2014), http://www.bbc.com/news/uk-politics-24936293 (Sir Jeremy Heywood, UK Cabinet Secretary, declaring that the Chilcot Report includes material that would never generally be disclosed "in a million years") (last visited July 20, 2016).

U.K. government archives.[3] Stephen Castle, *Delayed Report on Britain's Role in Iraq War Is Expected in Summer*, N.Y. TIMES (London) (Oct. 29, 2015), http://nyti.ms/1iovCfw (last visited July 20, 2016); Chilcot's 2009 Remarks (transcript available at The Iraq Inquiry website). The Iraq Committee was given full access to communications between former Prime Minister Anthony Blair and Defendant-Appellee George W. Bush in the run-up to the war. Publication of these materials was confirmed by Mr. Chilcot in January 2015 to former Prime Minister David Cameron. *See* Letter from Sir John Chilcot, Chairman, The Iraq Inquiry, to David Cameron, former Prime Minister, Government of the UK, 1 (Jan. 20, 2015) (on file with The Iraq Inquiry), http://www.iraqinquiry.org.uk/media/217723/2015-01-20-letter-chilcot-to-cameron.pdf (last visited July 21, 2016).

The Iraq Committee also held 130 public sessions of witness cross-examination, and took testimony from more than 150 witnesses concerning U.K. policy on Iraq between 2001 and 2003 and U.K.-U.S. relations.[4] *Chilcot Inquiry: Families Will Get Free Copies of £767 Report*, BBC NEWS (Jun. 3, 2016), http://www.bbc.com/news/uk-36442521 (last visited July 20, 2016); *The Key*

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[3] Former Prime Minister Brown noted, "[t]he committee of inquiry will have access to the fullest range of information, including secret information. In other words, its investigation can range across all papers, all documents and all material. It can ask for any British document to be brought before it, and for any British citizen to appear. No British document and no British witness will be beyond the scope of the inquiry." *See* 15 Jan. 2009, Parl Deb HC (2009) col. 23 (UK).

[4] See generally *Timetables*, THE IRAQ INQUIRY, http://www.iraqinquiry.org.uk/hearings/timetable.aspx (last visited Jun. 29, 2016).

Points of the Iraq War Inquiry Explained, BBC NEWS (Mar. 5, 2010), http://news.bbc.co.uk/2/hi/uk_news/politics/7312757.stm (last visited July 21, 2016).

Notable witnesses included former Prime Minister Anthony Blair, former Foreign Secretary Jack Straw, former Chief Foreign Policy Adviser David Manning, former U.K. Ambassador to the U.N. Jeremy Greenstock, former U.K. Ambassador to Washington Christopher Meyer, former Chairman of the Joint Intelligence Committee John Scarlett, and former First Secretary at the U.K. Mission to the U.N. Carne Ross.[5] Among those to also provide oral evidence in public were Lord Goldsmith, the attorney general who advised ministers that the war was legal, Sir Michael Wood, the legal advisor at the FCO from 1999 to 2006, and Elizabeth Wilmshurst, a deputy legal adviser who later resigned when the invasion began. *Straw Rejected Advice that Iraq Invasion Was 'Unlawful,'* BBC NEWS (Jan. 26, 2010), http://news.bbc.co.uk/2/hi/uk_news/politics/8479996.stm (last visited July 20, 2016). Other witnesses included senior diplomats, civil servants and military commanders involved in the events leading up to war and the

[5] See generally *Iraq War Inquiry: The Key Players*, BBC NEWS (Nov. 26, 2009), http://news.bbc.co.uk/2/hi/uk_news/politics/8377272.stm (last visited July 20, 2016), providing overview of these government officials and why they were considered "key players" in the Chilcot Committee's investigation.

military campaign. Transcripts of oral testimony from these proceedings are available to the public on The Iraq Inquiry website.[6]

STANDARD FOR JUDICIAL NOTICE

Judicial notice can be taken at any stage of a proceeding, including by an appellate court during the pendency of an appeal. Fed. R. Evid. 201(d). Original judicial notice on appeal is especially appropriate in cases where, like here,[7] the documents put forth were not available while the case was before the district court. *See*, e.g., *Aramark Facility Servs. v. SEI, Local 1877*, 530 F.3d 817, 826 n.4 (9th Cir. 2008) (taking judicial notice on appeal of legislative materials not part of the record); *Sandpiper Village v. Louisiana-Pacific Corp.*, 428 F.3rd 831, 837 n.4 (9th Cir. 2005) (original judicial notice taken on appeal of excerpts from a trial transcript that were previously unavailable); *Transmission Agency of N. Col v. Sierra Pac. Power Co.*, 295 F.3d 918, 924 n.3 (9th Cir. 2002) (on appeal, court took judicial notice of an administrative law judge's decision issued after the district court's decision); *Bryant v. Carleson*, 444 F.2d 353, 357 (9th Cir. 1971) (judicial notice of proceedings and filings in other courts, including a decision

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[6] See *Witnesses who have given oral evidence in public*, THE IRAQ INQUIRY, http://www.iraqinquiry.org.uk/transcripts/oralevidence-bywitness.aspx (last visited Jul. 18, 2016).

[7] The Iraq Committee did not release the Chilcot Report until July 6, 2016. *See generally*, http://www.iraqinquiry.org.uk/ ("The Report of the Iraq Inquiry was published on 6 July 2016").

released by the California Supreme Court while the parties' appeal in the federal case was pending).

A court may take judicial notice of any fact that is "not subject to reasonable dispute" when it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b), 201(b)(2); *Singh v. Ashcroft*, 393 F.3d 903, 905 (9th Cir. 2004). Such submissions must be considered "adjudicative facts" or facts regarding the immediate parties or issues being raised in a particular case. *See* Fed. R. Evid. 201(a); Advisory Comm. Note to Subdivision (a) (1972); Kenneth Davis 2 *Administrative Law Treatise* 353 (1958) ("When a court or any agency finds facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent—the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts.").

The facts for which Appellant requests judicial notice may and should be judicially noticed since they are "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). The materials proffered for judicial notice include the Chilcot Report's Executive Summary (at Exhibit 1A) and Section 5 of the Chilcot Report (at Exhibit 1B); at Exhibit 2, excerpts taken from U.S. and U.K. government documents used as supporting evidence in the Chilcot Report (i.e., the factual underpinnings of the

Chilcot Report), including statements from U.K. government officials Sir Michael Wood, Elizabeth Wilmshurst and Carne Ross, as well as communications between Defendant-Appellee Bush and former Prime Minister Anthony Blair. Finally, at Exhibit 3, Appellant provides the conclusions of international law experts that were submitted to the Iraq Committee at its request. These facts are offered in support of Appellant's appeal and in challenging the immunity under the Westfall Act granted by the District Court to Defendant-Appellees.

I. THE EXECUTIVE SUMMARY AND SECTION 5 OF THE CHILCOT REPORT ATTACHED AT EXHIBIT 1A AND EXHIBIT 1B ARE APPROPRIATE FOR JUDICIAL NOTICE.

This Court may take judicial notice of the Chilcot Report's Executive Summary and Section 5 of the Chilcot Report at Exhibit 1A and Exhibit 1B because the Iraq Committee and the process through which these summaries from the Chilcot Report were created have rendered them a source whose trustworthiness cannot be reasonably questioned. *See*, e.g., *United States v. Garland*, 991 F.2d 328, 332 (6th Cir. 1993) (taking judicial notice, on appeal, of a Ghana tribunal judgment for purposes of recognizing its existence as an official statement, since there was no indication that the process by which the record was made was "untrustworthy"); *A.I. Trade Fin. v. Centro Internationale Handelsbank AG*, 926 F. Supp. 378, 388 (S.D.N.Y. 1996) (judicial notice of a judgment rendered by a Vienna court, where the court acknowledged its existence as an official

statement, alleging it had "no reason to doubt the trustworthiness" of its decision); *Korematsu v. United States*, 584 F. Supp. 1406, 1415 (N.D. Cal. 1984) (taking judicial notice of a report of the Commission on Wartime Relocation and Interment of Civilians as to "the purpose of the Commission, the manner in which it was established and, subject to a finding of trustworthiness, the general nature and substance of its conclusions.").

Furthermore, a court may judicially notice public records and government documents, such as reports issued from a government entity or commission of inquiry. *See*, e.g., *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010) (taking judicial notice of information made public by governmental entities); *Arar v. Ashcroft*, 585 F.3d 559, 589 n.12 (2nd Cir. 2009) (taking judicial notice, on appeal, of the existence and scope of a report issued from a Commission of Inquiry established by the Canadian government, along with press releases from the Commission and Office of the Canadian Prime Minister); *Blair v. City of Pomona*, 223 F.3d 1074 (9th Cir. 2000) (judicial notice of an independent commission's report on police officers use of the code of silence); *Overfield v. Pennroad Corp.*, 146 F.2d 889, 898 (3rd Cir. 1944) ("Courts can and do take judicial notice of such Congressional proceedings and the existence of facts disclosed by them" through Congressional committee reports). The structure of the Iraq Committee, the process by which its Privy Counsellors produced the Chilcot Report, and the

availability of government materials, including U.S. and U.K. government documents, meet the standard of the Iraq Inquiry being a source "whose cannot reasonably be questioned." Fed. R. Evid. 201(b).

The excerpts below are just a few of the conclusions found in the Chilcot Report that are relevant to this appeal, and specifically, whether Defendant-Appellees were acting within the legitimate scope of their authority when they planned and waged the Iraq War:

> 24. President Bush decided at the end of 2001 to pursue a policy of regime change in Iraq.
>
> 68. On 26 February 2002, Sir Richard Dearlove, the Chief of the Secret Intelligence Service, advised that the US Administration had concluded that containment would not work, was drawing up plans for a military campaign later in the year, and was considering presenting Saddam Hussein with an ultimatum for the return of inspectors while setting the bar "**so high that Saddam Hussein would be unable to comply**."
>
> 74. Mr Straw's advice of 25 March proposed that the US and UK should seek an ultimatum to Saddam Hussein to re-admit weapons inspectors. That would provide a route for the UK to align itself with the US without adopting the US objective of regime change. **This reflected advice that regime change would be unlawful**.
>
> 89. Sir Richard Dearlove reported that he had been told that the US had already taken a decision on action – "the question was only how and when;" and that **he had been told it intended to set the threshold on weapons inspections so high that Iraq would not be able to hold up US policy**.

See THE IRAQ INQUIRY, THE REPORT OF THE IRAQ INQUIRY EXECUTIVE SUMMARY, 2016, HC 264, Ex. 1A at 11, 17-18 and 20 (all emphases added). These facts show that Defendant-Appellees were planning the war well in advance, and as argued by

Appellant, that at least some of them were implementing a plan they had developed prior to coming to office, thus supporting the argument that Defendant-Appellees were furthering personal motivations and not the motivations of their employer in planning and executing the war. AOB at 38-42, 36-38.

Section 5 of the Chilcot Report also contains relevant facts related to the lawfulness of the war, and, presumably, what U.K. and U.S. leaders knew about the lawfulness of the war:

> 289. **Despite being told that advice was not needed for Mr Blair's meeting with President Bush on 31 January, Lord Goldsmith wrote on 30 January to emphasise that his view remained that resolution 1441 did not authorise the use of military force without a further determination by the Security Council.**
>
> 344. **Mr Wood had warned Mr Straw on 24 January that "without a further decision by the Council, and absent extraordinary circumstances", the UK would not be able lawfully to use force against Iraq.**
>
> 348. Mr Wood wrote that Kosovo was "no precedent": the legal basis was the need to avert an overwhelming humanitarian catastrophe; no draft resolution had been put to the Security Council; and no draft had been vetoed. He hoped there was: "… no doubt in anyone's mind that without a further decision of the Council, and absent extraordinary circumstances (of which at present there is no sign), the United Kingdom cannot lawfully use force against Iraq to ensure compliance with its SCR WMD obligations. To use force without Security Council authority would amount to the crime of aggression."
>
> 579. **Lord Goldsmith recognised that there was a possibility of a legal challenge.**

See THE IRAQ INQUIRY, *Section 5: Advice on the Legal Basis for Military Action, November 2002 to March 2003*, in THE REPORT OF THE IRAQ INQUIRY, 2016, HC 264, Ex. 1B at 208, 217, 257 and (all emphases in original). These facts affirm that Defendant-Appellees likely were advised of the risk of committing the crime of aggression, as well as the risk of judicial review over their conduct, and thus, as alleged by Appellant, knew the war was illegal when they launched the invasion of Iraq.

II. GOVERNMENT DOCUMENTS AND TRANSCRIPTS PUBLISHED AS EVIDENCE ALONGSIDE THE CHILCOT REPORT, AT EXHIBIT 2, ARE ALSO SUBJECT TO JUDICIAL NOTICE.

When drafting the Executive Summary and twelve-volume Chilcot Report, the Iraq Committee relied on U.S. and U.K. government documents and transcripts as evidence to support its conclusions. Exhibit 2 includes such underlying materials including written statements of U.K. government officials, specifically, from former FCO legal advisors Sir Michael Wood and Elizabeth Wilmshurst, and First Secretary of the U.K. Permanent Mission to the U.N. Carne Ross. In addition to being subject to judicial notice because of their inclusion in the Chilcot Report (discussed *infra*), these statements are further subject to judicial notice because they are statements of government officials. *See N.Y. Times Co. v. United States DOJ*, 756 F.3d 100, 110 n.8 (2d Cir. 2014) (taking judicial notice, on appeal, of statements of Government officials made publicly available after the district

court's opinion was released, because such official statements were relevant to "contested claims"). Many courts have taken judicial notice of this type of information. *See*, e.g., *Sandpiper Village,* 428 F.3d at 837 n.4 (9th Cir. 2005) (judicial notice taken on appeal of excerpts from a trial transcript that were previously unavailable); *Young v. Selsky*, 41 F.3d 47, 50-51 (2d Cir. 1994) (taking judicial notice of testimony from transcripts); *Wietschner v. Monterey Pasta Co.*, 294 F.Supp.2d 1102, 1108 (N.D. Cal. 2003) (judicial notice of press releases made by the Securities and Exchange Commission); *Del Puerto Water Dist. v. United States Bureau of Reclamation*, 271 F.Supp.2d 1224, 1234 (E.D. Cal. 2003) (finding judicially noticeable public documents, including Senate and House Reports).

In particular, Appellant notes the following paragraphs from the written statements of Sir Michael Wood, Elizabeth Wilmshurst and Carne Ross, all relevant to the issue of the crime of aggression and whether Defendant-Appellees were acting out of personal motivation for purposes of this appeal:

> **SIR MICHAEL WOOD**: I considered that the use of force against Iraq in March 2003 was contrary to international law. In my opinion, that use of force had not been authorized by the Security Council, and had no other legal basis in international law. *See* 15 January 2010 Statement by Sir Michael Wood to the Iraq Inquiry at ¶ 15, Ex. 2 at 327.
>
> **ELIZABETH WILMSHURST:** Before the adoption of UN Security Council resolution 1441, the advice given by FCO legal advisers was that an invasion of Iraq would be contrary to international law in the absence of a new Security Council resolution. I shared and contributed to this view. The legal principles are well-known. In summary, the UN Charter prohibits the use of force against another State; the exceptions to this prohibition are first, action

in self-defence, as referred to in Article 51 of the UN Charter, second, action authorised by UN Security Council resolutions and, as a possible third, more controversial, exception, action to avert a humanitarian catastrophe. Of these exceptions, force in self-defence may be used only against an attack, actual or imminent; only where it is necessary to use force in the absence of other means; and only where the force is proportionate to the object of averting the attack. In the circumstances of Iraq, the facts did not justify the use of force in self- defence. Existing Security Council resolutions did not authorise the use of force. There was no other legal justification. A desire to change the regime did not give a legal basis for military action. *See* 18 January 2010 Statement by Elizabeth Wilmshurst to the Iraq Inquiry at ¶ 4, Ex. 2 at 333.

ELIZABETH WILMSHURST: I regarded the invasion of Iraq as illegal, and I therefore did not feel able to continue in my post. I would have been required to support and maintain the Government's position in international fora. The rules of international law on the use of force by States are at the heart of international law. Collective security, as opposed to unilateral military action, is a central purpose of the Charter of the United Nations. Acting contrary to the Charter, as I perceived the Government to be doing, would have the consequence of damaging the United Kingdom's reputation as a State committed to the rule of law in international relations and to the United Nations. *See* 18 January 2010 Statement by Elizabeth Wilmshurst to the Iraq Inquiry at ¶ 7, Ex. 2 at 334.

CARNE ROSS: In just war theory and international law, any country must exhaust all non-violent alternatives before resorting to force. It's clear in this case that the UK government did not adequately consider let alone pursue non-military alternatives to the 2003 invasion. *See* 12 July 2010 Statement by Carne Ross to the Iraq Inquiry at ¶ 9, Ex. 2 at 338.

CARNE ROSS: This process of exaggeration was gradual, and proceeded by accretion and editing from document to document, in a way that allowed those participating to convince themselves that they were not engaged in blatant dishonesty. But this process led to highly misleading statements about the UK assessment of the Iraqi threat that were, in their totality, lies. *See* 12 July 2010 Statement by Carne Ross to the Iraq Inquiry at ¶ 24, Ex. 2 at 342-43.

Such statements support Appellant's claim that Defendant-Appellees were acting outside the scope of their employment and are therefore "personally answerable" for the crime of aggression. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 423 (1995).

Plaintiff also attaches in Exhibit 2 a letter and two notes sent from former Prime Minister Anthony Blair to Defendant Bush dated October 11, 2001, December 4, 2001, and July 28, 2002, again, all relied on by the Chilcot Report, and as with the Wood, Wilmshurst, and Ross statements, subject to judicial notice. Mr. Blair in an October 11, 2001, letter to Defendant-Appellee Bush, discussed:

> I have no doubt **we need to deal with Saddam**. But if we hit Iraq now, we would lose the Arab world, Russia, probably half of the EU …
>
> However, I am sure **we can devise a strategy for Saddam deliverable at a later date**. My suggestion is, in order to give ourselves space that we say: phase 1 is the **military action focused on Afghanistan because it's there that perpetrators of 11 September hide.** Phase 2 is the medium and longer term campaign against terrorism in all its forms. …

Letter from Anthony Blair to George W. Bush 2 (Oct. 11, 2001) (on file with The Iraq Inquiry), http://www.iraqinquiry.org.uk/media/243721/2001-10-11-letter-blair-to-bush-untitled.pdf, Ex. 2 at 356 (all emphases added). Mr. Blair was apparently discussing with Defendant-Appellee Bush regime change in Iraq just one month after the attacks that took place on September 11, 2001. Mr. Blair's suggestion for "phase 1" of the U.S.-U.K. strategy on the war on terrorism to first direct military action toward **"Afghanistan because it's there that perpetrators**

of 11 September hide," further supports Appellant's claim that Defendant-Appellees used an unrelated terrorist attack to execute a pre-existing plan of regime change in Iraq. *See id.* at 356 (emphasis added); *see also* ER 73-79. Mr. Blair then went on to discuss a "phase 2" that would include invading Iraq.

In a December 4, 2001, note to Defendant-Appellee Bush entitled "The War Against Terrorism: The Second Phase," Mr. Blair stated:

> Iraq is a threat because it has WMD capability … But **any link to 11 September and AQ [Al Qaeda] is at best very tenuous**; and at present **international opinion would be reluctant, outside the US/UK, to support immediate military action** … So we need a strategy for regime change that builds over time. …

Letter from Anthony Blair to George W. Bush 1, 3-4 (Dec. 4, 2001) (on file with The Iraq Inquiry), http://www.iraqinquiry.org.uk/media/243731/2001-12-04-note-blair-to-bush-the-war-against-terrorism-the-second-phase.pdf (all emphases added), Ex. 2 at 359, 361-62. This note supports Appellant's allegation that Defendant-Appellee Bush was aware that Iraq had no link to the 9/11 attacks or Al Qaeda and support the allegations that Defendant-Appellees made false statements to the public about the threat Iraq posed, or its connection to Al Qaeda, in order to support a war and satisfy personally-held objectives of regime change that had no legitimate policy underpinning. ER 80-87, Complaint ¶¶ 65-95.

On July 28, 2002, Mr. Blair sent a note to Defendant-Appellee Bush entitled "Note On Iraq." Excerpts taken from this note confirm that Defendant-Appellees'

intent to invade Iraq was well-formed by July 2002, and that Defendant-Appellees intended to invade Iraq and "fix" intelligence around its invasion. ER 79-80, Complaint ¶¶ 61-64. Mr. Blair's July 2002 note to Defendant-Appellee Bush observed that U.S. officials thought evidence supporting regime change was "unnecessary" and that an "Al Qaida link" could be simply be tacked onto government messaging in order to sell the war:

> **The Evidence.** Again, I have been told **the US thinks this unnecessary**. But we still need to make the case. If we recapitulate all the WMD evidence; add his attempts to secure nuclear capability; and, as seems possible, **add on Al Qaida link**, it will be hugely persuasive over here.

See Letter from Anthony Blair to George W. Bush, 1, 3-5 (Jun. 28, 2002) (on file with The Iraq Inquiry), http://www.iraqinquiry.org.uk/media/243761/2002-07-28-note-blair-to-bush-note-on-iraq.pdf, Ex. 2 at 369 (emphasis added).

III. THIS COURT SHOULD TAKE JUDICIAL NOTICE OF LEGAL AUTHORITIES SUBMITTED IN RESPONSE TO REQUESTS FOR SUBMISSIONS FROM INTERNATIONAL LAW EXPERTS BY THE IRAQ INQUIRY.[8]

Submissions from experts in international law were made at the request of the Iraq Committee and were used to further inform the Iraq Committee's considerations about the U.K. government's legal justifications for the Iraq War. The excerpts in Exhibit 3 are considered facts about international law, and are thus

[8] See generally *International Law Submissions*, THE IRAQ INQUIRY, http://www.iraqinquiry.org.uk/other-material/submissions-international-law/ (last visited Jul. 13, 2016), for true and correct copies of the international law submissions from experts in international regarding the UK's legal basis for the use of force in the Iraq War.

subject to judicial notice. *See*, e.g., *The Paquete Habana*, 175 U.S. 677, 686, 708 20 S. Ct. 290 (1900) (taking judicial notice of ancient custom that has "ripened into a rule of international law," which exempts fishing vessels from being captured as a prize of war, because such a rule of international law is one that courts "administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS §113(1) (1987) (concluding "[t]he determination or interpretation of international law or agreements is a question of law and is appropriate for judicial notice in courts in the United States without pleading or proof."). Appellant attaches submissions from Professor Philippe Sands QC, Professor Maurice Mendelson QC, Lord Alexander of Weedon QC, Professor Nicholas Grief, and Dapo Akande, Co-Director of the Oxford Institute for Ethics, Law and Armed Conflict. As noted plainly by Professor Sands, "Distinguished members of the legal community in the United Kingdom have also concluded without ambiguity that the war was unlawful." 10 September 2010 Submission by Philippe Sands to the Iraq Inquiry at ¶ 3, Ex. 3 at 373. And as concluded by Professor Nicholas Grief:

> **PROFESSOR GRIEF:** A second Security Council resolution specifically and unambiguously authorising military action was required. The vague warning of 'serious consequences' in resolution 1441 did not suffice, and to interpret resolution 678 as granting the necessary authority was not 'good faith' interpretation as required by international law. Without such a resolution, the invasion of Iraq constituted an act of aggression, contrary to Article 2(4) of

the UN Charter. *See* Ex. 3, 9 September 2010 Statement by Nicholas Grief at ¶ 14-15, Ex. 3 at 441.

CONCLUSION

Plaintiff-Appellant therefore respectfully requests that the Court take judicial notice of the materials attached to this motion at Exhibit 1A, 1B, Exhibit 2 and Exhibit 3 in support of her AOB.

Respectfully submitted,

Dated: July 22, 2016

COMAR LAW

By /s/ *Inder Comar*
D. Inder Comar
Attorney for Appellant
SUNDUS SHAKER SALEH

EXHIBIT 1A

EXHIBIT 1A

The Report of the Iraq Inquiry

Executive Summary

Report of a Committee of Privy Counsellors

Return to an Address of the Honourable the House of Commons
dated 6 July 2016
for

The Report of the Iraq Inquiry

Executive Summary

Report of a Committee of Privy Counsellors

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THE IRAQ INQUIRY

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July 2016

Dear Prime Minister

I am very pleased to send you the completed Report of the Iraq Inquiry, commissioned by the then Prime Minister The Rt Hon Gordon Brown MP, in 2009. Following final typesetting, it comprises an Executive Summary and 12 volumes of evidence, findings and conclusions.

The Report provides an impartial, fair and accurate account of events from which the Inquiry has drawn its conclusions, but which will also allow the reader to draw their own.

My colleagues on the Inquiry Committee and I would like to thank Dame Rosalyn Higgins and General Sir Roger Wheeler for their invaluable expert advice; everyone who appeared as a witness before the Inquiry and those who assisted them; the departments and agencies which have supported the Inquiry's gathering and declassification of material; and the Inquiry Secretariat, led by Margaret Aldred, all of whose members – temporary and permanent – have made an outstanding contribution of the highest quality over a sustained period.

Yours sincerely,

John Chilcot

SIR JOHN CHILCOT

EXECUTIVE SUMMARY

Contents

Introduction

1. In 2003, for the first time since the Second World War, the United Kingdom took part in an opposed invasion and full-scale occupation of a sovereign State – Iraq. Cabinet decided on 17 March to join the US-led invasion of Iraq, assuming there was no last-minute capitulation by Saddam Hussein. That decision was ratified by Parliament the next day and implemented the night after that.

2. Until 28 June 2004, the UK was a joint Occupying Power in Iraq. For the next five years, UK forces remained in Iraq with responsibility for security in the South-East; and the UK sought to assist with stabilisation and reconstruction.

3. The consequences of the invasion and of the conflict within Iraq which followed are still being felt in Iraq and the wider Middle East, as well as in the UK. It left families bereaved and many individuals wounded, mentally as well as physically. After harsh deprivation under Saddam Hussein's regime, the Iraqi people suffered further years of violence.

4. The decision to use force – a very serious decision for any government to take – provoked profound controversy in relation to Iraq and became even more controversial when it was subsequently found that Iraq's programmes to develop and produce chemical, biological and nuclear weapons had been dismantled. It continues to shape debates on national security policy and the circumstances in which to intervene.

5. Although the Coalition had achieved the removal of a brutal regime which had defied the United Nations and which was seen as a threat to peace and security, it failed to achieve the goals it had set for a new Iraq. Faced with serious disorder in Iraq, aggravated by sectarian differences, the US and UK struggled to contain the situation. The lack of security impeded political, social and economic reconstruction.

6. The Inquiry's report sets out in detail decision-making in the UK Government covering the period from when the possibility of military action first arose in 2001 to the departure of UK troops in 2009. It covers many different aspects of policy and its delivery.

7. In this Executive Summary the Inquiry sets out its conclusions on a number of issues that have been central to the controversies surrounding Iraq. In addition to the factors that shaped the decision to take military action in March 2003 without support for an authorising resolution in the UN Security Council, they are: the assessments of Iraqi WMD capabilities by the intelligence community prior to the invasion (including their presentation in the September 2002 dossier); advice on whether military action would be legal; the lack of adequate preparation for the post-conflict period and the consequent struggle to cope with the deteriorating security situation in Iraq after the invasion. This Summary also contains the Inquiry's key findings and a compilation of lessons, from the conclusions of individual Sections of the report.

8. Other Sections of the report contain detailed accounts of the relevant decisions and events, and the Inquiry's full conclusions and lessons.

9. The following are extracts from the main body of the Report covering some of the most important issues considered by the Inquiry.

Pre-conflict strategy and planning

10. After the attacks on the US on 11 September 2001 and the fall of the Taliban regime in Afghanistan in November, the US Administration turned its attention to regime change in Iraq as part of the second phase of what it called the Global War on Terror.

11. The UK Government sought to influence the decisions of the US Administration and avoid unilateral US military action on Iraq by offering partnership to the US and seeking to build international support for the position that Iraq was a threat with which it was necessary to deal.

12. In Mr Blair's view, the decision to stand "shoulder to shoulder" with the US was an essential demonstration of solidarity with the UK's principal ally as well as being in the UK's long-term national interests.

13. To do so required the UK to reconcile its objective of disarming Iraq, if possible by peaceful means, with the US goal of regime change. That was achieved by the development of an ultimatum strategy threatening the use of force if Saddam Hussein did not comply with the demands of the international community, and by seeking to persuade the US to adopt that strategy and pursue it through the UN.

14. President Bush's decision, in September 2002, to challenge the UN to deal with Iraq, and the subsequent successful negotiation of resolution 1441 giving Iraq a final opportunity to comply with its disarmament obligations or face serious consequences if it did not, was perceived to be a major success for Mr Blair's strategy and his influence on President Bush.

15. But US willingness to act through the UN was limited. Following the Iraqi declaration of 7 December 2002, the UK perceived that President Bush had decided that the US would take military action in early 2003 if Saddam Hussein had not been disarmed and was still in power.

16. The timing of military action was entirely driven by the US Administration.

17. At the end of January 2003, Mr Blair accepted the US timetable for military action by mid-March. President Bush agreed to support a second resolution to help Mr Blair.

18. The UK Government's efforts to secure a second resolution faced opposition from those countries, notably France, Germany and Russia, which believed that the inspections process could continue. The inspectors reported that Iraqi co-operation, while far from perfect, was improving.

19. By early March, the US Administration was not prepared to allow inspections to continue or give Mr Blair more time to try to achieve support for action. The attempt to gain support for a second resolution was abandoned.

20. In the Inquiry's view, the diplomatic options had not at that stage been exhausted. Military action was therefore not a last resort.

21. In mid-March, Mr Blair's determination to stand alongside the US left the UK with a stark choice. It could act with the US but without the support of the majority of the Security Council in taking military action if Saddam Hussein did not accept the US ultimatum giving him 48 hours to leave. Or it could choose not to join US-led military action.

22. Led by Mr Blair, the UK Government chose to support military action.

23. Mr Blair asked Parliament to endorse a decision to invade and occupy a sovereign nation, without the support of a Security Council resolution explicitly authorising the use of force. Parliament endorsed that choice.

The UK decision to support US military action

24. President Bush decided at the end of 2001 to pursue a policy of regime change in Iraq.

25. The UK shared the broad objective of finding a way to deal with Saddam Hussein's defiance of UN Security Council resolutions and his assumed weapons of mass destruction (WMD) programmes. However, based on consistent legal advice, the UK could not share the US objective of regime change. The UK Government therefore set as its objective the disarmament of Iraq in accordance with the obligations imposed in a series of Security Council resolutions.

UK policy before 9/11

26. Before the attacks on the US on 11 September 2001 (9/11), the UK was pursuing a strategy of containment based on a new sanctions regime to improve international support and incentivise Iraq's co-operation, narrowing and deepening the sanctions regime to focus only on prohibited items and at the same time improving financial controls to reduce the flow of illicit funds to Saddam Hussein.

27. When UK policy towards Iraq was formally reviewed and agreed by the Ministerial Committee on Defence and Overseas Policy (DOP) in May 1999, the objectives towards Iraq were defined as:

> "... in the short term, to reduce the threat Saddam poses to the region including by eliminating his weapons of mass destruction (WMD) programmes; and, in

the longer term, to reintegrate a territorially intact Iraq as a law-abiding member of the international community."[1]

28. The policy of containment was seen as the "only viable way" to pursue those objectives. A "policy of trying to topple Saddam would command no useful international support". Iraq was unlikely to accept the package immediately but "might be persuaded to acquiesce eventually".

29. After prolonged discussion about the way ahead, the UN Security Council adopted resolution 1284 in December 1999, although China, France and Russia abstained.[2]

30. The resolution established:

- a new inspectorate, the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) (which Dr Hans Blix was subsequently appointed to lead);
- a timetable to identify and agree a work programme; and
- the principle that, if the inspectors reported co-operation in key areas, that would lead to the suspension of economic sanctions.[3]

31. Resolution 1284 described Iraq's obligations to comply with the disarmament standards of resolution 687 and other related resolutions as the "governing standard of Iraqi compliance"; and provided that the Security Council would decide what was required of Iraq for the implementation of each task and that it should be "clearly defined and precise".

32. The resolution was also a deliberate compromise which changed the criterion for the suspension, and eventual lifting, of sanctions from complete disarmament to tests which would be based on judgements by UNMOVIC on the progress made in completing identified tasks.

33. Iraq refused to accept the provisions of resolution 1284, including the re-admission of weapons inspectors. Concerns about Iraq's activities in the absence of inspectors increased.

34. The US Presidential election in November 2000 prompted a further UK review of the operation of the containment policy (see Section 1.2). There were concerns about how long the policy could be sustained and what it could achieve.

35. There were also concerns over both the continued legal basis for operations in the No-Fly Zones (NFZs) and the conduct of individual operations.[4]

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[1] Joint Memorandum by the Secretary of State for Foreign and Commonwealth Affairs and the Secretary of State for Defence, 17 May 1999, 'Iraq Future Strategy'.
[2] UN Security Council Press Release, 17 December 1999, *Security Council Establishes New Monitoring Commission For Iraq Adopting Resolution 1284 (1999) By Vote of 11-0-4 (*SC/6775).
[3] UN Security Council, '4084th Meeting Friday 17 December 1999' (S/PV.4084).
[4] Letter Goulty to McKane, 20 October 2000, 'Iraq'.

36. In an Assessment on 1 November, the Joint Intelligence Committee (JIC) judged that Saddam Hussein felt "**little pressure to negotiate** over ... resolution 1284 because the proceeds of oil smuggling and illicit trade have increased significantly this year, and more countries are increasing diplomatic contacts and trade with Iraq".[5]

37. The JIC also judged:

> "Saddam would only contemplate co-operation with [resolution] 1284, and the return of inspectors ... if it could be portrayed as a victory. He will not agree to co-operate unless:
>
> - there is a **UN-agreed timetable for the lifting of sanctions**. Saddam suspects that the US would not agree to sanctions lift while he remained in power;
> - he is **able to negotiate with the UN in advance to weaken the inspection provisions**. His ambitions to rebuild Iraq's weapons of mass destruction programmes makes him hostile to intrusive inspections or any other constraints likely to be effective.
>
> "Before accepting 1284, Saddam will try to obtain the abolition of the No-Fly Zones. He is also likely to demand that the US should abandon its stated aim to topple the Iraqi regime."

38. In November 2000, Mr Blair's "preferred option" was described as the implementation of 1284, enabling inspectors to return and sanctions to be suspended.[6]

39. In December 2000, the British Embassy Washington reported growing pressure to change course from containment to military action to oust Saddam Hussein, but no decision to change policy or to begin military planning had been taken by President Clinton.[7]

40. The Key Judgements of a JIC Assessment in February 2001 included:

- There was "broad international consensus to **maintain the arms embargo** at least as long as Saddam remains in power. **Saddam faces no economic pressure to accept** ... [resolution] **1284 because he is successfully undermining the economic sanctions regime**."
- "Through abuse of the UN Oil-for-Food [OFF] programme and smuggling of oil and other goods" it was estimated that Saddam Hussein would "**be able to appropriate in the region of $1.5bn to $1.8bn in cash and goods in 2001**", and there was "scope for earning even more".

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[5] JIC Assessment, 1 November 2000, 'Iraq: Prospects for Co-operation with UNSCR 1284'.
[6] Letter Sawers to Cowper-Coles, 27 November 2000, 'Iraq'.
[7] Letter Barrow to Sawers, 15 December 2000, 'Iraq'.

- "**Iranian** interdiction efforts" had "**significantly reduced smuggling down the Gulf**", but Saddam Hussein had "compensated by **exploiting land routes** to Turkey and Syria".
- "**Most countries**" believed that economic sanctions were "**ineffective, counterproductive and should now be lifted**. Without active enforcement, the economic sanctions regime" would "continue to erode".[8]

41. The Assessment also stated:

- Saddam Hussein needed funds "to maintain his military and security apparatus and secure its loyalty".
- Despite the availability of funds, Iraq had been slow to comply with UN recommendations on food allocation. Saddam needed "**the Iraqi people to suffer to underpin his campaign against sanctions**".
- Encouraged by the success of Iraq's border trade agreement with Turkey, "**front-line states**" were "**not enforcing sanctions**".
- There had been a "**significant increase in the erosion of sanctions** over the past six months".

42. When Mr Blair had his first meeting with President Bush at Camp David in late February 2001, the US and UK agreed on the need for a policy which was more widely supported in the Middle East region.[9] Mr Blair had concluded that public presentation needed to be improved. He suggested that the approach should be presented as a "deal" comprising four elements:

- do the right thing by the Iraqi people, with whom we have no quarrel;
- tighten weapons controls on Saddam Hussein;
- retain financial control on Saddam Hussein; and
- retain our ability to strike.

43. The stated position of the UK Government in February 2001 was that containment had been broadly successful.[10]

44. During the summer of 2001, the UK had been exploring the way forward with the US, Russia and France on a draft Security Council resolution to put in place a "smart sanctions" regime.[11] But there was no agreement on the way ahead between the UK, the US, China, France and Russia, the five Permanent Members of the UN Security Council.

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[8] JIC Assessment, 14 February 2001, 'Iraq: Economic Sanctions Eroding'.
[9] Letter Sawers to Cowper-Coles, 24 February 2001, 'Prime Minister's Talks with President Bush, Camp David, 23 February 2001'.
[10] House of Commons, *Official Report*, 26 February 2001, column 620.
[11] Minute McKane to Manning, 18 September 2001, 'Iraq Stocktake'.

45. Mr Blair told the Inquiry that, until 11 September 2001, the UK had a policy of containment, but sanctions were eroding.[12] The policy was "partially successful", but it did not mean that Saddam Hussein was "not still developing his [prohibited] programmes".

The impact of 9/11

46. The attacks on the US on 11 September 2001 changed perceptions about the severity and likelihood of the threat from international terrorism. They showed that attacks intended to cause large-scale civilian casualties could be mounted anywhere in the world.

47. In response to that perception of a greater threat, governments felt a responsibility to act to anticipate and reduce risks before they turned into a threat. That was described to the Inquiry by a number of witnesses as a change to the "calculus of risk" after 9/11.

48. In the wake of the attacks, Mr Blair declared that the UK would stand "shoulder to shoulder" with the US to defeat and eradicate international terrorism.[13]

49. The JIC assessed on 18 September that the attacks on the US had "set a new benchmark for terrorist atrocity", and that terrorists seeking comparable impact might try to use chemical, biological, radiological or nuclear devices.[14] Only Islamic extremists such as those who shared Usama Bin Laden's agenda had the motivation to pursue attacks with the deliberate aim of causing maximum casualties.

50. Throughout the autumn of 2001, Mr Blair took an active and leading role in building a coalition to act against that threat, including military action against Al Qaida and the Taliban regime in Afghanistan. He also emphasised the potential risk of terrorists acquiring and using nuclear, biological or chemical weapons, and the dangers of inaction.

51. In November 2001, the JIC assessed that Iraq had played no role in the 9/11 attacks on the US and that practical co-operation between Iraq and Al Qaida was "unlikely".[15] There was no "credible evidence of covert transfers of WMD-related technology and expertise to terrorist groups". It was possible that Iraq might use WMD in terrorist attacks, but only if the regime was under serious and imminent threat of collapse.

52. The UK continued actively to pursue a strengthened policy of containing Iraq, through a revised and more targeted sanctions regime and seeking Iraq's agreement to the return of inspectors as required by resolution 1284 (1999).

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[12] Public hearing, 21 January 2011, page 8.
[13] The National Archives, 11 September 2001, *September 11 attacks: Prime Minister's statement.*
[14] JIC Assessment, 18 September 2001, 'UK Vulnerability to Major Terrorist Attack'.
[15] JIC Assessment, 28 November 2001, 'Iraq after September 11 – The Terrorist Threat'.

53. The adoption on 29 November 2001 of resolution 1382 went some way towards that objective. But support for economic sanctions was eroding and whether Iraq would ever agree to re-admit weapons inspectors and allow them to operate without obstruction was in doubt.

54. Although there was no evidence of links between Iraq and Al Qaida, Mr Blair encouraged President Bush to address the issue of Iraq in the context of a wider strategy to confront terrorism after the attacks of 9/11. He sought to prevent precipitate military action by the US which he considered would undermine the success of the coalition which had been established for action against international terrorism.

55. President Bush's remarks[16] on 26 November renewed UK concerns that US attention was turning towards military action in Iraq.

56. Following a discussion with President Bush on 3 December, Mr Blair sent him a paper on a second phase of the war against terrorism.[17]

57. On Iraq, Mr Blair suggested a strategy for regime change in Iraq. This would build over time until the point was reached where "military action could be taken if necessary", without losing international support.

58. The strategy was based on the premise that Iraq was a threat which had to be dealt with, and it had multiple diplomatic strands. It entailed renewed demands for Iraq to comply with the obligations imposed by the Security Council and for the re-admission of weapons inspectors, and a readiness to respond firmly if Saddam Hussein failed to comply.

59. Mr Blair did not, at that stage, have a ground invasion of Iraq or immediate military action of any sort in mind. The strategy included mounting covert operations in support of those "with the ability to topple Saddam". But Mr Blair did state that, when a rebellion occurred, the US and UK should "back it militarily".

60. That was the first step towards a policy of possible intervention in Iraq.

61. A number of issues, including the legal basis for any military action, would need to be resolved as part of developing the strategy.

62. The UK Government does not appear to have had any knowledge at that stage that President Bush had asked General Tommy Franks, Commander in Chief, US Central Command, to review the military options for removing Saddam Hussein, including options for a conventional ground invasion.

63. Mr Blair also emphasised the threat which Iraq might pose in the future. That remained a key part of his position in the months that followed.

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[16] The White House, 26 November 2001, *The President Welcomes Aid Workers Rescued from Afghanistan.*
[17] Paper [Blair to Bush], 4 December 2001, 'The War against Terrorism: The Second Phase'.

64. In his annual State of the Union speech on 29 January 2002, President Bush described the regimes in North Korea and Iran as "sponsors of terrorism".[18] He added that Iraq had continued to:

> "... flaunt its hostility towards America and to support terror ... The Iraqi regime has plotted to develop anthrax, and nerve gas, and nuclear weapons for over a decade. This is a regime that has already used poison gas to murder thousands of its own citizens ... This is a regime that agreed to international inspections – then kicked out the inspectors. This is a regime that has something to hide from the civilized world."

65. President Bush stated:

> "States like these [North Korea, Iran and Iraq], and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world. By seeking weapons of mass destruction these regimes pose a grave and growing danger."

66. From late February 2002, Mr Blair and Mr Straw began publicly to argue that Iraq was a threat which had to be dealt with. Iraq needed to disarm or be disarmed.

67. The urgency and certainty with which the position was stated reflected the ingrained belief that Saddam Hussein's regime retained chemical and biological warfare capabilities, was determined to preserve and if possible enhance its capabilities, including at some point in the future a nuclear capability, and was pursuing an active policy of deception and concealment. It also reflected the wider context in which the policy was being discussed with the US.

68. On 26 February 2002, Sir Richard Dearlove, the Chief of the Secret Intelligence Service, advised that the US Administration had concluded that containment would not work, was drawing up plans for a military campaign later in the year, and was considering presenting Saddam Hussein with an ultimatum for the return of inspectors while setting the bar "so high that Saddam Hussein would be unable to comply".[19]

69. The following day, the JIC assessed that Saddam Hussein feared a US military attack on the scale of the 1991 military campaign to liberate Kuwait but did not regard such an attack as inevitable; and that Iraqi opposition groups would not act without "visible and sustained US military support on the ground".[20]

70. At Cabinet on 7 March, Mr Blair and Mr Straw emphasised that no decisions to launch further military action had been taken and any action taken would be in accordance with international law.

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[18] The White House, 29 January 2002, *The President's State of the Union Address.*
[19] Letter C to Manning, 26 February 2002, 'US Policy on Iraq'.
[20] JIC Assessment, 27 February 2002, 'Iraq: Saddam Under the Spotlight'.

71. The discussion in Cabinet was couched in terms of Iraq's need to comply with its obligations, and future choices by the international community on how to respond to the threat which Iraq represented.

72. Cabinet endorsed the conclusion that Iraq's WMD programmes posed a threat to peace, and endorsed a strategy of engaging closely with the US Government in order to shape policy and its presentation. It did not discuss how that might be achieved.

73. Mr Blair sought and was given information on a range of issues before his meeting with President Bush at Crawford on 5 and 6 April. But no formal and agreed analysis of the issues and options was sought or produced, and there was no collective consideration of such advice.

74. Mr Straw's advice of 25 March proposed that the US and UK should seek an ultimatum to Saddam Hussein to re-admit weapons inspectors.[21] That would provide a route for the UK to align itself with the US without adopting the US objective of regime change. This reflected advice that regime change would be unlawful.

75. At Crawford, Mr Blair offered President Bush a partnership in dealing urgently with the threat posed by Saddam Hussein. He proposed that the UK and the US should pursue a strategy based on an ultimatum calling on Iraq to permit the return of weapons inspectors or face the consequences.[22]

76. President Bush agreed to consider the idea but there was no decision until September 2002.

77. In the subsequent press conference on 6 April, Mr Blair stated that "doing nothing" was not an option: the threat of WMD was real and had to be dealt with.[23] The lesson of 11 September was to ensure that "groups" were not allowed to develop a capability they might use.

78. In his memoir, Mr Blair characterised the message that he and President Bush had delivered to Saddam Hussein as "change the regime attitude on WMD inspections or face the prospect of changing regime".[24]

79. Documents written between April and July 2002 reported that, in the discussion with President Bush at Crawford, Mr Blair had set out a number of considerations in relation to the development of policy on Iraq. These were variously described as:

- The UN inspectors needed to be given every chance of success.
- The US should take action within a multilateral framework with international support, not unilateral action.

---

[21] Minute Straw to Prime Minister, 25 March 2002, 'Crawford/Iraq'.
[22] Letter Manning to McDonald, 8 April 2002, 'Prime Minister's Visit to the United States: 5-7 April'.
[23] The White House, 6 April 2002, *President Bush, Prime Minister Blair Hold Press Conference.*
[24] Blair T. *A Journey*. Hutchinson, 2010.

- A public information campaign should be mounted to explain the nature of Saddam Hussein's regime and the threat he posed.
- Any military action would need to be within the framework of international law.
- The military strategy would need to ensure Saddam Hussein could be removed quickly and successfully.
- A convincing "blueprint" was needed for a post-Saddam Hussein Iraq which would be acceptable to both Iraq's population and its neighbours.
- The US should advance the Middle East Peace Process in order to improve the chances of gaining broad support in the Middle East for military action against Iraq; and to pre-empt accusations of double standards.
- Action should enhance rather than diminish regional stability.
- Success would be needed in Afghanistan to demonstrate the benefits of regime change.

80. Mr Blair considered that he was seeking to influence US policy by describing the key elements for a successful strategy to secure international support for any military action against Iraq.

81. Key Ministers and some of their most senior advisers thought these were the conditions that would need to be met if the UK was to participate in US-led military action.

82. By July, no progress had been made on the ultimatum strategy and Iraq was still refusing to admit weapons inspectors as required by resolution 1284 (1999).

83. The UK Government was concerned that the US Administration was contemplating military action in circumstances where it would be very difficult for the UK to participate in or, conceivably, to support that action.

84. To provide the basis for a discussion with the US, a Cabinet Office paper of 19 July, 'Iraq: Conditions for Military Action', identified the conditions which would be necessary before military action would be justified and the UK could participate in such action.[25]

85. The Cabinet Office paper stated that Mr Blair had said at Crawford:

> "... that the UK would support military action to bring about regime change, provided that certain conditions were met:
>
> - efforts had been made to construct a coalition/shape public opinion,
> - the Israel-Palestine Crisis was quiescent, and
> - the options for action to eliminate Iraq's WMD through the UN weapons inspectors had been exhausted."

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[25] Paper Cabinet Office, 19 July 2002, 'Iraq: Conditions for Military Action'.

86. The Cabinet Office paper also identified the need to address the issue of whether the benefits of military action would outweigh the risks.

87. The potential mismatch between the timetable and work programme for UNMOVIC stipulated in resolution 1284 (1999) and the US plans for military action was recognised by officials during the preparation of the Cabinet Office paper.[26]

88. The issue was not addressed in the final paper submitted to Ministers on 19 July.[27]

89. Sir Richard Dearlove reported that he had been told that the US had already taken a decision on action – "the question was only how and when"; and that he had been told it intended to set the threshold on weapons inspections so high that Iraq would not be able to hold up US policy.[28]

90. Mr Blair's meeting with Ministerial colleagues and senior officials on 23 July was not seen by those involved as having taken decisions.[29]

91. Further advice and background material were commissioned, including on the possibility of a UN ultimatum to Iraq and the legal basis for action. The record stated:

> "We should work on the assumption that the UK would take part in any military action. But we needed a fuller picture of US planning before we could take any firm decisions. CDS [the Chief of the Defence Staff, Admiral Sir Michael Boyce] should tell the US military that we were considering a range of options."

92. Mr Blair was advised that there would be "formidable obstacles" to securing a new UN resolution incorporating an ultimatum without convincing evidence of a greatly increased threat from Iraq.[30] A great deal more work would be needed to clarify what the UK was seeking and how its objective might best be achieved.

93. Mr Blair's Note to President Bush of 28 July sought to persuade President Bush to use the UN to build a coalition for action by seeking a partnership between the UK and the US and setting out a framework for action.[31]

94. The Note began:

> "I will be with you, whatever. But this is the moment to assess bluntly the difficulties. The planning on this and the strategy are the toughest yet. This is not Kosovo. This is not Afghanistan. It is not even the Gulf War.

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[26] Paper [Draft] Cabinet Office, 'Iraq: Conditions for Military Action' attached to Minute McKane to Bowen, 16 July 2002, 'Iraq'.
[27] Paper Cabinet Office, 19 July 2002, 'Iraq: Conditions for Military Action'.
[28] Report, 22 July 2002, 'Iraq [C's account of discussions with Dr Rice]'.
[29] Minute Rycroft to Manning, 23 July 2002, 'Iraq: Prime Minister's Meeting, 23 July'.
[30] Letter McDonald to Rycroft, 26 July 2002, 'Iraq: Ultimatum' attaching Paper 'Elements which might be incorporated in an SCR embodying an ultimatum to Iraq'.
[31] Note Blair [to Bush], 28 July 2002, 'Note on Iraq'.

"The military part of this is hazardous but I will concentrate mainly on the political context for success."

95. Mr Blair stated that getting rid of Saddam Hussein was:

"... the right thing to do. He is a potential threat. He could be contained. But containment ... is always risky. His departure would free up the region. And his regime is ... brutal and inhumane ..."

96. Mr Blair told President Bush that the UN was the simplest way to encapsulate a "casus belli" in some defining way, with an ultimatum to Iraq once military forces started to build up in October. That might be backed by a UN resolution.

97. Mr Blair thought it unlikely that Saddam Hussein intended to allow inspectors to return. If he did, the JIC had advised that Iraq would obstruct the work of the inspectors. That could result in a material breach of the obligations imposed by the UN.

98. A workable military plan to ensure the collapse of the regime would be required.

99. The Note reflected Mr Blair's own views. The proposals had not been discussed or agreed with his colleagues.

Decision to take the UN route

100. Sir David Manning, Mr Blair's Foreign Policy Adviser, told President Bush that it would be impossible for the UK to take part in any action against Iraq unless it went through the UN.

101. When Mr Blair spoke to President Bush on 31 July the "central issue of a casus belli" and the need for further work on the optimal route to achieve that was discussed.[32] Mr Blair said that he wanted to explore whether the UN was the right route to set an ultimatum or whether it would be an obstacle.

102. In late August, the FCO proposed a strategy of coercion, using a UN resolution to issue an ultimatum to Iraq to admit the weapons inspectors and disarm. The UK was seeking a commitment from the Security Council to take action in the event that Saddam Hussein refused or subsequently obstructed the inspectors.

103. Reflecting the level of public debate and concern, Mr Blair decided in early September that an explanation of why action was needed to deal with Iraq should be published.

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[32] Rycroft to McDonald, 31 July 2002, 'Iraq: Prime Minister's Phone Call with President Bush, 31 July'.

104. In his press conference at Sedgefield on 3 September, Mr Blair indicated that time and patience were running out and that there were difficulties with the existing policy of containment.[33] He also announced the publication of the Iraq dossier, stating that:

> "... people will see that there is no doubt at all the United Nations resolutions that Saddam is in breach of are there for a purpose. He [Saddam Hussein] is without any question, still trying to develop that chemical, biological, potentially nuclear capability and to allow him to do so without any let or hindrance, just to say, we [sic] can carry on and do it, I think would be irresponsible."

105. President Bush decided in the meeting of the National Security Council on 7 September to take the issue of Iraq back to the UN.

106. The UK was a key ally whose support was highly desirable for the US. The US Administration had been left in no doubt that the UK Government needed the issue of Iraq to be taken back to the Security Council before it would be able to participate in military action in Iraq.

107. The objective of the subsequent discussions between President Bush and Mr Blair at Camp David was, as Mr Blair stated in the press conference before the discussions, to work out the strategy.[34]

108. Mr Blair told President Bush that he was in no doubt about the need to deal with Saddam Hussein.[35]

109. Although at that stage no decision had been taken on which military package might be offered to the US for planning purposes, Mr Blair also told President Bush that, if it came to war, the UK would take a significant military role.

110. In his speech to the General Assembly on 12 September, President Bush set out his view of the "grave and gathering danger" posed by Saddam Hussein and challenged the UN to act to address Iraq's failure to meet the obligations imposed by the Security Council since 1990.[36] He made clear that, if Iraq defied the UN, the world must hold Iraq to account and the US would "work with the UN Security Council for the necessary resolutions". But the US would not stand by and do nothing in the face of the threat.

111. Statements made by China, France and Russia in the General Assembly debate after President Bush's speech highlighted the different positions of the five Permanent Members of the Security Council, in particular about the role of the Council in deciding whether military action was justified.

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[33] The National Archives, 3 September 2002, *PM press conference* [at Sedgefield].
[34] The White House, 7 September 2002, *President Bush, Prime Minister Blair Discuss Keeping the Peace*.
[35] Minute Manning to Prime Minister, 8 September 2002, 'Your Visit to Camp David on 7 September: Conversation with President Bush'.
[36] The White House, 12 September 2002, *President's Remarks to the United Nations General Assembly.*

112. The Government dossier on Iraq was published on 24 September.[37] It was designed to "make the case" and secure Parliamentary (and public) support for the Government's policy that action was urgently required to secure Iraq's disarmament.

113. In his statement to Parliament on 24 September and in his answers to subsequent questions, Mr Blair presented Iraq's past, current and potential future capabilities as evidence of the severity of the potential threat from Iraq's weapons of mass destruction. He said that at some point in the future that threat would become a reality.[38]

114. Mr Blair wrote his statement to the House of Commons himself and chose the arguments to make clear his perception of the threat and why he believed that there was an "overwhelming" case for action to disarm Iraq.

115. Addressing the question of why Saddam Hussein had decided in mid-September, but not before, to admit the weapons inspectors, Mr Blair stated that the answer was in the dossier, and it was because:

> "... his chemical, biological and nuclear programme is not an historic left-over from 1998. The inspectors are not needed to clean up the old remains. His weapons of mass destruction programme is active detailed and growing. The policy of containment is not working. The weapons of mass destruction programme is not shut down; it is up and running now."

116. Mr Blair posed, and addressed, three questions: "Why Saddam?"; "Why now?"; and "Why should Britain care?"

117. On the question "Why Saddam?", Mr Blair said that two things about Saddam Hussein stood out: "He had used these weapons in Iraq" and thousands had died, and he had used them during the war with Iran "in which one million people died"; and the regime had "no moderate elements to appeal to".

118. On the question "Why now?", Mr Blair stated:

> "I agree I cannot say that this month or next, even this year or next, Saddam will use his weapons. But I can say that if the international community, having made the call for his disarmament, now, at this moment, at the point of decision, shrugs its shoulders and walks away, he will draw the conclusion dictators faced with a weakening will always draw: that the international community will talk but not act, will use diplomacy but not force. We know, again from our history, that diplomacy not backed by the threat of force has never worked with dictators and never will."

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[37] *Iraq's Weapons of Mass Destruction. The Assessment of the British Government*, 24 September 2002.
[38] House of Commons, *Official Report*, 24 September 2002, columns 1-23.

Negotiation of resolution 1441

119. There were significant differences between the US and UK positions, and between them and China, France and Russia about the substance of the strategy to be adopted, including the role of the Security Council in determining whether peaceful means had been exhausted and the use of force to secure disarmament was justified.

120. Those differences resulted in difficult negotiations over more than eight weeks before the unanimous adoption of resolution 1441 on 8 November 2002.

121. When President Bush made his speech on 12 September, the US and UK had agreed the broad approach, but not the substance of the proposals to be put to the UN Security Council or the tactics.

122. Dr Naji Sabri, the Iraqi Foreign Minister, wrote to Mr Kofi Annan, the UN Secretary-General, on 16 September to inform him that, following the series of talks between Iraq and the UN in New York and Vienna between March and July 2002 and the latest round in New York on 14 and 15 September, Iraq had decided "to allow the return of United Nations inspectors to Iraq without conditions".[39]

123. The US and UK immediately expressed scepticism. They had agreed that the provisions of resolution 1284 (1999) were no longer sufficient to secure the disarmament of Iraq and a strengthened inspections regime would be required.

124. A new resolution would be needed both to maintain the pressure on Iraq and to define a more intrusive inspections regime allowing the inspectors unconditional and unrestricted access to all Iraqi facilities.

125. The UK's stated objective for the negotiation of resolution 1441 was to give Saddam Hussein "one final chance to comply" with his obligations to disarm. The UK initially formulated the objective in terms of:

- a resolution setting out an ultimatum to Iraq to re-admit the UN weapons inspectors and to disarm in accordance with its obligations; and
- a threat to resort to the use of force to secure disarmament if Iraq failed to comply.[40]

126. Lord Goldsmith, the Attorney General, informed Mr Blair on 22 October that, although he would not be able to give a final view until the resolution was adopted, the draft of the resolution of 19 October would not on its own authorise military action.[41]

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[39] UN Security Council, 16 September 2002, 'Letter dated 16 September from the Minister of Foreign Affairs of Iraq addressed to the Secretary-General', attached to 'Letter dated 16 September from the Secretary-General addressed to the President of the Security Council' (S/2002/1034).
[40] Minute Straw to Prime Minister, 14 September 2002, 'Iraq: Pursuing the UN Route'.
[41] Minute Adams to Attorney General, 22 October 2002, 'Iraq: Meeting with the Prime Minister, 22 October' attaching Briefing, 'Lines to take'.

127. Mr Blair decided on 31 October to offer significant forces for ground operations to the US for planning purposes.[42]

128. During the negotiations, France and Russia made clear their opposition to the use of force, without firm evidence of a further material breach and a further decision in the Security Council.

129. The UK was successful in changing some aspects of the US position during the negotiations, in particular ensuring that the Security Council resolution was based on the disarmament of Iraq rather than wider issues as originally proposed by the US.

130. To secure consensus in the Security Council despite the different positions of the US and France and Russia (described by Sir Jeremy Greenstock, the UK Permanent Representative to the UN in New York, as "irreconcilable"), resolution 1441 was a compromise containing drafting "fixes". That created deliberate ambiguities on a number of key issues including:

- the level of non-compliance with resolution 1441 which would constitute a material breach;
- by whom that determination would be made; and
- whether there would be a second resolution explicitly authorising the use of force.

131. As the Explanations of Vote demonstrated, there were significant differences between the positions of the members of the Security Council about the circumstances and timing of recourse to military action. There were also differences about whether Member States should be entitled to report Iraqi non-compliance to the Council.

132. Mr Blair, Mr Straw and other senior UK participants in the negotiation of resolution 1441 envisaged that, in the event of a material breach of Iraq's obligations, a second resolution determining that a breach existed and authorising the use of force was likely to be tabled in the Security Council.

133. Iraq announced on 13 November that it would comply with resolution 1441.[43]

134. Iraq also restated its position that it had neither produced nor was in possession of weapons of mass destruction since the inspectors left in December 1998. It explicitly challenged the UK statement on 8 November that Iraq had "decided to keep possession" of its WMD.

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[42] Letter Wechsberg to Watkins, 31 October 2002, 'Iraq: Military Options'.
[43] UN Security Council, 13 November 2002, 'Letter dated 13 November 2002 from the Minister for Foreign Affairs of Iraq addressed to the Secretary-General' (S/2002/1242).

The prospect of military action

135. Following Iraq's submission of the declaration on its chemical, biological, nuclear and ballistic missile programmes to the UN on 7 December, and before the inspectors had properly begun their task, the US concluded that Saddam Hussein was not going to take the final opportunity offered by resolution 1441 to comply with his obligations.

136. Mr Blair was advised on 11 December that there was impatience in the US Administration and it was looking at military action as early as mid-February 2003.[44]

137. Mr Blair told President Bush on 16 December that the Iraqi declaration was "patently false".[45] He was "cautiously optimistic" that the inspectors would find proof.

138. In a statement issued on 18 December, Mr Straw said that Saddam Hussein had decided to continue the pretence that Iraq had no WMD programme. If he persisted "in this obvious falsehood" it would become clear that he had "rejected the pathway to peace".[46]

139. The JIC's initial Assessment of the Iraqi declaration on 18 December stated that there had been "No serious attempt" to answer any of the unresolved questions highlighted by the UN Special Commission (UNSCOM) or to refute any of the points made in the UK dossier on Iraq's WMD programme.[47]

140. President Bush is reported to have told a meeting of the US National Security Council on 18 December 2002, at which the US response to Iraq's declaration was discussed, that the point of the 7 December declaration was to test whether Saddam Hussein would accept the "final opportunity" for peace offered by the Security Council.[48] He had summed up the discussion by stating:

> "We've got what we need now, to show America that Saddam won't disarm himself."

141. Mr Colin Powell, the US Secretary of State, stated on 19 December that Iraq was "well on its way to losing its last chance", and that there was a "practical limit" to how long the inspectors could be given to complete their work.[49]

142. Mr Straw told Secretary Powell on 30 December that the US and UK should develop a clear "plan B" postponing military action on the basis that inspections plus the threat of force were containing Saddam Hussein.[50]

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[44] Minute Manning to Prime Minister, 11 December 2002, 'Iraq'.
[45] Letter Rycroft to McDonald, 16 December 2002, 'Prime Minister's Telephone Call with President Bush, 16 December'.
[46] The National Archives, 18 December 2002, *Statement by Foreign Secretary on Iraq Declaration.*
[47] JIC Assessment, 18 December 2002, 'An Initial Assessment of Iraq's WMD Declaration'.
[48] Feith DJ. *War and Decision: Inside the Pentagon at the Dawn of the War on Terrorism.* HarperCollins, 2008.
[49] US Department of State Press Release, *Press Conference Secretary of State Colin L Powell, Washington, 19 December 2002*.
[50] Letter Straw to Manning, 30 December 2002, 'Iraq: Conversation with Colin Powell, 30 December'.

143. In early 2003, Mr Straw still thought a peaceful solution was more likely than military action. Mr Straw advised Mr Blair on 3 January that he had concluded that, in the potential absence of a "smoking gun", there was a need to consider a "Plan B".[51] The UK should emphasise to the US that the preferred strategy was peaceful disarmament.

144. Mr Blair took a different view. By the time he returned to the office on 4 January 2003, he had concluded that the "likelihood was war" and, if conflict could not be avoided, the right thing to do was fully to support the US.[52] He was focused on the need to establish evidence of an Iraqi breach, to persuade opinion of the case for action and to finalise the strategy with President Bush at the end of January.

145. The UK objectives were published in a Written Ministerial Statement by Mr Straw on 7 January.[53] The "prime objective" was:

> "... to rid Iraq of its weapons of mass destruction (WMD) and their associated programmes and means of delivery, including prohibited ballistic missiles ... as set out in UNSCRs [UN Security Council resolutions]. This would reduce Iraq's ability to threaten its neighbours and the region, and prevent Iraq using WMD against its own people. UNSCRs also require Iraq to renounce terrorism, and return captured Kuwaitis and property taken from Kuwait."

146. Lord Goldsmith gave Mr Blair his draft advice on 14 January that resolution 1441 would not by itself authorise the use of military force.[54]

147. Mr Blair agreed on 17 January to deploy a UK division with three combat brigades for possible operations in southern Iraq.[55]

148. There was no collective discussion of the decision by senior Ministers.

149. In January 2003, there was a clear divergence between the UK and US Government positions over the timetable for military action, and the UK became increasingly concerned that US impatience with the inspections process would lead to a decision to take unilateral military action in the absence of support for such action in the Security Council.

150. On 23 January, Mr Blair was advised that the US military would be ready for action in mid-February.[56]

151. In a Note to President Bush on 24 January, Mr Blair wrote that the arguments for proceeding with a second Security Council resolution, "or at the very least a

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[51] Minute Straw to Prime Minister, 3 January 2003, 'Iraq - Plan B'.
[52] Note Blair [to No.10 officials], 4 January 2003, [extract 'Iraq'].
[53] House of Commons, *Official Report*, 7 January 2003, columns 4-6WS.
[54] Minute [Draft] [Goldsmith to Prime Minister], 14 January 2003, 'Iraq: Interpretation of Resolution 1441'.
[55] Letter Manning to Watkins, 17 January 2003, 'Iraq: UK Land Contribution'.
[56] Letter PS/C to Manning, 23 January 2003, [untitled].

clear statement" from Dr Blix which allowed the US and UK to argue that a failure to pass a second resolution was in breach of the spirit of 1441, remained in his view, overwhelming; and that inspectors should be given until the end of March or early April to carry out their task.[57]

152. Mr Blair suggested that, in the absence of a "smoking gun", Dr Blix would be able to harden up his findings on the basis of a pattern of non-co-operation from Iraq and that that would be sufficient for support for military action in the Security Council.

153. The US and UK should seek to persuade others, including Dr Blix, that that was the "true view" of resolution 1441.

154. Mr Blair used an interview on *Breakfast with Frost* on 26 January to set out the position that the inspections should be given sufficient time to determine whether or not Saddam Hussein was co-operating fully.[58] If he was not, that would be a sufficient reason for military action. A find of WMD was not required.

155. Mr Blair's proposed approach to his meeting with President Bush was discussed in a meeting of Ministers before Cabinet on 30 January and then discussed in general terms in Cabinet itself.

156. In a Note prepared before his meeting with President Bush on 31 January, Mr Blair proposed seeking a UN resolution on 5 March followed by an attempt to "mobilise Arab opinion to try to force Saddam out" before military action on 15 March.[59]

157. When Mr Blair met President Bush on 31 January, it was clear that the window of opportunity before the US took military action would be very short. The military campaign could begin "around 10 March".[60]

158. President Bush agreed to seek a second resolution to help Mr Blair, but there were major reservations within the US Administration about the wisdom of that approach.

159. Mr Blair confirmed that he was "solidly with the President and ready to do whatever it took to disarm Saddam" Hussein.

160. Reporting on his visit to Washington, Mr Blair told Parliament on 3 February 2003 that Saddam Hussein was not co-operating as required by resolution 1441 and, if that continued, a second resolution should be passed to confirm such a material breach.[61]

161. Mr Blair continued to set the need for action against Iraq in the context of the need to be seen to enforce the will of the UN and to deter future threats.

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[57] Letter Manning to Rice, 24 January 2003, [untitled], attaching Note [Blair to Bush], [undated], 'Note'.
[58] *BBC News*, 26 January 2003, *Breakfast with Frost.*
[59] Note [Blair to Bush], [undated], 'Countdown'.
[60] Letter Manning to McDonald, 31 January 2003, 'Iraq: Prime Minister's Conversation with President Bush on 31 January'.
[61] House of Commons, *Official Report*, 3 February 2003, columns 21-38.

The gap between the Permanent Members of the Security Council widens

162. In their reports to the Security Council on 14 February:

- Dr Blix reported that UNMOVIC had not found any weapons of mass destruction and the items that were not accounted for might not exist, but Iraq needed to provide the evidence to answer the questions, not belittle them.
- Dr Mohamed ElBaradei, Director General of the International Atomic Energy Agency (IAEA), reported that the IAEA had found no evidence of ongoing prohibited nuclear or nuclear-related activities in Iraq although a number of issues were still under investigation.[62]

163. In the subsequent debate, members of the Security Council voiced widely divergent views.

164. Mr Annan concluded that there were real differences on strategy and timing in the Security Council. Iraq's non-co-operation was insufficient to bring members to agree that war was justified; they would only move if they came to their own judgement that inspections were pointless.[63]

165. On 19 February, Mr Blair sent President Bush a six-page Note. He proposed focusing on the absence of full co-operation and a "simple" resolution stating that Iraq had failed to take the final opportunity, with a side statement defining tough tests of co-operation and a vote on 14 March to provide a deadline for action.[64]

166. President Bush and Mr Blair agreed to introduce a draft resolution at the UN the following week but its terms were subject to further discussion.[65]

167. On 20 February, Mr Blair told Dr Blix that he wanted to offer the US an alternative strategy which included a deadline and tests for compliance.[66] He did not think Saddam Hussein would co-operate but he would try to get Dr Blix as much time as possible. Iraq could have signalled a change of heart in the December declaration. The Americans did not think that Saddam was going to co-operate: "Nor did he. But we needed to keep the international community together."

168. Dr Blix stated that full co-operation was a nebulous concept; and a deadline of 15 April would be too early. Dr Blix commented that "perhaps there was not much WMD in Iraq after all". Mr Blair responded that "even German and French intelligence were sure that there was WMD in Iraq". Dr Blix said they seemed "unsure" about "mobile BW

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[62] UN Security Council, '4707th Meeting Friday 14 February 2003' (S/PV.4707).
[63] Telegram 268 UKMIS New York to FCO London, 15 February 2003, 'Foreign Secretary's Meeting with the UN Secretary-General: 14 February'.
[64] Letter Manning to Rice, 19 February 2003, 'Iraq' attaching Note [Blair to Bush], [undated], 'Note'.
[65] Letter Rycroft to McDonald, 19 February 2003, 'Iraq and MEPP: Prime Minister's Telephone Conversation with Bush, 19 February'.
[66] Letter Cannon to Owen, 20 February 2003, 'Iraq: Prime Minister's Conversation with Blix'.

production facilities": "It would be paradoxical and absurd if 250,000 men were to invade Iraq and find very little."

169. Mr Blair responded that "our intelligence was clear that Saddam had reconstituted his WMD programme".

170. On 24 February, the UK, US and Spain tabled a draft resolution stating that Iraq had failed to take the final opportunity offered by resolution 1441 and that the Security Council had decided to remain seized of the matter.[67] The draft failed to attract support.

171. France, Germany and Russia responded by tabling a memorandum, building on their tripartite declaration of 10 February, stating that "full and effective disarmament" remained "the imperative objective of the international community".[68] That "should be achieved peacefully through the inspection regime". The "conditions for using force" had "not been fulfilled". The Security Council "must step up its efforts to give a real chance to the peaceful settlement of the crisis".

172. On 25 February, Mr Blair told the House of Commons that the intelligence was "clear" that Saddam Hussein continued "to believe that his weapons of mass destruction programme is essential both for internal repression and for external aggression".[69] It was also "essential to his regional power". "Prior to the inspectors coming back in", Saddam Hussein "was engaged in a systematic exercise in concealment of those weapons". The inspectors had reported some co-operation on process, but had "denied progress on substance".

173. The House of Commons was asked on 26 February to reaffirm its endorsement of resolution 1441, support the Government's continuing efforts to disarm Iraq, and to call upon Iraq to recognise that this was its final opportunity to comply with its obligations.[70]

174. The Government motion was approved by 434 votes to 124; 199 MPs voted for an amendment which invited the House to "find the case for military action against Iraq as yet unproven".[71]

175. In a speech on 26 February, President Bush stated that the safety of the American people depended on ending the direct and growing threat from Iraq.[72]

176. President Bush also set out his hopes for the future of Iraq.

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[67] Telegram 302 UKMIS New York to FCO London, 25 February 2003, 'Iraq: Tabling of US/UK/Spanish Draft Resolution: Draft Resolution'.
[68] UN Security Council, 24 February 2003, 'Letter dated 24 February 2003 from the Permanent Representatives of France, Germany and the Russian Federation to the United Nations addressed to the President of the Security Council' (S/2003/214).
[69] House of Commons, *Official Report*, 25 February 2003, columns 123-126.
[70] House of Commons, *Official Report*, 26 February 2003, column 265.
[71] House of Commons, *Official Report*, 26 February 2003, columns 367-371.
[72] The White House, 26 February 2003, *President discusses the future of Iraq.*

177. Reporting discussions in New York on 26 February, Sir Jeremy Greenstock wrote that there was "a general antipathy to having now to take decisions on this issue, and a wariness about what our underlying motives are behind the resolution".[73] Sir Jeremy concluded that the US was focused on preserving its room for manoeuvre while he was "concentrating on trying to win votes". It was the "middle ground" that mattered. Mexico and Chile were the "pivotal sceptics".

178. Lord Goldsmith told No.10 officials on 27 February that the safest legal course for future military action would be to secure a further Security Council resolution.[74] He had, however, reached the view that a "reasonable case" could be made that resolution 1441 was capable of reviving the authorisation to use force in resolution 678 (1990) without a further resolution, if there were strong factual grounds for concluding that Iraq had failed to take the final opportunity offered by resolution 1441.

179. Lord Goldsmith advised that, to avoid undermining the case for reliance on resolution 1441, it would be important to avoid giving any impression that the UK believed a second resolution was legally required.

180. Informal consultations in the Security Council on 27 February showed there was little support for the UK/US/Spanish draft resolution.[75]

181. An Arab League Summit on 1 March concluded that the crisis in Iraq must be resolved by peaceful means and in the framework of international legitimacy.[76]

182. Following his visit to Mexico, Sir David Manning concluded that Mexican support for a second resolution was "not impossible, but would not be easy and would almost certainly require some movement".[77]

183. During Sir David's visit to Chile, President Ricardo Lagos repeated his concerns, including the difficulty of securing nine votes or winning the presentational battle without further clarification of Iraq's non-compliance. He also suggested identifying benchmarks.[78]

184. Mr Blair wrote in his memoir that, during February, "despite his best endeavours", divisions in the Security Council had grown not reduced; and that the "dynamics of disagreement" were producing new alliances.[79] France, Germany and Russia were moving to create an alternative pole of power and influence.

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[73] Telegram 314 UKMIS New York to FCO London, 27 February 2003, 'Iraq: 26 February'.
[74] Minute Brummell, 27 February 2003, 'Iraq: Attorney General's Meeting at No. 10 on 27th February 2003'.
[75] Telegram 318 UKMIS New York to FCO London, 28 February 2003, 'Iraq: 27 February Consultations and Missiles'.
[76] Telegram 68 Cairo to FCO London, 2 March 2003, 'Arab League Summit: Final Communique'.
[77] Telegram 1 Mexico City to Cabinet Office, 1 March 2003, 'Iraq: Mexico'.
[78] Telegram 34 Santiago to FCO London, 2 March 2003, 'Chile/Iraq: Visit by Manning and Scarlett'.
[79] Blair T. *A Journey*. Hutchinson, 2010.

185. Mr Blair thought that was "highly damaging" but "inevitable": "They felt as strongly as I did; and they weren't prepared to indulge the US, as they saw it."

186. Mr Blair concluded that for moral and strategic reasons the UK should be with the US and that:

> "... [W]e should make a last ditch attempt for a peaceful solution. First to make the moral case for removing Saddam ... Second, to try one more time to reunite the international community behind a clear base for action in the event of a continuing breach."

187. On 3 March, Mr Blair proposed an approach focused on setting a deadline of 17 March for Iraq to disclose evidence relating to the destruction of prohibited items and permit interviews; and an amnesty if Saddam Hussein left Iraq by 21 March.[80]

188. Mr Straw told Secretary Powell that the level of support in the UK for military action without a second resolution was palpably "very low". In that circumstance, even if a majority in the Security Council had voted for the resolution with only France exercising its veto, he was "increasingly pessimistic" about support within the Labour Party for military action.[81] The debate in the UK was:

> "... significantly defined by the tone of the debate in Washington and particularly remarks made by the President and others to the right of him, which suggested that the US would go to war whatever and was not bothered about a second resolution one way or another."

189. Following a discussion with Mr Blair, Mr Straw told Secretary Powell that Mr Blair:

> "... was concerned that, having shifted world (and British) public opinion over the months, it had now been seriously set back in recent days. We were not in the right position. The Prime Minister was considering a number of ideas which he might well put to the President."[82]

190. Mr Straw recorded that Secretary Powell had advised that, if Mr Blair wanted to make proposals, he should do so quickly. The US was not enthusiastic about the inclusion of an immunity clause for Saddam Hussein in the resolution.

191. Mr Straw reported that Secretary Powell had told President Bush that he judged a vetoed resolution would no longer be possible for the UK. Mr Straw said that without a second resolution approval for military action could be "beyond reach".

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[80] Note (handwritten) [Blair], 3 March 2003, [untitled].
[81] Minute Straw to Prime Minister, 3 March 2003, 'Iraq: Second Resolution'.
[82] Letter Straw to Manning, 4 March 2003, 'Iraq: Conversation with Colin Powell, 3 March'.

192. Mr Straw told the Foreign Affairs Committee (FAC) on 4 March that it was "a matter of fact" that Iraq had been in material breach "for some weeks" and resolution 1441 provided sufficient legal authority to justify military action against Iraq if it was "in further material breach".[83]

193. Mr Straw also stated that a majority of members of the Security Council had been opposed to the suggestion that resolution 1441 should state explicitly that military action could be taken only if there were a second resolution.

194. Mr Blair was informed on the evening of 4 March that US military planners were looking at 12 March as the possible start date for the military campaign; and that Mr Geoff Hoon, the Defence Secretary, was concerned about the apparent disconnect with activity in the UN.[84]

195. Baroness Amos, Minister of State, Department for International Development (DFID), advised on 4 March that Angola, Cameroon and Guinea were not yet ready to commit to a "yes vote" and had emphasised the need for P5 unity.[85]

196. Sir Christopher Hum, British Ambassador to China, advised on 4 March that, if the resolution was put to a vote that day, China would abstain.[86]

197. Sir John Holmes, British Ambassador to France, advised on 4 March that France's main aim was to "avoid being put on the spot" by influencing the undecided, preventing the US and UK mustering nine votes, and keeping alongside the Russians and Chinese; and that there was "nothing that we can now do to dissuade them from this course".[87] Sir John also advised that "nothing the French say at this stage, even privately, should be taken at face value".

198. Mr Igor Ivanov, the Russian Foreign Minister, told Mr Straw on 4 March that Russia had failed in an attempt to persuade Saddam Hussein to leave and it would veto a resolution based on the draft circulated on 24 February.[88]

199. France, Germany and Russia stated on 5 March that they would not let a resolution pass that authorised the use of force.[89] Russia and France, "as Permanent Members of the Security Council, will assume all their responsibilities on this point".

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[83] Minutes, Foreign Affairs Committee (House of Commons), 4 March 2003, [Evidence Session], Qs 151 and 154.
[84] Letter Watkins to Manning, 4 March 2003, 'Iraq: Timing of Military Action'.
[85] Minute Amos to Foreign Secretary, 4 March 2003, [untitled].
[86] Telegram 90 Beijing to FCO London, 4 March 2003, 'Iraq: Lobbying the Chinese'.
[87] Telegram 110 Paris to FCO London, 4 March 2003, 'Iraq: Avoiding a French Veto'.
[88] Telegram 37 FCO London to Moscow, 3 [sic] March 2003, 'Iraq: Foreign Secretary's Meetings with Russian Foreign Minister, 4 March'.
[89] *The Guardian*, 5 March 2003, *UN war doubters unite against resolution*; *The Guardian*, 6 March 2003, *Full text of Joint declaration*.

200. The British Embassy Washington reported overnight on 5/6 March that "barring a highly improbable volte face by Saddam", the US was now firmly on track for military action and would deal firmly with any efforts in the UN to slow down the timetable.[90]

201. The Embassy reported that the only event which might significantly affect the US timetable would be problems for the UK. That had been described as "huge – like trying to play football without the quarterback". The US was "therefore pulling out all the stops at the UN". The US fully understood the importance of the second resolution for the UK.

202. Sir Jeremy Greenstock advised that the US would not countenance the use of benchmarks. That risked delaying the military timetable.[91]

203. Mr Blair told Cabinet on 6 March that the argument boiled down to the question of whether Saddam Hussein would ever voluntarily co-operate with the UN to disarm Iraq.[92]

204. Mr Blair concluded that it was for the Security Council to determine whether Iraq was co-operating fully.

205. In his discussions with President Lagos on 6 March, Mr Blair stated that the US would go ahead without the UN if asked to delay military action until April or May.[93]

206. In his report to the Security Council on 7 March, Dr Blix stated that there had been an acceleration of initiatives from Iraq since the end of January, but they could not be said to constitute immediate co-operation.[94] Nor did they necessarily cover all areas of relevance; but they were nevertheless welcome. UNMOVIC was drawing up a work programme of key disarmament tasks, which would be ready later that month, for approval by the Security Council. It would take "months" to complete the programme.

207. Dr ElBaradei reported that there were no indications that Iraq had resumed nuclear activities since the inspectors left in December 1998 and the recently increased level of Iraqi co-operation should allow the IAEA to provide the Security Council with an assessment of Iraq's nuclear capabilities in the near future.

208. There was unanimity in calls for Iraq to increase its co-operation. But there was a clear division between the US, UK, Spain and Bulgaria who spoke in favour of a further resolution and France, Germany, Russia and China and most other Member States who spoke in favour of continuing to pursuing disarmament through strengthened inspections.

209. The UK, US and Spain circulated a revised draft resolution deciding that Iraq would have failed to take the final opportunity offered by resolution 1441 (2002) unless

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[90] Telegram 294 Washington to FCO London, 6 March 2003, 'Personal Iraq: UN Endgame'.
[91] Telegram 353 UKMIS New York to FCO London, 6 March 2003, 'Iraq: 5 March'.
[92] Cabinet Conclusions, 6 March 2003.
[93] Letter Cannon to Owen, 6 March 2003, 'Iraq: Prime Minister's Conversation with President of Chile, 6 March'.
[94] UN Security Council, '4714th Meeting Friday 7 March 2003' (S/PV.4714).

the Council concluded, on or before 17 March 2003, that Iraq had demonstrated full, unconditional, immediate and active co-operation in accordance with its disarmament obligations and was yielding possession of all weapons and proscribed material to UNMOVIC and the IAEA.

210. President Putin told Mr Blair on 7 March that Russia would oppose military action.[95]

211. Mr Straw told Mr Annan that military considerations could not be allowed "to dictate policy", but the military build-up "could not be maintained for ever", and:

> "... the more he had looked into the Iraq dossier [issue] the more convinced he had become of the need for action. Reading the clusters document [a report of outstanding issues produced by UNMOVIC on 7 March] made his hair stand on end."[96]

212. Mr Straw set out the UK thinking on a deadline, stating that this was "Iraq's last chance", but the objective was disarmament and, if Saddam Hussein did what was demanded, "he could stay". In those circumstances, a "permanent and toughened inspections regime" would be needed, possibly "picking up some earlier ideas for an all-Iraq NFZ".

213. Lord Goldsmith sent his formal advice to Mr Blair on 7 March.[97]

The end of the UN route

214. When Mr Blair spoke to President Bush at 6pm on 7 March he emphasised the importance of securing nine positive votes[98] in the Security Council for Parliamentary approval for UK military action.[99]

215. Mr Blair argued that while the 17 March deadline in the draft resolution was not sufficient for Iraq to disarm fully, it was sufficient to make a judgement on whether Saddam Hussein had had a change of heart. If Iraq started to co-operate, the inspectors could have as much time as they liked.

216. In a last attempt to move opinion and secure the support of nine members of the Security Council, Mr Blair decided on 8 March to propose a short extension of the timetable beyond 17 March and to revive the idea of producing a "side statement" setting out a series of tests which would provide the basis for a judgement on Saddam Hussein's intentions.

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[95] Letter Rycroft to McDonald, 7 March 2003, 'Iraq: Prime Minister's Conversation with President Putin, 7 March'.
[96] Telegram 366 UKMIS New York to FCO London, 7 March 2003, 'Iraq: Foreign Secretary's Meeting with UN Secretary-General, New York, 6 March'.
[97] Minute Goldsmith to Prime Minister, 7 March 2003, 'Iraq: Resolution 1441'.
[98] The number of votes required, in the absence of a veto from one or more of the five Permanent Members, for a decision to take action with the authority of the Security Council.
[99] Letter Rycroft to McDonald, 7 March 2003, 'Iraq: Prime Minister's Conversation with Bush, 7 March'.

217. The initiative was pursued through intensive diplomatic activity to lobby for support between London and the capitals of Security Council Member States.

218. Mr Blair told the Inquiry:

> "It was worth having one last-ditch chance to see if you could bring people back together on the same page ... [W]hat President Bush had to do was agree to table a fresh resolution. What the French had to agree was you couldn't have another resolution and another breach and no action. So my idea was define the circumstances of breach – that was the tests that we applied with Hans Blix – get the Americans to agree to the resolution, get the French to agree that you couldn't just go back to the same words of 1441 again, you had to take it a stage further."[100]

219. In a discussion on 9 March, Mr Blair told President Bush that he needed a second resolution to secure Parliamentary support for UK involvement in military action.[101] He sought President Bush's support for setting out tests in a side statement, including that the vote in the Security Council might have to be delayed "by a couple of days".

220. President Bush was unwilling to countenance delay. He was reported to have told Mr Blair that, if the second resolution failed, he would find another way to involve the UK.

221. Mr Blair told President Bush the UK would be with the US in taking action if he (Mr Blair) possibly could be.

222. Sir Jeremy Greenstock reported that Dr Blix was prepared to work with the UK on identifying tests but had reminded him that UNMOVIC still lacked clear evidence that Iraq possessed any WMD.[102]

223. Mr Blair spoke twice to President Lagos on 10 March in an attempt to find a path that President Lagos and President Vicente Fox of Mexico could support.

224. In the second conversation, Mr Blair said that he thought it "would be possible to find different wording" on the ultimatum to Iraq. Timing "would be difficult, but he would try to get some flexibility" if the first two issues "fell into place".[103]

225. Mr Straw reported that Secretary Powell thought that there were seven solid votes, and uncertainty about Mexico, Chile and Pakistan.[104] If there were fewer than nine, the second resolution should not be put to the vote.

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[100] Public hearing, 29 January 2010, page 127.
[101] Letter Rycroft to McDonald, 9 March 2003, 'Iraq: Prime Minister's Conversation with Bush, 9 March'.
[102] Telegram 391 UKMIS New York to FCO London, 10 March 2003, 'Iraq: Second Resolution'.
[103] Letter Rycroft to McDonald, 10 March 2003, 'Iraq: Prime Minister's Phone Calls with Lagos, Bush and Aznar, 10 March'.
[104] Letter Straw to Manning, 11 March 2003, 'Conversation with US Secretary of State, 10 March'.

226. Mr Straw replied that "he was increasingly coming to the view that we should not push the matter to a vote if we were going to be vetoed"; but that had not yet been agreed by Mr Blair.

227. By 10 March, President Bush's position was hardening and he was very reluctant to delay military action.

228. When Mr Blair spoke to President Bush, they discussed the "seven solid votes" for the resolution.[105]

229. Mr Alastair Campbell, Mr Blair's Director of Communications and Strategy, wrote that Mr Blair had done most of the talking.[106] President Bush thought President Jacques Chirac of France was "trying to get us to the stage where we would not put [the resolution] to a vote because we would be so worried about losing".

230. Mr Blair had argued that if Chile and Mexico could be shifted, that would "change the weather". If France and Russia then vetoed the resolution but the "numbers were right on the UN", Mr Blair thought that he would "have a fighting chance of getting it through the Commons". Subsequently, Mr Blair suggested that a change in Chile and Mexico's position might be used to influence President Putin.

231. President Bush was "worried about rolling in more time" but Mr Blair had "held his ground", arguing that Chile and Mexico would "need to be able to point to something that they won last minute that explains why they finally supported us". President Bush "said 'Let me be frank. The second resolution is for the benefit of Great Britain. We would want it so we can go ahead together.'" President Bush's position was that the US and UK "must not retreat from 1441 and we cannot keep giving them more time"; it was "time to do this" and there should be "no more deals".

232. Sir David Manning sent the UK proposals for a revised deadline, and a side statement identifying six tests on which Saddam Hussein's intentions would be judged, to Dr Condoleezza Rice, President Bush's National Security Advisor, and to President Lagos.[107]

233. Mr Blair wrote in his memoir that President Bush and his military were concerned about delay.[108]

> "It [the proposal for tests/more time] was indeed a hard sell to George. His system was completely against it. His military were, not unreasonably, fearing that delay gave the enemy time – and time could mean a tougher struggle and more lives lost.

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[105] Letter Rycroft to McDonald, 10 March 2003, 'Iraq: Prime Minister's Phone Calls with Lagos, Bush and Aznar, 10 March'.
[106] Campbell A & Hagerty B. *The Alastair Campbell Diaries. Volume 4. The Burden of Power: Countdown to Iraq.* Hutchinson, 2012.
[107] Letter Manning to Rice, 10 March 2003, [untitled].
[108] Blair T. *A Journey*. Hutchinson, 2010.

> This was also troubling my military. We had all sorts of contingency plans in place ... There was both UK and US intelligence warning us of the risk.
>
> "Nonetheless I thought it was worth a try ..."

234. Mr Blair also wrote:

> "Chile and Mexico were prepared to go along, but only up to a point. Ricardo made it clear that if there was heavy opposition from France, it would be tough for them to participate in what would then be a token vote, incapable of being passed because of a veto – and what's more, a veto not by Russia, but by France.
>
> "Unfortunately, the French position had, if anything, got harder not softer. They were starting to say they would not support military action in any circumstances, irrespective of what the inspectors found ..."

235. In a press conference on 10 March, Mr Annan reiterated the Security Council's determination to disarm Iraq, but said that every avenue for a peaceful resolution of the crisis had to be exhausted before force should be used.[109]

236. Mr Annan also warned that, if the Security Council failed to agree on a common position and action was taken without the authority of the Council, the legitimacy and support for any such action would be seriously impaired.

237. In an interview on 10 March, President Chirac stated that it was for the inspectors to advise whether they could complete their task.[110] If they reported that they were not in a position to guarantee Iraq's disarmament, it would be:

> "... for the Security Council alone to decide the right thing to do. But in that case ... regrettably, the war would become inevitable. It isn't today."

238. President Chirac stated that he did not consider that the draft resolution tabled by the US, UK and Spain would attract support from nine members of the Security Council. In that case, there would be no majority for action, "So there won't be a veto problem."

239. But if there were a majority "in favour of the new resolution", France would "vote 'no'".

240. In response to a question asking, "And, this evening, this is your position in principle?", President Chirac responded:

> "My position is that, regardless of the circumstances, France will vote 'no' because she considers this evening that there are no grounds for waging war in order to achieve the goal we have set ourselves, that is to disarm Iraq."

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[109] United Nations, 10 March 2003, *Secretary-General's press conference (unofficial transcript).*
[110] The Élysée, *Interview télévisée de Jacques Chirac, le 10 mars 2003*. A translation for HMG was produced in a Note, [unattributed and undated], 'Iraq – Interview given by M. Jacques Chirac, President of the Republic, to French TV (10 March 2003)'.

241. By 11 March, it was clear that, in the time available before the US was going to take military action, it would be difficult to secure nine votes in the Security Council for a resolution determining that Iraq had failed to take the final opportunity offered by resolution 1441.

242. Mr Straw wrote to Mr Blair on 11 March setting out his firm conclusion that:

> "If we cannot gain nine votes and be sure of no veto, we should not push our second resolution to a vote. The political and diplomatic consequences for the UK would be significantly worse to have our ... resolution defeated ... than if we camp on 1441 ..."[111]

243. Mr Straw set out his reasoning in some detail, including that:

- Although in earlier discussion he had "warmed to the idea" that it was worth pushing the issue to a vote "if we had nine votes and faced only a French veto", the more he "thought about this, the worse an idea it becomes".
- A veto by France only was "in practice less likely than two or even three vetoes".
- The "best, least risky way to gain a moral majority" was "by the 'Kosovo route' – essentially what I am recommending. The key to our moral legitimacy then was the matter never went to a vote – but everyone knew the reason for this was that Russia would have vetoed."

244. Mr Straw suggested that the UK should adopt a strategy based on the argument that Iraq had failed to take the final opportunity offered by resolution 1441, and that the last three meetings of the Security Council met the requirement for Security Council consideration of reports of non-compliance.

245. Mr Straw also identified the need for a "Plan B" for the UK not to participate in military action in the event that the Government failed to secure a majority in the Parliamentary Labour Party for military action.

246. Mr Straw concluded:

> "We will obviously need to discuss all this, but I thought it best to put it in your mind as event[s] could move fast. And what I propose is a great deal better than the alternatives. When Bush graciously accepted your offer to be with him all the way, he wanted you alive not dead!"

247. There was no reference in the minute to President Chirac's remarks the previous evening.

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[111] Minute Straw to Prime Minister, 11 March 2003, 'Iraq: What if We Cannot Win the Second Resolution?'

248. When Mr Blair and President Bush discussed the position late on 11 March, it was clear that President Bush was determined not to postpone the start of military action.[112] They discussed the impact of President Chirac's "veto threats". Mr Blair considered that President Chirac's remarks "gave some cover" for ending the UN route.

249. Reporting discussions in New York on 11 March on the draft resolution and details of a possible "side statement", Sir Jeremy Greenstock advised that the draft resolution tabled by the UK, US and Spain on 7 March had "no chance ... of adoption".[113]

250. In a telephone call with President Bush on 12 March, Mr Blair proposed that the US and UK should continue to seek a compromise in the UN, while confirming that he knew it would not happen. He would say publicly that the French had prevented them from securing a resolution, so there would not be one.[114]

251. Mr Blair wanted to avoid a gap between the end of the negotiating process and the Parliamentary vote in which France or another member of the Security Council might table a resolution that attracted the support of a majority of the Council. That could have undermined the UK (and US) position on its legal basis for action.

252. When he discussed the options with Mr Straw early on 12 March, Mr Blair decided that the UK would continue to support the US.[115]

253. During Prime Minister's Questions on 12 March, Mr Blair stated:

> "I hope that even now those countries that are saying they would use their veto no matter what the circumstances will reconsider and realise that by doing so they put at risk not just the disarmament of Saddam, but the unity of the United Nations."[116]

254. The FCO assessed on 12 March that the votes of the three African states were reasonably secure but Pakistan's vote was not so certain. It was hoped that the six tests plus a short extension of the 17 March deadline might deliver Mexico and Chile.[117]

255. The UK circulated its draft side statement setting out the six tests to a meeting of Security Council members in New York on the evening of 12 March.[118]

256. Sir Jeremy Greenstock told Council members that the UK "non-paper" responded to an approach from the "undecided six"[119] looking for a way forward, setting out six

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[112] Letter Cannon to McDonald, 11 March 2003, 'Iraq: Prime Minister's Conversations with Bush and Lagos, 11 March'.
[113] Telegram 417 UKMIS New York to FCO London, 12 March 2003, 'Personal Iraq: Side Statement and End Game Options'.
[114] Letter Rycroft to McDonald, 12 March 2003, 'Iraq: Prime Minister's Telephone Conversation with President Bush, 12 March'.
[115] Public hearing, 21 January 2010, page 105.
[116] House of Commons, *Official Report*, 12 March 2003, column 288.
[117] Telegram 33 FCO London to Riyadh, 12 March 2003, 'Personal for Heads of Mission: Iraq: The Endgame'.
[118] Telegram 429 UKMIS New York to FCO London, 13 March 2003, 'Iraq: UK Side-Statement'.
[119] Angola, Cameroon, Chile, Guinea, Mexico, Pakistan.

tasks to be achieved in a 10-day timeline.[120] Sir Jeremy reported that France, Germany and Russia all said that the draft resolution without operative paragraph 3 would still authorise force. The UK had not achieved "any kind of breakthrough" and there were "serious questions about the available time", which the US would "not help us to satisfy".

257. Mr Blair told Cabinet on 13 March that work continued in the UN to obtain a second resolution and, following the French decision to veto, the outcome remained open.[121]

258. Mr Straw described President Chirac's position as "irresponsible".

259. Mr Straw told Cabinet that there was "good progress" in gaining support in the Security Council.

260. Mr Blair concluded that the French position "looked to be based on a calculation of strategic benefit". It was "in contradiction of the Security Council's earlier view that military action would follow if Iraq did not fully and unconditionally co-operate with the inspectors". The UK would "continue to show flexibility" in its efforts to achieve a second resolution and, "if France could be shown to be intransigent, the mood of the Security Council could change towards support for the British draft".

261. Mr Blair agreed the military plan later on 13 March.[122]

262. On 13 March, Mr Blair and President Bush discussed withdrawing the resolution on 17 March followed by a US ultimatum to Saddam Hussein to leave within 48 hours. There would be no US military action until after the vote in the House of Commons on 18 March.[123]

263. Mr Blair continued to press President Bush to publish the Road Map on the Middle East Peace Process because of its impact on domestic opinion in the UK as well as its strategic impact.

264. Reporting developments in New York on 13 March, Sir Jeremy Greenstock warned that the UK tests had attracted no support, and that the US might be ready to call a halt to the UN process on 15 March.[124] The main objections had included the "perceived authorisation of force in the draft resolution" and a desire to wait for UNMOVIC's own list of key tasks which would be issued early the following week.

265. President Chirac told Mr Blair on 14 March that France was "content to proceed 'in the logic of UNSCR 1441'; but it could not accept an ultimatum or any 'automaticity' of recourse to force".[125] He proposed looking at a new resolution in line with

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[120] Telegram 428 UKMIS New York to FCO London, 13 March 2003, 'Iraq: UK Circulates Side-Statement'.
[121] Cabinet Conclusions, 13 March 2003.
[122] Letter Rycroft to Watkins, 13 March 2003, 'Iraq: Military Planning'.
[123] Letter Cannon to McDonald, 13 March 2003, 'Iraq: Military Timetable'.
[124] Telegram 438 UKMIS New York to FCO London, 14 March 2003, 'Iraq: 13 March'.
[125] Letter Cannon to Owen, 14 March 2003, 'Iraq: Prime Minister's Conversation with President Chirac, 14 March'.

resolution 1441, "provided that it excluded these options". President Chirac "suggested that the UNMOVIC work programme might provide a way forward. France was prepared to look at reducing the 120 day timeframe it envisaged."

266. In response to a question from President Chirac about whether it would be the inspectors or the Security Council who decided whether Saddam had co-operated, Mr Blair "insisted that it must be the Security Council".

267. President Chirac agreed, "although the Security Council should make its judgement on the basis of the inspectors' report". He "wondered whether it would be worth" Mr Straw and Mr Dominique de Villepin, the French Foreign Minister, "discussing the situation to see if we could find some flexibility"; or was it "too late"?

268. Mr Blair said, "every avenue must be explored".

269. In the subsequent conversation with President Bush about the French position and what to say when the resolution was pulled, Mr Blair proposed that they would need to show that France would not authorise the use of force in any circumstances.[126]

270. President Lagos initially informed Mr Blair on 14 March that the UK proposals did not have Chile's support and that he was working on other ideas.[127] He subsequently informed Mr Blair that he would not pursue his proposals unless Mr Blair or President Bush asked him to.

271. Mr Tony Brenton, Chargé d'Affaires, British Embassy Washington, reported that President Bush was determined to remove Saddam Hussein and to stick to the US timetable for action. The UK's "steadfastness" had been "invaluable" in bringing in other countries in support of action.[128]

272. In a declaration on 15 March, France, with Germany and Russia, attempted to secure support in the Security Council for continued inspections.[129]

273. At the Azores Summit on 16 March, President Bush, Mr Blair and Prime Minister José María Aznar of Spain agreed that, unless there was a fundamental change in the next 24 hours, the UN process would end.[130]

274. In public, the focus was on a "last chance for peace". The joint communiqué contained a final appeal to Saddam Hussein to comply with his obligations and to the Security Council to back a second resolution containing an ultimatum.

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[126] Letter Rycroft to McDonald, 14 March 2003, 'Iraq: Prime Minister's Conversation with Bush, 14 March'.
[127] Letter [Francis] Campbell to Owen, 14 March 2003, 'Iraq: Prime Minister's Conversation with President Lagos of Chile, 14 March'.
[128] Telegram 350 Washington to FCO London, 15 March 2003, 'Iraq'.
[129] UN Security Council, 18 March 2003, 'Letter dated 15 March 2003 from the Permanent Representative of Germany to the United Nations addressed to the President of the Security Council' (S/2003/320).
[130] Letter Manning to McDonald, 16 March 2013, 'Iraq: Summit Meeting in the Azores: 16 March'.

275. In his memoir, Mr Blair wrote:

> "So when I look back ... I know there was never any way Britain was not going to be with the US at that moment, once we went down the UN route and Saddam was in breach. Of course such a statement is always subject to *in extremis* correction. A crazy act of aggression? No, we would not have supported that. But given the history, you couldn't call Saddam a crazy target.
>
> "Personally I have little doubt that at some point we would have to have dealt with him ..."[131]

276. At "about 3.15pm UK time" on 17 March, Sir Jeremy Greenstock announced that the resolution would not be put to a vote, stating that the co-sponsors reserved the right to take their own steps to secure the disarmament of Iraq.[132]

277. The subsequent discussion in the Council suggested that only the UK, the US, and Spain took the view that all options other than the use of military force had been exhausted.[133]

278. A specially convened Cabinet at 1600 on 17 March 2003 endorsed the decision that the diplomatic process was now at an end and Saddam Hussein should be given an ultimatum to leave Iraq; and that the House of Commons would be asked to endorse the use of military action against Iraq to enforce compliance, if necessary.[134]

279. In his statement to the House of Commons that evening, Mr Straw said that the Government had reluctantly concluded that France's actions had put a consensus in the Security Council on a further resolution "beyond reach".[135]

280. As a result of Saddam Hussein's persistent refusal to meet the UN's demands, the Cabinet had decided to ask the House of Commons to support the UK's participation in military action, should that be necessary to achieve the disarmament of Iraq "and thereby the maintenance of the authority of the United Nations".

281. Mr Straw stated that Lord Goldsmith's Written Answer "set out the legal basis for the use of force".

282. Mr Straw drew attention to the significance of the fact that no one "in discussions in the Security Council and outside" had claimed that Iraq was in full compliance with its obligations.

283. In a statement later that evening, Mr Robin Cook, the Leader of the House of Commons, set out his doubts about the degree to which Saddam Hussein posed a

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[131] Blair T. *A Journey*. Hutchinson, 2010.
[132] Telegram 465 UKMIS New York to FCO London, 18 March 2003, 'Iraq: Resolution: Statement'.
[133] Telegram 464 UKMIS New York to FCO London, 18 March 2003, 'Iraq: Resolution'.
[134] Cabinet Conclusions, 17 March 2003.
[135] House of Commons, *Official Report*, 17 March 2003, columns 703-705.

"clear and present danger" and his concerns that the UK was being "pushed too quickly into conflict" by the US without the support of the UN and in the face of hostility from many of the UK's traditional allies.[136]

284. On 17 March, President Bush issued an ultimatum giving Saddam Hussein 48 hours to leave Iraq.

285. The French President's office issued a statement early on 18 March stating that the US ultimatum was a unilateral decision going against the will of the international community who wanted to pursue Iraqi disarmament in accordance with resolution 1441.[137] It stated:

> "... only the Security Council is authorised to legitimise the use of force. France appeals to the responsibility of all to see that international legality is respected. To disregard the legitimacy of the UN, to favour force over the law, would be to take on a heavy responsibility."

286. On the evening of 18 March, the House of Commons passed by 412 votes to 149 a motion supporting "the decision of Her Majesty's Government that the United Kingdom should use all means necessary to ensure the disarmament of Iraq's weapons of mass destruction".

287. President Bush wrote in his memoir that he convened "the entire National Security Council" on the morning of 19 March where he "gave the order to launch Operation Iraqi Freedom".[138]

288. In the Security Council debate on 19 March, the majority of members of the Security Council, including France, Russia and China, made clear that they thought the goal of disarming Iraq could be achieved by peaceful means and emphasised the primary responsibility of the Security Council for the maintenance of international peace and security.[139]

289. UNMOVIC and the IAEA had provided the work programmes required by resolution 1284. They included 12 key tasks identified by UNMOVIC where progress "could have an impact on the Council's assessment of co-operation of Iraq".

290. Shortly before midnight on 19 March, the US informed Sir David Manning that there was to be a change to the plan and US airstrikes would be launched at 0300 GMT on 20 March.[140]

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[136] House of Commons, *Official Report*, 17 March 2003, columns 726-728.
[137] Telegram 135 Paris to FCO London, 18 March 2003, 'Iraq: Chirac's Reaction to Ultimatum'.
[138] Bush GW. *Decision Points*. Virgin Books, 2010.
[139] UN Security Council, '4721st Meeting Wednesday 19 March 2003' (S/PV.4721).
[140] Letter Manning to McDonald, 20 March 2003, 'Iraq'.

291. Early on the morning of 20 March, US forces crossed into Iraq and seized the port area of Umm Qasr.[141]

292. Mr Blair continued to state that France was responsible for the impasse.

293. At Cabinet on 20 March, Mr Blair concluded that the Government:

> "... should lose no opportunity to propagate the reason, at every level and as widely as possible, why we had arrived at a diplomatic impasse, and why it was necessary to take action against Iraq. France had not been prepared to accept that Iraq's failure to comply with its obligations should lead to the use of force to achieve compliance."[142]

Why Iraq? Why now?

294. In his memoir, Mr Blair described his speech opening the debate on 18 March as "the most important speech I had ever made".[143]

295. Mr Blair framed the decision for the House of Commons as a "tough" and "stark" choice between "retreat" and holding firm to the course of action the Government had set. Mr Blair stated that he believed "passionately" in the latter. He deployed a wide range of arguments to explain the grounds for military action and to make a persuasive case for the Government's policy.[144]

296. In setting out his position, Mr Blair recognised the gravity of the debate and the strength of opposition in both the country and Parliament to immediate military action. In his view, the issue mattered "so much" because the outcome would not just determine the fate of the Iraqi regime and the Iraqi people but would:

> "... determine the way in which Britain and the world confront the central security threat of the 21st century, the development of the United Nations, the relationship between Europe and the United States, the relations within the European Union and the way in which the United States engages with the rest of the world. So it could hardly be more important. It will determine the pattern of international politics for the next generation."

Was Iraq a serious or imminent threat?

297. On 18 March 2003, the House of Commons was asked:

- to recognise that Iraq's weapons of mass destruction and long-range missiles, and its continuing non-compliance with Security Council resolutions, posed a threat to international peace and security; and

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[141] Ministry of Defence, *Operations in Iraq: Lessons for the Future*, December 2003, page 12.
[142] Cabinet Conclusions, 20 March 2003.
[143] Blair T. *A Journey*. Hutchinson, 2010.
[144] House of Commons, *Official Report*, 18 March 2003, columns 760-774.

- to support the use of all means necessary to ensure the disarmament of Iraq's weapons of mass destruction, on the basis that the United Kingdom must uphold the authority of the United Nations as set out in resolution 1441 and many resolutions preceding it.

298. In his statement, Mr Blair addressed both the threat to international peace and security presented by Iraq's defiance of the UN and its failure to comply with its disarmament obligations as set out in resolution 1441 (2002). Iraq was "the test of whether we treat the threat seriously".

299. Mr Blair rehearsed the Government's position on Iraq's past pursuit and use of weapons of mass destruction; its failures to comply with the obligations imposed by the UN Security Council between 1991 and 1998; Iraq's repeated declarations which proved to be false; and the "large quantities of weapons of mass destruction" which were "unaccounted for". He described UNSCOM's final report (in January 1999) as "a withering indictment of Saddam's lies, deception and obstruction".

300. Mr Blair cited the UNMOVIC "clusters" document issued on 7 March as "a remarkable document", detailing "all the unanswered questions about Iraq's weapons of mass destruction", listing "29 different areas in which the inspectors have been unable to obtain information".

301. He stated that, based on Iraq's false declaration, its failure to co-operate, the unanswered questions in the UNMOVIC "clusters" document, and the unaccounted for material, the Security Council should have convened and condemned Iraq as in material breach of its obligations. If Saddam Hussein continued to fail to co-operate, force should be used.

302. Addressing the wider message from the issue of Iraq, Mr Blair asked:

> "... what ... would any tyrannical regime possessing weapons of mass destruction think when viewing the history of the world's diplomatic dance with Saddam over ... 12 years? That our capacity to pass firm resolutions has only been matched by our feebleness in implementing them."

303. Mr Blair acknowledged that Iraq was "not the only country with weapons of mass destruction", but declared: "back away from this confrontation now, and future conflicts will be infinitely worse and more devastating in their effects".

304. Mr Blair added:

> "The real problem is that ... people dispute Iraq is a threat, dispute the link between terrorism and weapons of mass destruction, and dispute in other words, the whole basis of our assertion that the two together constitute a fundamental assault on our way of life."

305. Mr Blair also described a "threat of chaos and disorder" arising from "tyrannical regimes with weapons of mass destruction and extreme terrorist groups" prepared to use them.

306. Mr Blair set out his concerns about:

- proliferators of nuclear equipment or expertise;
- "dictatorships with highly repressive regimes" who were "desperately trying to acquire" chemical, biological or, "particularly, nuclear weapons capability" – some of those were "a short time away from having a serviceable nuclear weapon", and that activity was increasing, not diminishing; and
- the possibility of terrorist groups obtaining and using weapons of mass destruction, including a "radiological bomb".

307. Those two threats had very different motives and different origins. He accepted "fully" that the association between the two was:

> "... loose – but it is hardening. The possibility of the two coming together – of terrorist groups in possession of weapons of mass destruction or even of a so called dirty radiological bomb – is now in my judgement, a real and present danger to Britain and its national security."

308. Later in his speech, Mr Blair stated that the threat which Saddam Hussein's arsenal posed:

> "... to British citizens at home and abroad cannot simply be contained. Whether in the hands of his regime or in the hands of the terrorists to whom he would give his weapons, they pose a clear danger to British citizens ..."

309. This fusion of long-standing concerns about proliferation with the post-9/11 concerns about mass-casualty terrorism was at the heart of the Government's case for taking action at this time against Iraq.

310. The UK assessment of Iraq's capabilities set out in Section 4 of the Report shows:

- The proliferation of nuclear, chemical and biological weapons and their delivery systems, particularly ballistic missiles, was regarded as a major threat. But Iran, North Korea and Libya were of greater concern than Iraq in terms of the risk of nuclear and missile proliferation.
- JIC Assessments, reflected in the September 2002 dossier, had consistently taken the view that, if sanctions were removed or became ineffective, it would take Iraq at least five years following the end of sanctions to produce enough fissile material for a weapon. On 7 March, the IAEA had reported to the Security Council that there was no indication that Iraq had resumed its nuclear activities.
- The September dossier stated that Iraq could produce a nuclear weapon within one to two years if it obtained fissile material and other essential components

from a foreign supplier. There was no evidence that Iraq had tried to acquire fissile material and other components or – were it able to do so – that it had the technical capabilities to turn these materials into a usable weapon.

- JIC Assessments had identified the possible stocks of chemical and biological weapons which would largely have been for short-range, battlefield use by the Iraqi armed forces. The JIC had also judged in the September dossier that Iraq was producing chemical and biological agents and that there were development programmes for longer-range missiles capable of delivering them.
- Iraq's proscribed Al Samoud 2 missiles were being destroyed.

311. The UK Government did have significant concerns about the potential risks of all types of weapons of mass destruction being obtained by Islamist extremists (in particular Al Qaida) who would be prepared to use such weapons.

312. Saddam Hussein's regime had the potential to proliferate material and know-how, to terrorist groups, but it was not judged likely to do so.

313. On 28 November 2001, the JIC assessed that:

- Saddam Hussein had "refused to permit any Al Qaida presence in Iraq".
- Evidence of contact between Iraq and Usama Bin Laden (UBL) was "fragmentary and uncorroborated"; including that Iraq had been in contact with Al Qaida for exploratory discussions on toxic materials in late 1988.
- "With common enemies ... there was clearly scope for collaboration."
- There was "no evidence that these contacts led to practical co-operation; we judge it unlikely ... There is no evidence UBL's organisation has ever had a presence in Iraq."
- Practical co-operation between Iraq and Al Qaida was "unlikely because of mutual mistrust".
- There was "no credible evidence of covert transfers of WMD-related technology and expertise to terrorist groups".[145]

314. On 29 January 2003, the JIC assessed that, despite the presence of terrorists in Iraq "with links to Al Qaida", there was "no intelligence of current co-operation between Iraq and Al Qaida".[146]

315. On 10 February 2003, the JIC judged that Al Qaida would "not carry out attacks under Iraqi direction".[147]

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[145] JIC Assessment, 28 November 2001, 'Iraq after September 11 – The Terrorist Threat'.
[146] JIC Assessment, 29 January 2003, 'Iraq: The Emerging view from Baghdad'.
[147] JIC Assessment, 10 February 2003, 'International Terrorism: War with Iraq'

316. Sir Richard Dearlove told the Inquiry:

> "... I don't think the Prime Minister ever accepted the link between Iraq and terrorism. I think it would be fair to say that the Prime Minister was very worried about the possible conjunction of terrorism and WMD, but not specifically in relation to Iraq ... [I] think, one could say this is one of his primary national security concerns given the nature of Al Qaida."[148]

317. The JIC assessed that Iraq was likely to mount a terrorist attack only in response to military action and if the existence of the regime was threatened.

318. The JIC Assessment of 10 October 2002 stated that Saddam Hussein's "overriding objective" was to "avoid a US attack that would threaten his regime".[149] The JIC judged that, in the event of US-led military action against Iraq, Saddam would:

> "... aim to use terrorism or the threat of it. Fearing the US response, he is likely to weigh the costs and benefits carefully in deciding the timing and circumstances in which terrorism is used. But intelligence on Iraq's capabilities and intentions in this field is limited."

319. The JIC also judged that:

- Saddam's "capability to conduct effective terrorist attacks" was "very limited".
- Iraq's "terrorism capability" was "inadequate to carry out chemical or biological attacks beyond individual assassination attempts using poisons".

320. The JIC Assessment of 29 January 2003 sustained its earlier judgements on Iraq's ability and intent to conduct terrorist operations.[150]

321. Sir David Omand, the Security and Intelligence Co-ordinator in the Cabinet Office from 2002 to 2005, told the Inquiry that, in March 2002, the Security Service judged that the "threat from terrorism from Saddam's own intelligence apparatus in the event of an intervention in Iraq ... was judged to be limited and containable".[151]

322. Baroness Manningham-Buller, the Director General of the Security Service from 2002 to 2007, confirmed that position, stating that the Security Service felt there was "a pretty good intelligence picture of a threat from Iraq within the UK and to British interests".[152]

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[148] Private hearing, 16 June 2010, pages 39-40.
[149] JIC Assessment, 10 October 2002, 'International Terrorism: The Threat from Iraq'.
[150] JIC Assessment, 29 January 2003, 'Iraq: The Emerging view from Baghdad'.
[151] Public hearing, 20 January 2010, page 37.
[152] Public hearing, 20 July 2010, page 6.

323. Baroness Manningham-Buller added that subsequent events showed the judgement that Saddam Hussein did not have the capability to do anything much in the UK, had "turned out to be the right judgement".[153]

324. While it was reasonable for the Government to be concerned about the fusion of proliferation and terrorism, there was no basis in the JIC Assessments to suggest that Iraq itself represented such a threat.

325. The UK Government assessed that Iraq had failed to comply with a series of UN resolutions. Instead of disarming as these resolutions had demanded, Iraq was assessed to have concealed materials from past inspections and to have taken the opportunity of the absence of inspections to revive its WMD programmes.

326. In Section 4, the Inquiry has identified the importance of the ingrained belief of the Government and the intelligence community that Saddam Hussein's regime retained chemical and biological warfare capabilities, was determined to preserve and if possible enhance its capabilities, including at some point in the future a nuclear capability, and was pursuing an active and successful policy of deception and concealment.

327. This construct remained influential despite the lack of significant finds by inspectors in the period leading up to military action in March 2003, and even after the Occupation of Iraq.

328. Challenging Saddam Hussein's "claim" that he had no weapons of mass destruction, Mr Blair said in his speech on 18 March:

- "... we are asked to believe that after seven years of obstruction and non-compliance ... he [Saddam Hussein] voluntarily decided to do what he had consistently refused to do under coercion."
- "We are asked now seriously to accept that in the last few years – contrary to all history, contrary to all intelligence – Saddam decided unilaterally to destroy those weapons. I say that such a claim is palpably absurd."
- "... Iraq continues to deny that it has any weapons of mass destruction, although no serious intelligence service anywhere in the world believes it."
- "What is perfectly clear is that Saddam is playing the same old games in the same old way. Yes, there are minor concessions, but there has been no fundamental change of heart or mind."[154]

329. At no stage was the proposition that Iraq might no longer have chemical, biological or nuclear weapons or programmes identified and examined by either the JIC or the policy community.

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[153] Public hearing, 20 July 2010, page 9.
[154] House of Commons, *Official Report*, 18 March 2003, columns 760-764.

330. Intelligence and assessments were used to prepare material to be used to support Government statements in a way which conveyed certainty without acknowledging the limitations of the intelligence.

331. Mr Blair's statement to the House of Commons on 18 March was the culmination of a series of public statements and interviews setting out the urgent need for the international community to act to bring about Iraq's disarmament in accordance with those resolutions, dating back to February 2002, before his meeting with President Bush at Crawford on 5 and 6 April.

332. As Mr Cook's resignation statement on 17 March made clear, it was possible for a Minister to draw different conclusions from the same information.

333. Mr Cook set out his doubts about Saddam Hussein's ability to deliver a strategic attack and the degree to which Iraq posed a "clear and present danger" to the UK. The points Mr Cook made included:

- "... neither the international community nor the British public is persuaded that there is an urgent and compelling reason for this military action in Iraq."
- "Over the past decade that strategy [of containment] had destroyed more weapons than in the Gulf War, dismantled Iraq's nuclear weapons programme and halted Saddam's medium and long range missile programmes."
- "Iraq probably has no weapons of mass destruction in the commonly understood sense of the term – namely a credible device capable of being delivered against a strategic city target. It probably ... has biological toxins and battlefield chemical munitions, but it has had them since the 1980s when US companies sold Saddam anthrax agents and the then British Government approved chemical and munitions factories. Why is it now so urgent that we should take military action to disarm a military capacity that has been there for twenty years, and which we helped to create? Why is it necessary to resort to war this week, while Saddam's ambition to complete his weapons programme is blocked by the presence of UN inspectors?"[155]

334. On 12 October 2004, announcing the withdrawal of two lines of intelligence reporting which had contributed to the pre-conflict judgements on mobile biological production facilities and the regime's intentions, Mr Straw stated that he did:

> "... not accept, even with hindsight, that we were wrong to act as we did in the circumstances that we faced at the time. Even after reading all the evidence detailed by the Iraq Survey Group, it is still hard to believe that any regime could behave in so self-destructive a manner as to pretend that it had forbidden weaponry, when in fact it had not."[156]

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[155] House of Commons, *Official Report*, 17 March 2003, columns 726-728.
[156] House of Commons, *Official Report*, 12 October 2004, columns 151-152.

335. Iraq had acted suspiciously over many years, which led to the inferences drawn by the Government and the intelligence community that it had been seeking to protect concealed WMD assets. When Iraq denied that it had retained any WMD capabilities, the UK Government accused it of lying.

336. This led the Government to emphasise the ability of Iraq successfully to deceive the inspectors, and cast doubt on the investigative capacity of the inspectors. The role of the inspectors, however, as was often pointed out, was not to seek out assets that had been hidden, but rather to validate Iraqi claims.

337. By March 2003, however:

- The Al Samoud 2 missiles which exceeded the range permitted by the UN, were being destroyed.
- The IAEA had concluded that there was no Iraqi nuclear programme of any significance.
- The inspectors believed that they were making progress and expected to achieve more co-operation from Iraq.
- The inspectors were preparing to step up their activities with U2 flights and interviews outside Iraq.

338. When the UK sought a further Security Council resolution in March 2003, the majority of the Council's members were not persuaded that the inspections process, and the diplomatic efforts surrounding it, had reached the end of the road. They did not agree that the time had come to terminate inspections and resort to force. The UK went to war without the explicit authorisation which it had sought from the Security Council.

339. At the time of the Parliamentary vote of 18 March, diplomatic options had not been exhausted. The point had not been reached where military action was the last resort.

The predicted increase in the threat to the UK as a result of military action in Iraq

340. Mr Blair had been advised that an invasion of Iraq was expected to increase the threat to the UK and UK interests from Al Qaida and its affiliates.

341. Asked about the risk that attacking Iraq with cruise missiles would "act as a recruiting sergeant for a young generation throughout the Islamic and Arab world", Mr Blair responded that:

> "... what was shocking about 11 September was not just the slaughter of innocent people but the knowledge that, had the terrorists been able, there would have been not 3,000 innocent dead, but 30,000 or 300,000 ... America did not attack the Al Qaida terrorist group ... [it] attacked America. They did not need to be

recruited ... Unless we take action against them, they will grow. That is why we should act."[157]

342. The JIC judged in October 2002 that "the greatest terrorist threat in the event of military action against Iraq will come from Al Qaida and other Islamic extremists"; and they would be "pursuing their own agenda".[158]

343. The JIC Assessment of 10 February 2003 repeated previous warnings that:

- Al Qaida and associated networks would remain the greatest terrorist threat to the UK and its activity would increase at the onset of any military action against Iraq.
- In the event of imminent regime collapse, Iraqi chemical and biological material could be transferred to terrorists, including Al Qaida.[159]

344. Addressing the prospects for the future, the JIC Assessment concluded:

> "... **Al Qaida and associated groups will continue to represent by far the greatest terrorist threat to Western interests, and that threat will be heightened by military action against Iraq.** The broader threat from Islamist terrorists will also increase in the event of war, reflecting intensified anti-US/anti-Western sentiment in the Muslim world, including among Muslim communities in the West. And there is a risk that the transfer of CB [chemical and biological] material or expertise, during or in the aftermath of conflict, will enhance Al Qaida's capabilities."

345. In response to a call for Muslims everywhere to take up arms in defence of Iraq issued by Usama Bin Laden on 11 February, and a further call on 16 February for "compulsory jihad" by Muslims against the West, the JIC Assessment on 19 February predicted that the upward trend in the reports of threats to the UK was likely to continue.[160]

346. The JIC continued to warn in March that the threat from Al Qaida would increase at the onset of military action against Iraq.[161]

347. The JIC also warned that:

- Al Qaida activity in northern Iraq continued.
- Al Qaida might have established sleeper cells in Baghdad, to be activated during a US occupation.

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[157] House of Commons, *Official Report*, 18 March 2003, column 769.
[158] JIC Assessment, 10 October 2002, 'International Terrorism: The Threat from Iraq'.
[159] JIC Assessment, 10 February 2003, 'International Terrorism: War with Iraq'.
[160] JIC Assessment, 19 February 2003, 'International Terrorism: The Current Threat from Islamic Extremists'.
[161] JIC Assessment, 12 March 2003, 'International Terrorism: War with Iraq: Update'.

348. The warning about the risk of chemical and biological weapons becoming available to extremist groups as a result of military action in Iraq was reiterated on 19 March.[162]

349. Addressing the JIC Assessment of 10 February 2003, Mr Blair told the Intelligence and Security Committee (ISC) later that year that:

> "One of the most difficult aspects of this is that there was obviously a danger that in attacking Iraq you ended up provoking the very thing you were trying to avoid. On the other hand I think you had to ask the question, 'Could you really, as a result of that fear, leave the possibility that in time developed into a nexus between terrorism and WMD in an event?' This is where you've just got to make your judgement about this. But this is my judgement and it remains my judgement and I suppose time will tell whether it's true or it's not true."[163]

350. In its response to the ISC Report, the Government drew:

> "... attention to the difficult judgement that had to be made and the factors on both sides of the argument to be taken into account."[164]

351. Baroness Manningham-Buller told the Inquiry:

> "By 2003/2004 we were receiving an increasing number of leads to terrorist activity from within the UK ... our involvement in Iraq radicalised, for want of a better word ... a few among a generation ... [who] saw our involvement in Iraq, on top of our involvement in Afghanistan, as being an attack on Islam."[165]

352. Asked about the proposition that it was right to remove Saddam Hussein's regime to forestall a fusion of weapons of mass destruction and international terrorism at some point in the future, and if it had eliminated a threat of terrorism from his regime, Baroness Manningham-Buller replied:

> "It eliminated the threat of terrorism from his direct regime; it didn't eliminate the threat of terrorism using unconventional methods ... So using weapons of mass destruction as a terrorist weapon is still a potential threat.
>
> "After all Usama Bin Laden said it was the duty of members of his organisation or those in sympathy with it to acquire and use these weapons. It is interesting that ... such efforts as we have seen to get access to these sort of materials have been low-grade and not very professional, but it must be a cause of concern to my former colleagues that at some stage terrorist groups will resort to these methods.

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[162] Note JIC, 19 March 2003, 'Saddam: The Beginning of the End'.
[163] Intelligence and Security Committee, *Iraqi Weapons of Mass Destruction – Intelligence and Assessments*, September 2003, Cm5972, paragraph 128.
[164] *Government Response to the Intelligence and Security Committee Report on Iraqi Weapons of Mass Destruction – Intelligence and Assessments, 11 September 2003*, February 2004, Cm6118, paragraph 22.
[165] Public hearing, 20 July 2010, page 19.

> In that respect, I don't think toppling Saddam Hussein is germane to the long-term ambitions of some terrorist groups to use them."[166]

353. Asked specifically about the theory that at some point in the future Saddam Hussein would probably have brought together international terrorism and weapons of mass destruction in a threat to Western interests, Baroness Manningham-Buller responded:

> "It is a hypothetical theory. It certainly wasn't of concern in either the short-term or the medium-term to my colleagues and myself."[167]

354. Asked if "a war in Iraq would aggravate the threat from whatever source to the United Kingdom", Baroness Manningham-Buller stated that that was the view communicated by the JIC Assessments.[168]

355. Baroness Manningham-Buller subsequently added that if Ministers had read the JIC Assessments they could "have had no doubt" about that risk.[169] She said that by the time of the July 2005 attacks in London:

> "... an increasing number of British-born individuals ... were attracted to the ideology of Usama Bin Laden and saw the West's activities in Iraq and Afghanistan as threatening their fellow religionists and the Muslim world."

356. Asked whether the judgement that the effect of the invasion of Iraq had increased the terrorist threat to the UK was based on hard evidence or a broader assessment, Baroness Manningham-Buller replied:

> "I think we can produce evidence because of the numerical evidence of the number of plots, the number of leads, the number of people identified, and the correlation of that to Iraq and statements of people as to why they were involved ... So I think the answer to your ... question: yes."[170]

357. In its request for a statement, the Inquiry asked Mr Blair if he had read the JIC Assessment of 10 February 2002, and what weight he had given to it when he decided to take military action.[171]

358. In his statement Mr Blair wrote:

> "I was aware of the JIC Assessment of 10 February that the Al Qaida threat to the UK would increase. But I took the view then and take the same view now that to have backed down because of the threat of terrorism would be completely wrong.

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[166] Public hearing, 20 July 2010, pages 23-24.
[167] Public hearing, 20 July 2010, page 24.
[168] Public hearing, 20 July 2010, page 31.
[169] Public hearing, 20 July 2010, page 33.
[170] Public hearing, 20 July 2010, pages 33-34.
[171] Inquiry request for a witness statement, 13 December 2010, Qs 11c and 11d page 7.

In any event, following 9/11 and Afghanistan we were a terrorist target and, as recent events in Europe and the US show, irrespective of Iraq, there are ample justifications such terrorists will use as excuses for terrorism."[172]

The UK's relationship with the US

359. The UK's relationship with the US was a determining factor in the Government's decisions over Iraq.

360. It was the US Administration which decided in late 2001 to make dealing with the problem of Saddam Hussein's regime the second priority, after the ousting of the Taliban in Afghanistan, in the "Global War on Terror". In that period, the US Administration turned against a strategy of continued containment of Iraq, which it was pursuing before the 9/11 attacks.

361. This was not, initially, the view of the UK Government. Its stated view at that time was that containment had been broadly effective, and that it could be adapted in order to remain sustainable. Containment continued to be the declared policy of the UK throughout the first half of 2002.

362. The declared objectives of the UK and the US towards Iraq up to the time of the invasion differed. The US was explicitly seeking to achieve a change of regime; the UK to achieve the disarmament of Iraq, as required by UN Security Council resolutions.

363. Most crucially, the US Administration committed itself to a timetable for military action which did not align with, and eventually overrode, the timetable and processes for inspections in Iraq which had been set by the UN Security Council. The UK wanted UNMOVIC and the IAEA to have time to complete their work, and wanted the support of the Security Council, and of the international community more widely, before any further steps were taken. This option was foreclosed by the US decision.

364. On these and other important points, including the planning for the post-conflict period and the functioning of the Coalition Provisional Authority (CPA), the UK Government decided that it was right or necessary to defer to its close ally and senior partner, the US.

365. It did so essentially for two reasons:

- Concern that vital areas of co-operation between the UK and the US could be damaged if the UK did not give the US its full support over Iraq.
- The belief that the best way to influence US policy towards the direction preferred by the UK was to commit full and unqualified support, and seek to persuade from the inside.

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[172] Statement, 14 January 2011, page 16.

366. The UK Government was right to think very carefully about both of those points.

367. First, the close strategic alliance with the US has been a cornerstone of the UK's foreign and security policy under successive governments since the Second World War. Mr Blair rightly attached great importance to preserving and strengthening it.

368. After the attacks on the US on 11 September 2001, that relationship was reinforced when Mr Blair declared that the UK would stand "shoulder to shoulder" with the US to defeat and eradicate international terrorism.[173] The action that followed in Afghanistan to bring about the fall of the Taliban served to strengthen and deepen the sense of shared endeavour.

369. When the US Administration turned its attention to regime change in Iraq as part of the second phase of the "Global War on Terror", Mr Blair's immediate response was to seek to offer a partnership and to work with it to build international support for the position that Iraq was a threat which had to be dealt with.

370. In Mr Blair's view, the decision to stand alongside the US was in the UK's long-term national interests. In his speech of 18 March 2003, he argued that the handling of Iraq would:

> "... determine the way in which Britain and the world confront the central security threat of the 21st century, the development of the United Nations, the relationship between Europe and the United States, the relations within the European Union and the way in which the United States engages with the rest of the world. So it could hardly be more important. It will determine the pattern of international politics for the next generation."

371. In his memoir in 2010, Mr Blair wrote:

> "I knew in the final analysis I would be with the US, because it was right morally and strategically. But we should make a last ditch attempt for a peaceful solution. First to make the moral case for removing Saddam ... Second, to try one more time to reunite the international community behind a clear base for action in the event of a continuing breach."[174]

372. Concern about the consequences, were the UK not to give full support to the US, featured prominently in policy calculations across Whitehall. Mr Hoon, for example, sought advice from Sir Kevin Tebbit, MOD Permanent Under Secretary, on the implications for the alliance of the UK's approach to Iraq.[175]

373. Although there has historically been a very close relationship between the British and American peoples and a close identity of values between our democracies, it is an

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[173] The National Archives, 11 September 2001, *September 11 attacks: Prime Minister's statement.*
[174] Blair T. *A Journey*. Hutchinson, 2010.
[175] Minute Tebbit to Secretary of State [MOD], 14 January 2003, 'Iraq: What If?'.

alliance founded not on emotion, but on a hard-headed appreciation of mutual benefit. The benefits do not by any means flow only in one direction.

374. In his memoir, Mr Blair wrote:

> "... I agreed with the basic US analysis of Saddam as a threat; I thought he was a monster; and to break the US partnership in such circumstances, when America's key allies were all rallying round, would in my view, then (and now) have done major long-term damage to that relationship."

375. The Government was right to weigh the possible consequences for the wider alliance with the US very carefully, as previous Governments have done. A policy of direct opposition to the US would have done serious short-term damage to the relationship, but it is questionable whether it would have broken the partnership.

376. Over the past seven decades, the UK and US have adopted differing, and sometimes conflicting, positions on major issues, for example Suez, the Vietnam War, the Falklands, Grenada, Bosnia, the Arab/Israel dispute and, at times, Northern Ireland. Those differences did not fundamentally call into question the practice of close co-operation, to mutual advantage, on the overall relationship, including defence and intelligence.

377. The opposition of Germany and France to US policy in 2002 to 2003 does not appear to have had a lasting impact on the relationships of those countries with the US, despite the bitterness at the time.

378. However, a decision not to oppose does not have to be translated into unqualified support. Throughout the post-Second World War period (and, notably, during the wartime alliance), the UK's relationship with the US and the commonality of interests therein have proved strong enough to bear the weight of different approaches to international problems and not infrequent disagreements.

379. Had the UK stood by its differing position on Iraq – which was not an opposed position, but one in which the UK had identified conditions seen as vital by the UK Government – the Inquiry does not consider that this would have led to a fundamental or lasting change in the UK's relationship with the US.

380. This is a matter of judgement, and one on which Mr Blair, bearing the responsibility of leadership, took a different view.

381. The second reason for committing unqualified support was, by standing alongside and taking part in the planning, the UK would be able to influence US policy.

382. Mr Blair's stalwart support for the US after 9/11 had a significant impact in that country. Mr Blair developed a close working relationship with President Bush. He used this to compare notes and inject his views on the major issues of the day, and it is clear from the records of the discussions that President Bush encouraged that dialogue and listened to Mr Blair's opinions.

383. Mr Blair expressed his views in frequent telephone calls and in meetings with the President. There was also a very active channel between his Foreign Affairs Adviser and the President's National Security Advisor. Mr Blair also sent detailed written Notes to the President.

384. Mr Jonathan Powell, Mr Blair's Chief of Staff, told the Inquiry:

> "... the Prime Minister had a habit of writing notes, both internally and to President Clinton and to President Bush, on all sorts of subjects, because he found it better to put something in writing rather than to simply talk about it orally and get it much more concretely ... in focused terms."[176]

385. Mr Blair drew on information and briefing received from Whitehall departments, but evidently drafted many or most of his Notes to the President himself, showing the drafts to his close advisers in No.10 but not (ahead of despatch) to the relevant Cabinet Ministers.

386. How best to exercise influence with the President of the United States is a matter for the tactical judgement of the Prime Minister, and will vary between Prime Ministers and Presidents. In relation to Iraq, Mr Blair's judgement, as he and others have explained, was that objectives the UK identified for a successful strategy should not be expressed as conditions for its support.

387. Mr Powell told the Inquiry that Mr Blair was offering the US a "partnership to try to get to a wide coalition" and "setting out a framework" and to try to persuade the US to move in a particular direction.[177]

388. Mr Blair undoubtedly influenced the President's decision to go to the UN Security Council in the autumn of 2002. On other critical decisions set out in the Report, he did not succeed in changing the approach determined in Washington.

389. This issue is addressed in the Lessons section of this Executive Summary, under the heading "The decision to go to war".

Decision-making

390. The way in which the policy on Iraq was developed and decisions were taken and implemented within the UK Government has been at the heart of the Inquiry's work and fundamental to its conclusions.

391. The Inquiry has set out in Section 2 of the Report the roles and responsibilities of key individuals and bodies in order to assist the reader. It is also publishing with the Report many of the documents which illuminate who took the key decisions and on what

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[176] Public hearing, 18 January 2010, page 38.
[177] Public hearing, 18 January 2010, pages 77-78.

basis, including the full record of the discussion on Iraq in Cabinet on five key occasions pre-conflict, and policy advice to Ministers which is not normally disclosed.

Collective responsibility

392. Under UK constitutional conventions – in which the Prime Minister leads the Government – Cabinet is the main mechanism by which the most senior members of the Government take collective responsibility for its most important decisions. Cabinet is supported by a system of Ministerial Committees whose role is to identify, test and develop policy options; analyse and mitigate risks; and debate and hone policy proposals until they are endorsed across the Government.[178]

393. The *Ministerial Code* in place in 2003 said:

> "The Cabinet is supported by Ministerial Committees (both standing and ad hoc) which have a two-fold purpose. First, they relieve the pressure on the Cabinet itself by settling as much business as possible at a lower level or, failing that, by clarifying the issues and defining the points of disagreement. Second, they support the principle of collective responsibility by ensuring that, even though an important question may never reach the Cabinet itself, the decision will be fully considered and the final judgement will be sufficiently authoritative to ensure that the Government as a whole can properly be expected to accept responsibility for it."[179]

394. The Code also said:

> "The business of the Cabinet and Ministerial Committees consists in the main of:
>
> a. questions which significantly engage the collective responsibility of the Government because they raise major issues of policy or because they are of critical importance to the public;
>
> b. questions on which there is an unresolved argument between Departments."

395. Lord Wilson of Dinton told the Inquiry that between January 1998 and January 1999, in the run-up to and immediate aftermath of Operation Desert Fox in December 1998 (see Section 1.1), as Cabinet Secretary, he had attended and noted 21 Ministerial discussions on Iraq: 10 in Cabinet, of which seven had "some substance"; five in DOP; and six ad hoc meetings, including one JIC briefing.[180] Discussions in Cabinet or a Cabinet Committee would have been supported by the relevant part of the Cabinet Secretariat, the Overseas and Defence Secretariat (OD Sec).

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[178] *Ministerial Code*, 2001, page 3.
[179] *Ministerial Code*, 2001, page 3.
[180] Public hearing, 25 January 2011, page 11.

396. Similarly, Lord Wilson stated that, between 11 September 2001 and January 2002, the Government's response to international terrorism and the subsequent military action against the Taliban in Afghanistan had been managed through 46 Ministerial meetings.[181]

397. The last meeting of DOP on Iraq before the 2003 conflict, however, took place in March 1999.[182]

398. In April 2002, the MOD clearly expected consideration of military options to be addressed through DOP. Mr Simon Webb, the MOD Policy Director, advised Mr Hoon that:

> "Even these preparatory steps would properly need a Cabinet Committee decision, based on a minute from the Defence Secretary ..."[183]

399. Most decisions on Iraq pre-conflict were taken either bilaterally between Mr Blair and the relevant Secretary of State or in meetings between Mr Blair, Mr Straw and Mr Hoon, with No.10 officials and, as appropriate, Mr John Scarlett (Chairman of the JIC), Sir Richard Dearlove and Adm Boyce. Some of those meetings were minuted; some were not.

400. As the guidance for the Cabinet Secretariat makes clear, the purpose of the minute of a meeting is to set out the conclusions reached so that those who have to take action know precisely what to do; the second purpose is to "give the reasons why the conclusions were reached".[184]

401. Lord Turnbull, Cabinet Secretary from 2002 to 2005, described Mr Blair's characteristic way of working with his Cabinet colleagues as:

> "… 'I like to move fast. I don't want to spend a lot of time in kind of conflict resolution, and, therefore, I will get the people who will make this thing move quickly and efficiently.' That was his sort of characteristic style, but it has drawbacks."[185]

402. Lord Turnbull subsequently told the Inquiry that the group described above was "a professional forum ... they had ... with one possible exception [Ms Clare Short, the International Development Secretary], the right people in the room. It wasn't the kind of sofa government in the sense of the Prime Minister and his special advisers and political cronies".[186]

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[181] Public hearing, 25 January 2011, page 11.
[182] Email Cabinet Office to Secretary Iraq Inquiry, 5 July 2011, 'FOI request for joint MOD/FCO memo on Iraq Policy 1999'.
[183] Minute Webb to PS/Secretary of State, 12 April 2002, 'Bush and the War on Terrorism'.
[184] Cabinet Office, June 2001, *Guide to Minute Taking*.
[185] Public hearing, 13 January 2010, page 28.
[186] Public hearing, 13 January 2010, pages 45-46.

403. In July 2004, Lord Butler's Report stated that his Committee was:

> "... concerned that the informality and circumscribed character of the Government's procedures which we saw in the context of policy-making towards Iraq risks reducing the scope for informed collective political judgement. Such risks are particularly significant in a field like the subject of our Review, where hard facts are inherently difficult to come by and the quality of judgement is accordingly all the more important."[187]

404. In response, Mr Blair agreed that:

> "... where a small group is brought together to work on operational military planning and developing the diplomatic strategy, in future such a group will operate formally as an ad hoc Cabinet Committee."[188]

405. The Inquiry considers that where policy options include significant military deployments, particularly where they will have implications for the responsibilities of more than one Cabinet Minister, are likely to be controversial, and/or are likely to give rise to significant risks, the options should be considered by a group of Ministers meeting regularly, whether or not they are formally designated as a Cabinet Committee, so that Cabinet as a whole can be enabled to take informed collective decisions.

406. Describing the important function a Cabinet Committee can play, Mr Powell wrote:

> "Most of the important decisions of the Blair Government were taken either in informal meetings of Ministers and officials or by Cabinet Committees ... Unlike the full Cabinet, a Cabinet Committee has the right people present, including, for example, the military Chiefs of Staff or scientific advisers, its members are well briefed, it can take as long as it likes over its discussion on the basis of well-prepared papers, and it is independently chaired by a senior Minister with no departmental vested interest."[189]

407. The Inquiry concurs with this description of the function of a Cabinet Committee when it is working well. In particular, it recognises the important function which a Minister without departmental responsibilities for the issues under consideration can play. This can provide some external challenge from experienced members of the government and mitigate any tendency towards group-think. In the case of Iraq, for example, the inclusion of the Chancellor of the Exchequer or Deputy Prime Minister, as senior members of the Cabinet, or of Mr Cook, as a former Foreign Secretary known to have concerns about the policy, could have provided an element of challenge.

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[187] *Review of Intelligence on Weapons of Mass Destruction* ["The Butler Report"], 14 July 2004, HC 898.
[188] Cabinet Office, *Review on Intelligence on Weapons of Mass Destruction: Implementation of its Conclusions*, March 2005, Cm6492.
[189] Powell J. *The New Machiavelli: How to wield power in the modern world.* The Bodley Head, 2010.

408. Mr Powell likewise recognises the importance of having written advice which can be seen before a meeting, allowing all those present to have shared information and the opportunity to digest it and seek further advice if necessary. This allows the time in meetings to be used productively.

409. The Inquiry considers that there should have been collective discussion by a Cabinet Committee or small group of Ministers on the basis of inter-departmental advice agreed at a senior level between officials at a number of decision points which had a major impact on the development of UK policy before the invasion of Iraq. Those were:

- The decision at the beginning of December 2001 to offer to work with President Bush on a strategy to deal with Iraq as part of Phase 2 of the "War on Terror", despite the fact that there was no evidence of any Iraqi involvement with the attacks on the US or active links to Al Qaida.
- The adoption of the position at the end of February 2002 that Iraq was a threat which had to be dealt with, together with the assumption that the only certain means to remove Saddam Hussein and his regime was to invade Iraq and impose a new government.
- The position Mr Blair should adopt in discussions with President Bush at Crawford in April 2002. The meeting at Chequers on 2 April was given a presentation on the military options and did not explore the political and legal implications of a conflict with Iraq. There was no FCO representative at the Chequers meeting and no subsequent meeting with Mr Straw and Mr Hoon.
- The position Mr Blair should adopt in his discussion with President Bush at Camp David on 5 and 6 September 2002. Mr Blair's long Note of 28 July, telling President Bush "I will be with you, whatever", was seen, before it was sent, only by No.10 officials. A copy was sent afterwards to Mr Straw, but not to Mr Hoon. While the Note was marked "Personal" (to signal that it should have a restricted circulation), it represented an extensive statement of the UK Government's position by the Prime Minister to the President of the United States. The Foreign and Defence Secretaries should certainly have been given an opportunity to comment on the draft in advance.
- A discussion in mid-September 2002 on the need for robust post-conflict planning.
- The decision on 31 October 2002 to offer ground forces to the US for planning purposes.
- The decision on 17 January 2003 to deploy large scale ground forces for operations in southern Iraq.
- The position Mr Blair should adopt in his discussion with President Bush in Washington on 31 January 2003.
- The proposals in Mr Blair's Note to President Bush of 19 February suggesting a deadline for a vote in the Security Council of 14 March.

- A review of UK policy at the end of February 2003 when the inspectors had found no evidence of WMD and there was only limited support for the second resolution in the Security Council.
- The question of whether Iraq had committed further material breaches as specified in operative paragraph 4 of resolution 1441 (2002), as posed in Mr Brummell's letter of 14 March to Mr Rycroft.

410. In addition to providing a mechanism to probe and challenge the implications of proposals before decisions were taken, a Cabinet Committee or a more structured process might have identified some of the wider implications and risks associated with the deployment of military forces to Iraq. It might also have offered the opportunity to remedy some of the deficiencies in planning which are identified in Section 6 of the Report. There will, of course, be other policy issues which would benefit from the same approach.

411. Cabinet has a different role to that of a Cabinet Committee.

412. Mr Powell has written that:

> "... Cabinet is the right place to ratify decisions, the right place for people to raise concerns if they have not done so before, the right place for briefings by the Prime Minister and other Ministers on strategic issues, the right place to ensure political unity; but it is categorically not the right place for an informed decision on difficult and detailed policy issues."[190]

413. In 2009, in a statement explaining a Cabinet decision to veto the release of minutes of one of its meetings under the Freedom of Information Act 2000, Mr Straw explained the need for frank discussion at Cabinet very cogently:

> "Serious and controversial decisions must be taken with free, frank – even blunt deliberations between colleagues. Dialogue must be fearless. Ministers must have the confidence to challenge each other in private. They must ensure that decisions have been properly thought through, sounding out all possibilities before committing themselves to a course of action. They must not feel inhibited from advancing options that may be unpopular or controversial. They must not be deflected from expressing dissent by the fear that they may be held personally to account for views that are later cast aside."[191]

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[190] Powell J. *The New Machiavelli: How to wield power in the modern world.* The Bodley Head, 2010.
[191] Statement J Straw, 23 February 2009, 'Exercise of the Executive Override under section 53 of the Freedom of Information Act 2000 in respect of the decision of the Information Commissioner dated 18 February 2008 (Ref: FS50165372) as upheld by the decision of the Information Tribunal of 27 January 2009 (Ref: EA/2008/0024 and EA/2008/0029): Statement of Reasons'.

414. Mr Blair told the Inquiry that:

> "... the discussion that we had in Cabinet was substantive discussion. We had it again and again and again, and the options were very simple. The options were: a sanctions framework that was effective; alternatively, the UN inspectors doing the job; alternatively, you have to remove Saddam. Those were the options."[192]

415. Mr Blair added:

> "Nobody in the Cabinet was unaware of ... what the whole issue was about. It was the thing running throughout the whole of the political mainstream at the time. There were members of the Cabinet who would challenge and disagree, but most of them agreed."[193]

416. The Inquiry has seen the minutes of 26 meetings of Cabinet between 28 February 2002 and 17 March 2003 at which Iraq was mentioned and Cabinet Secretariat notebooks. Cabinet was certainly given updates on diplomatic developments and had opportunities to discuss the general issues. The number of occasions on which there was a substantive discussion of the policy was very much more limited.

417. There were substantive discussions of the policy on Iraq, although not necessarily of all the issues (as the Report sets out), in Cabinet on 7 March and 23 September 2002 and 16 January, 13 March and 17 March 2003. Those are the records which are being published with the Report.

418. At the Cabinet meeting on 7 March 2002, Mr Blair concluded:

> "... the concerns expressed in discussion were justified. It was important that the United States did not appear to be acting unilaterally. It was critically important to reinvigorate the Middle East Peace Process. Any military action taken against President Saddam Hussein's regime had to be effective. On the other hand, the Iraqi regime was in clear breach of its obligations under several United Nations Security Council resolutions. Its WMD programmes posed a threat to peace. Iraq's neighbours regarded President Saddam Hussein as a danger. The right strategy was to engage closely with the Government of the United States in order to be in a position to shape policy and its presentation. The international community should proceed in a measured but determined way to decide how to respond to the real threat represented by the Iraqi regime. No decisions to launch military action had been taken and any action taken would be in accordance with international law.
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> "The Cabinet, 'Took note, with approval.'"[194]

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[192] Public hearing, 29 January 2010, page 22.
[193] Public hearing, 29 January 2010, pages 228-229.
[194] Cabinet Conclusions, 7 March 2002.

419. Cabinet on 17 March 2003 noted Mr Blair's conclusion that "the diplomatic process was at an end; Saddam Hussein would be given an ultimatum to leave Iraq; and the House of Commons would be asked to endorse the use of military action against Iraq to enforce compliance, if necessary".

420. In Section 5 of the Report, the Inquiry concludes that Lord Goldsmith should have been asked to provide written advice which fully reflected the position on 17 March and explained the legal basis on which the UK could take military action and set out the risks of legal challenge.

421. There was no substantive discussion of the military options, despite promises by Mr Blair, before the meeting on 17 March.

422. In his statement for the Inquiry, Mr Hoon wrote that by the time he joined Cabinet, in 1999:

> "... the pattern of the organisation and format of Cabinet meetings was ... well established. Tony Blair was well known to be extremely concerned about leaks from Cabinet discussions ... It was my perception that, largely as a consequence of this, he did not normally expect key decisions to be made in the course of Cabinet meetings. Papers were submitted to the Cabinet Office, and in turn by the Cabinet Office to appropriate Cabinet Committees for decisions."[195]

423. Mr Hoon wrote:

> "At no time when I was serving in the Ministry of Defence were other Cabinet Ministers involved in discussions about the deployment of specific forces and the nature of their operations. Relevant details would have been circulated to 10 Downing Street or other Government departments as necessary ... I do not recall a single Cabinet level discussion of specific troop deployments and the nature of their operations."[196]

424. The Inquiry recognises that there will be operational constraints on discussion of the details of military deployments, but that would not preclude the discussion of the principles and the implications of military options.

425. In January 2006, the Cabinet discussed the proposal to deploy military forces to Helmand later that year.

426. The Inquiry also recognises that the nature of foreign policy, as the Report vividly demonstrates, requires the Prime Minister of the UK, the Foreign Secretary and their most senior officials to be involved in negotiating and agreeing policy on a day-by-day, and sometimes hour-by-hour basis.

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[195] Statement, 2 April 2015, page 1.
[196] Statement, 2 April 2015, page 2.

427. It would neither be necessary nor feasible to seek a mandate from Cabinet at each stage of a discussion. That reinforces the importance of ensuring Cabinet is kept informed as strategy evolves, is given the opportunity to raise questions and is asked to endorse key decisions. Cabinet Ministers need more information than will be available from the media, especially on sensitive issues of foreign and security policy.

428. In 2009, three former Cabinet Secretaries[197] told the House of Lords Select Committee on the Constitution:

> "... each of us, as Secretary of the Cabinet, has been constantly conscious of his responsibility to the Cabinet collectively and of the need to have regard to the needs and responsibilities of the other members of the Cabinet (and indeed of other Ministers) as well of those of the Prime Minister. That has coloured our relationships with Number 10 as well as those with other Ministers and their departments."[198]

429. Lord Turnbull told the Inquiry that Mr Blair:

> "... wanted a step change in the work on delivery and reform, which I hope I managed to give him. Now ... how does the Cabinet Secretary work? You come in and you are – even with the two roles that you have, head of an organisation of half a million civil servants and in some sense co-ordinating a public sector of about five million people. You have to make choices as to where you make your effort, and I think the policy I followed was not to take an issue over from someone to whom it was delegated simply because it was big and important, but you have to make a judgement as to whether it is being handled competently, whether that particular part is, in a sense, under pressure, whether you think they are getting it wrong in some sense, or they are missing certain important things."[199]

430. The responsibility of the Cabinet Secretary to ensure that members of Cabinet are fully engaged in ways that allow them to accept collective responsibility and to meet their departmental obligations nevertheless remains.

Advice on the legal basis for military action

431. The Inquiry has reviewed the debate that took place within the Government and how it reached its decision.

432. The circumstances in which it was ultimately decided that there was a legal basis for UK participation were far from satisfactory.

433. It was not until 13 March 2003 that Lord Goldsmith advised that there was, on balance, a secure legal basis for military action.

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[197] Lord Armstrong of Ilminster, Lord Butler of Brockwell and Lord Wilson of Dinton.
[198] Fourth Report from the House of Lords Select Committee on the Constitution, Session 2009-10, *The Cabinet Office and the Centre of Government*, HL Paper 30.
[199] Public hearing, 13 January 2010, page 3.

434. In the letter of 14 March 2003 from Lord Goldsmith's office to No.10, which is addressed in Section 5 of the Report, Mr Blair was told that an essential ingredient of the legal basis was that he, himself, should be satisfied of the fact that Iraq was in breach of resolution 1441.

435. In accordance with that advice, it was Mr Blair who decided that, so far as the UK was concerned, Iraq was and remained in breach of resolution 1441.

436. Apart from No.10's response to the letter of 14 March, sent the following day, in terms that can only be described as perfunctory, no formal record was made of that decision and the precise grounds on which it was made remain unclear.

437. The Inquiry was told, and it accepts, that it would have been possible at that stage for the UK Government to have decided not to go ahead with military action if it had been necessary to make a decision to do so; or if the House of Commons on 18 March had voted against the Government.

438. Although, when resolution 1441 was adopted, there was unanimous support for a rigorous inspections and monitoring regime backed by the threat of military force as the means to disarm Iraq, there was no such consensus in the Security Council in March 2003. If the matter had been left to the Security Council to decide, military action might have been postponed and, possibly, avoided.

439. The Charter of the United Nations vests responsibility for the maintenance of peace and security in the Security Council. The UK Government was claiming to act on behalf of the international community "to uphold the authority of the Security Council", knowing that it did not have a majority in the Security Council in support of its actions. In those circumstances, the UK's actions undermined the authority of the Security Council.

440. A determination by the Security Council on whether Iraq was in fact in material breach of resolution 1441 would have furthered the UK's aspiration to uphold the authority of the Council.

The timing of Lord Goldsmith's advice on the interpretation of resolution 1441

441. Following the adoption of resolution 1441, a decision was taken to delay the receipt of formal advice from Lord Goldsmith.

442. On 11 November 2002, Mr Powell told Lord Goldsmith that there should be a meeting some time before Christmas to discuss the legal position.

443. On 9 December, formal "instructions" to provide advice were sent to Lord Goldsmith. They were sent by the FCO on behalf of the FCO and the MOD as well as No.10.

444. The instructions made it clear that Lord Goldsmith should not provide an immediate response.

445. When Lord Goldsmith met Mr Powell, Sir David Manning and Baroness Morgan (Director of Political and Government Relations to the Prime Minister) on 19 December, he was told that he was not, at that stage, being asked for his advice; and that, when he was, it would be helpful for him to discuss a draft with Mr Blair in the first instance.

446. Until 7 March 2003, Mr Blair and Mr Powell asked that Lord Goldsmith's views on the legal effect of resolution 1441 should be tightly held and not shared with Ministerial colleagues without No.10's permission.

447. Lord Goldsmith agreed that approach.

448. Lord Goldsmith provided draft advice to Mr Blair on 14 January 2003. As instructed he did not, at that time, provide a copy of his advice to Mr Straw or to Mr Hoon.

449. Although Lord Goldsmith was invited to attend Cabinet on 16 January, there was no discussion of Lord Goldsmith's views.

450. Mr Straw was aware, in general terms, of Lord Goldsmith's position but he was not provided with a copy of Lord Goldsmith's draft advice before Cabinet on 16 January. He did not read it until at least two weeks later.

451. The draft advice of 14 January should have been provided to Mr Straw, Mr Hoon and the Cabinet Secretary, all of whose responsibilities were directly engaged.

452. Lord Goldsmith provided Mr Blair with further advice on 30 January. It was not seen by anyone outside No.10.

453. Lord Goldsmith discussed the negotiating history of resolution 1441 with Mr Straw, Sir Jeremy Greenstock, with White House officials and the State Department's Legal Advisers. They argued that resolution 1441 could be interpreted as not requiring a second resolution. The US Government's position was that it would not have agreed to resolution 1441 had its terms required one.

454. When Lord Goldsmith met No.10 officials on 27 February, he told them that he had reached the view that a "reasonable case" could be made that resolution 1441 was capable of reviving the authorisation to use force in resolution 678 (1990) without a further resolution, if there were strong factual grounds for concluding that Iraq had failed to take the final opportunity offered by resolution 1441.

455. Until that time, No.10 could not have been sure that Lord Goldsmith would advise that there was a basis on which military action against Iraq could be taken in the absence of a further decision of the Security Council.

456. In the absence of Lord Goldsmith's formal advice, uncertainties about the circumstances in which the UK would be able to participate in military action continued, although the possibility of a second resolution remained.

457. Lord Goldsmith provided formal written advice on 7 March.

Lord Goldsmith's advice of 7 March 2003

458. Lord Goldsmith's formal advice of 7 March set out alternative interpretations of the legal effect of resolution 1441. He concluded that the safer route would be to seek a second resolution, and he set out the ways in which, in the absence of a second resolution, the matter might be brought before a court. Lord Goldsmith identified a key question to be whether or not there was a need for an assessment of whether Iraq's conduct constituted a failure to take the final opportunity or a failure fully to co-operate within the meaning of operative paragraph 4, such that the basis of the cease-fire was destroyed.

459. Lord Goldsmith wrote (paragraph 26): "A narrow textual reading of the resolution suggested no such assessment was needed because the Security Council had pre-determined the issue. Public statements, on the other hand, say otherwise."

460. While Lord Goldsmith remained "of the opinion that the safest legal course would be to secure a second resolution", he concluded (paragraph 28) that "a reasonable case can be made that resolution 1441 was capable of reviving the authorisation in resolution 678 without a further resolution".

461. Lord Goldsmith wrote that a reasonable case did not mean that, if the matter ever came to court, he would be confident that the court would agree with this view. He judged a court might well conclude that OPs 4 and 12 required a further Security Council decision in order to revive the authorisation in resolution 678.

462. Lord Goldsmith noted that on a number of previous occasions, including in relation to Operation Desert Fox in Iraq in 1998 and Kosovo in 1999, UK forces had participated in military action on the basis of advice from previous Attorneys General that (paragraph 30) "the legality of the action under international law was no more than reasonably arguable".

463. Lord Goldsmith warned Mr Blair (paragraph 29):

> "... the argument that resolution 1441 alone has revived the authorisation to use force in resolution 678 will only be sustainable if there are strong factual grounds for concluding that Iraq failed to take the final opportunity. In other words, we would need to be able to demonstrate hard evidence of non-compliance and non-co-operation ... the views of UNMOVIC and the IAEA will be highly significant in this respect."

464. Lord Goldsmith added:

> "In the light of the latest reporting by UNMOVIC, you will need to consider extremely carefully whether the evidence of non-co-operation and non-compliance by Iraq is sufficiently compelling to justify the conclusion that Iraq has failed to take its final opportunity."

465. Mr Straw, Mr Hoon, Dr John Reid (Minister without Portfolio and Labour Party Chair) and the Chiefs of Staff had all seen Lord Goldsmith's advice of 7 March before the No.10 meeting on 11 March, but it is not clear how and when it reached them.

466. Other Ministers whose responsibilities were directly engaged, including Mr Gordon Brown (Chancellor of the Exchequer) and Ms Short, and their senior officials, did not see the advice.

Lord Goldsmith's arrival at a "better view"

467. At the meeting on 11 March, Mr Blair stated that Lord Goldsmith's "advice made it clear that a reasonable case could be made" that resolution 1441 was "capable of reviving" the authorisation of resolution 678, "although of course a second resolution would be preferable". There was concern, however, that the advice did not offer a clear indication that military action would be lawful.

468. Lord Goldsmith was asked, after the meeting, by Adm Boyce on behalf of the Armed Forces, and by the Treasury Solicitor, Ms Juliet Wheldon, in respect of the Civil Service, to give a clear-cut answer on whether military action would be lawful rather than unlawful.

469. On 12 March, Mr Blair and Mr Straw reached the view that there was no chance of securing a majority in the Security Council in support of the draft resolution of 7 March and there was a risk of one or more vetoes if the resolution was put to a vote.

470. There is no evidence to indicate that Lord Goldsmith was informed of their conclusion.

471. Lord Goldsmith concluded on 13 March that, on balance, the "better view" was that the conditions for the operation of the revival argument were met in this case, meaning that there was a lawful basis for the use of force without a further resolution beyond resolution 1441.

The exchange of letters on 14 and 15 March 2003

472. Mr David Brummell (Legal Secretary to the Law Officers) wrote to Mr Matthew Rycroft (Mr Blair's Private Secretary for Foreign Affairs) on 14 March:

> "It is an essential part of the legal basis for military action without a further resolution of the Security Council that there is strong evidence that Iraq has failed to comply

> with and co-operate fully in the implementation of resolution 1441 and has thus failed to take the final opportunity offered by the Security Council in that resolution. The Attorney General understands that it is unequivocally the Prime Minister's view that Iraq has committed further material breaches as specified in [operative] paragraph 4 of resolution 1441, but as this is a judgement for the Prime Minister, the Attorney would be grateful for confirmation that this is the case."

473. Mr Rycroft replied to Mr Brummell on 15 March:

> "This is to confirm that it is indeed the Prime Minister's unequivocal view that Iraq is in further material breach of its obligations, as in OP4 of UNSCR 1441, because of 'false statements or omissions in the declarations submitted by Iraq pursuant to this resolution and failure to comply with, and co-operate fully in the interpretation of, this resolution'."

474. It is unclear what specific grounds Mr Blair relied upon in reaching his view.

475. In his advice of 7 March, Lord Goldsmith had said that the views of UNMOVIC and the IAEA would be highly significant in demonstrating hard evidence of non-compliance and non-co-operation. In the exchange of letters on 14 and 15 March between Mr Brummell and No.10, there is no reference to their views; the only view referred to was that of Mr Blair.

476. Following receipt of Mr Brummell's letter of 14 March, Mr Blair neither requested nor received considered advice addressing the evidence on which he expressed his "unequivocal view" that Iraq was "in further material breach of its obligations".

477. Senior Ministers should have considered the question posed in Mr Brummell's letter of 14 March, either in the Defence and Overseas Policy Committee or a "War Cabinet", on the basis of formal advice. Such a Committee should then have reported its conclusions to Cabinet before its members were asked to endorse the Government's policy.

Lord Goldsmith's Written Answer of 17 March 2003

478. In Parliament during the second week of March, and in the media, there were calls on the Government to make a statement about its legal position.

479. When Lord Goldsmith spoke to Mr Brummell on 13 March, they agreed that a statement should be prepared "setting out the Attorney's view of the legal position which could be deployed at Cabinet and in Parliament the following week".

480. The message was conveyed to No.10 during the morning of 15 March that Lord Goldsmith "would make clear during the course of the week that there is a sound legal basis for action should that prove necessary".

481. The decision that Lord Goldsmith would take the lead in explaining the Government's legal position to Parliament, rather than the Prime Minister or responsible Secretary of State providing that explanation, was unusual.

482. The normal practice was, and is, that the Minister responsible for the policy, in this case Mr Blair or Mr Straw, would have made such a statement.

Cabinet, 17 March 2003

483. Cabinet was provided with the text of Lord Goldsmith's Written Answer to Baroness Ramsey of Cartvale setting out the legal basis for military action.

484. That document represented a statement of the Government's legal position – it did not explain the legal basis of the conclusion that Iraq had failed to take "the final opportunity" to comply with its disarmament obligations offered by resolution 1441.

485. Lord Goldsmith told Cabinet that it was "plain" that Iraq had failed to comply with its obligations and continued to be in "material breach" of the relevant Security Council resolutions. The authority to use force under resolution 678 was, "as a result", revived. Lord Goldsmith said that there was no need for a further resolution.

486. Cabinet was not provided with written advice which set out, as the advice of 7 March had done, the conflicting arguments regarding the legal effect of resolution 1441 and whether, in particular, it authorised military action without a further resolution of the Security Council.

487. Cabinet was not provided with, or informed of, Mr Brummell's letter to Mr Rycroft of 14 March; or Mr Rycroft's response of 15 March. Cabinet was not told how Mr Blair had reached the view recorded in Mr Rycroft's letter.

488. The majority of Cabinet members who gave evidence to the Inquiry took the position that the role of the Attorney General on 17 March was, simply, to tell Cabinet whether or not there was a legal basis for military action.

489. None of those Ministers who had read Lord Goldsmith's 7 March advice asked for an explanation as to why his legal view of resolution 1441 had changed.

490. There was little appetite to question Lord Goldsmith about his advice, and no substantive discussion of the legal issues was recorded.

491. Cabinet was not misled on 17 March and the exchange of letters between the Attorney General's office and No.10 on 14 and 15 March did not constitute, as suggested to the Inquiry by Ms Short, a "side deal".

492. Cabinet was, however, being asked to confirm the decision that the diplomatic process was at an end and that the House of Commons should be asked to endorse the use of military action to enforce Iraq's compliance. Given the gravity of this decision, Cabinet should have been made aware of the legal uncertainties.

493. Lord Goldsmith should have been asked to provide written advice which fully reflected the position on 17 March, explained the legal basis on which the UK could take military action and set out the risks of legal challenge.

494. The advice should have addressed the significance of the exchange of letters of 14 and 15 March and how, in the absence of agreement from the majority of members of the Security Council, the point had been reached that Iraq had failed to take the final opportunity offered by resolution 1441.

495. The advice should have been provided to Ministers and senior officials whose responsibilities were directly engaged and should have been made available to Cabinet.

Weapons of mass destruction

Iraq WMD assessments, pre-July 2002

496. The ingrained belief that Saddam Hussein's regime retained chemical and biological warfare capabilities, was determined to preserve and if possible enhance its capabilities, including at some point in the future a nuclear capability, and was pursuing an active policy of deception and concealment, had underpinned UK policy towards Iraq since the Gulf Conflict ended in 1991.

497. While the detail of individual JIC Assessments on Iraq varied, this core construct remained in place.

498. Security Council resolutions adopted since 1991 demanded Iraq's disarmament and the re-admission of inspectors, and imposed sanctions in the absence of Iraqi compliance with those – and other – obligations. Agreement to those resolutions indicated that doubts about whether Iraq had disarmed were widely shared.

499. In parallel, by 2000, the wider risk of proliferation was regarded as a major threat. There was heightened concern about:

- the danger of proliferation, particularly that countries of concern might obtain nuclear weapons and ballistic missiles; and
- the potential risk that terrorist groups which were willing to use them might gain access to chemical and biological agents and, possibly, nuclear material, and the means to deliver them.

500. These concerns were reinforced after 9/11.

501. The view conveyed in JIC Assessments between December 2000 and March 2002 was that, despite the considerable achievements of UNSCOM and the IAEA between 1991 and December 1998, including dismantling Iraq's nuclear programme,

the inspectors had been unable to account for some of the ballistic missiles and chemical and biological weapons and material produced by Iraq; and that it had:

- not totally destroyed all its stockpile of chemical and biological weapons;
- retained up to 360 tonnes of chemical agents and precursor chemicals and growth media which would allow it to produce more chemical and biological agents;
- hidden a small number of long-range Al Hussein ballistic missiles; and
- retained the knowledge, documentation and personnel which would allow it to reconstitute its chemical, biological, nuclear and ballistic missile programmes.

502. The JIC also judged that, since the departure of the weapons inspectors, Iraq:

- was actively pursuing programmes to extend the range of its existing short-range ballistic missiles beyond the permitted range of 150km;
- had begun development of a ballistic missile with a range greater than 1,000km;
- was capable of resuming undetected production of "significant quantities" of chemical and biological agents, and in the case of VX (a nerve agent) might have already done so; and
- was pursuing activities that could be linked to a nuclear programme.

503. Iraq's chemical, biological and ballistic missile programmes were seen as a threat to international peace and security in the Middle East region, but Iraq was viewed as a less serious proliferation threat than other key countries of concern – Iran, Libya and North Korea – which had current nuclear programmes. Iraq's nuclear facilities had been dismantled by the weapons inspectors. The JIC judged that Iraq would be unable to obtain a nuclear weapon while sanctions remained effective.

504. The JIC continued to judge that co-operation between Iraq and Al Qaida was "unlikely", and that there was no "credible evidence of Iraqi transfers of WMD-related technology and expertise to terrorist groups".

505. In mid-February 2002, in preparation for Mr Blair's planned meeting with President Bush in early April 2002, No.10 commissioned the preparation of a paper to inform the public about the dangers of nuclear proliferation and WMD more generally in four key countries of concern, North Korea, Iran, Libya and Iraq.

506. When the preparation of this document became public knowledge, it was perceived to be intended to underpin a decision on military action against Iraq. The content and timing became a sensitive issue.

507. Reflecting the UK position that action was needed to disarm Iraq, Mr Blair and Mr Straw began, from late February 2002, publicly to argue that Iraq was a threat which had to be dealt with; that Iraq needed to disarm or be disarmed in accordance with the

obligations imposed by the UN; and that it was important to agree to the return of UN inspectors to Iraq.

508. The focus on Iraq was not the result of a step change in Iraq's capabilities or intentions.

509. When he saw the draft paper on WMD countries of concern on 8 March, Mr Straw commented:

> "Good, but should not Iraq be first and also have more text? The paper has to show why there is an exceptional threat from Iraq. It does not quite do this yet."[200]

510. On 18 March, Mr Straw decided that a paper on Iraq should be issued before one addressing other countries of concern.

511. On 22 March, Mr Straw was advised that the evidence would not convince public opinion that there was an imminent threat from Iraq. Publication was postponed.

512. No.10 decided that the Cabinet Office Overseas and Defence Secretariat should co-ordinate the production of a "public dossier" on Iraq, and that Mr Campbell should "retain the lead role on the timing/form of its release".

513. The statements prepared for, and used by, the UK Government in public, from late 2001 onwards, about Iraq's proscribed activities and the potential threat they posed were understandably written in more direct and less nuanced language than the JIC Assessments on which they drew.

514. The question is whether, in doing so, they conveyed more certainty and knowledge than was justified, or created tests it would be impossible for Iraq to meet. That is of particular concern in relation to the evidence in Section 4.1 on two key issues.

515. First, the estimates of the weapons and material related to Iraq's chemical and biological warfare programmes for which UNSCOM had been unable to account were based on extrapolations from UNSCOM records. Officials explicitly advised that it was "inherently difficult to arrive at precise figures". In addition, it was acknowledged that neither UNSCOM nor the UK could be certain about either exactly what had existed or what Iraq had already destroyed.

516. The revised estimates announced by Mr Straw on 2 May were increasingly presented in Government statements as the benchmark against which Iraq should be judged.

517. Second, the expert MOD examination of issues in late March 2002 exposed the difficulties Iraq would have to overcome before it could acquire a nuclear weapon. That included the difficulty of acquiring suitable fissile material from the "black market".

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[200] Minute McDonald to Ricketts, 11 March 2002, 'Iraq'.

518. In addition, the tendency to refer in public statements only to Iraq's "weapons of mass destruction" without addressing their nature (the type of warhead and whether they were battlefield or strategic weapons systems) or how they might be used (as a last resort against invading military forces or as a weapon of terror to threaten civilian populations in other countries) was likely to have created the impression that Iraq posed a greater threat than the detailed JIC Assessments would have supported.

Iraq WMD assessments, July to September 2002

519. From late February 2002, the UK Government position was that Iraq was a threat that had to be dealt with; that Iraq needed to disarm in accordance with the obligations imposed by the UN; and that it was important to agree to the return of UN inspectors to Iraq.

520. The urgency and certainty with which the position was stated reflected both the ingrained beliefs already described and the wider context in which the policy was being discussed with the US.

521. But it also served to fuel the demand that the Government should publish the document it was known to have prepared, setting out the reasons why it was so concerned about Iraq.

522. In the spring and summer of 2002, senior officials and Ministers took the view that the Iraq dossier should not be published until the way ahead on the policy was clearer.

523. By late August 2002, the Government was troubled by intense speculation about whether a decision had already been taken to use military force. In Mr Blair's words, the US and UK had been "outed" as having taken a decision when no such decision had been taken.

524. Mr Blair's decision on 3 September to announce that the dossier would be published was a response to that pressure.

525. The dossier was designed to "make the case" and secure Parliamentary (and public) support for the Government's position that action was urgently required to secure Iraq's disarmament.

526. The UK Government intended the information and judgements in the Iraq dossier to be seen to be the product of the JIC in order to carry authority with Parliament and the public.

527. The Secret Intelligence Service (SIS) was commissioned by No.10 on 5 September to examine whether it had any additional material which could be included.

528. Mr Scarlett, as Chairman of the JIC, was given the responsibility of producing the dossier.

529. The dossier drew on the 9 September JIC Assessment, 'Iraqi Use of Chemical and Biological Weapons – Possible Scenarios', which had been commissioned to address scenarios for Iraq's possible use of chemical and biological weapons in the event of military action, previous JIC Assessments and the subsequent report issued by SIS on 11 September.

530. The SIS report should have been shown to the relevant experts in the Defence Intelligence Staff (DIS) who could have advised their senior managers and the Assessments Staff.

531. Expert officials in DIS questioned the certainty with which some of the judgements in the dossier were expressed. Some of their questions were discussed during the preparation of the dossier. The text was agreed by Air Marshal Joe French, Chief of Defence Intelligence, at the JIC meeting on 19 September.

532. There is no evidence that other members of the JIC were aware at the time of the reservations recorded in the minute by Dr Brian Jones (the branch head of the nuclear, biological and chemical section in the Scientific and Technical Directorate of the Defence Intelligence Staff) of 19 September and that written by the chemical weapons expert in his team the following day.

533. The JIC accepted ownership of the dossier and agreed its content. There is no evidence that intelligence was improperly included in the dossier or that No.10 improperly influenced the text.

534. At issue are the judgements made by the JIC and how they and the intelligence were presented, including in Mr Blair's Foreword and in his statement to Parliament on 24 September 2002.

535. It is unlikely that Parliament and the public would have distinguished between the ownership and therefore the authority of the judgements in the Foreword and those in the Executive Summary and the main body of the dossier.

536. In the Foreword, Mr Blair stated that he believed the "assessed intelligence" had "established beyond doubt" that Saddam Hussein had "continued to produce chemical and biological weapons, that he continues in his efforts to develop nuclear weapons, and that he had been able to extend the range of his ballistic missile programme". That raises two key questions.

- Did Mr Blair's statements in whole or in part go further than the assessed intelligence?
- Did that matter?

537. The Inquiry is not questioning Mr Blair's belief, which he consistently reiterated in his evidence to the Inquiry, or his legitimate role in advocating Government policy.

538. But the deliberate selection of a formulation which grounded the statement in what Mr Blair believed, rather than in the judgements which the JIC had actually reached in its assessment of the intelligence, indicates a distinction between his beliefs and the JIC's actual judgements.

539. That is supported by the position taken by the JIC and No.10 officials at the time, and in the evidence offered to the Inquiry by some of those involved.

540. The assessed intelligence had not established beyond doubt that Saddam Hussein had continued to produce chemical and biological weapons. The Executive Summary of the dossier stated that the JIC judged that Iraq had "continued to produce chemical and biological agents". The main text of the dossier said that there had been "recent" production. It also stated that Iraq had the means to deliver chemical and biological weapons. It did not say that Iraq had continued to produce weapons.

541. Nor had the assessed intelligence established beyond doubt that efforts to develop nuclear weapons continued. The JIC stated in the Executive Summary of the dossier that Iraq had:

- made covert attempts "to acquire technology and materials which could be used in the production of nuclear weapons";
- "sought significant quantities of uranium from Africa, despite having no active nuclear programme that would require it"; and
- "recalled specialists to work on its nuclear programme".

542. But the dossier made clear that, as long as sanctions remained effective, Iraq could not produce a nuclear weapon.

543. These conclusions draw on the evidence from the JIC Assessments at the time and the Executive Summary of the dossier, which are set out in Section 4.2. They do not rely on hindsight.

544. The JIC itself should have made that position clear because its ownership of the dossier, which was intended to inform a highly controversial policy debate, carried with it the responsibility to ensure that the JIC's integrity was protected.

545. The process of seeking the JIC's views, through Mr Scarlett, on the text of the Foreword shows that No.10 expected the JIC to raise any concerns it had.

546. The firmness of Mr Blair's beliefs, despite the underlying uncertainties, is important in considering how the judgements in the Foreword would have been interpreted by Cabinet in its discussions on 23 September and by Parliament.

547. In his statement to Parliament on 24 September and in his answers to subsequent questions, Mr Blair presented Iraq's past, current and potential future capabilities as evidence of the severity of the potential threat from Iraq's weapons of mass destruction; and that, at some point in the future, that threat would become a reality.

548. By the time the dossier was published, President Bush had announced that the US was seeking action on Iraq through the UN, and Iraq had agreed to the return of inspectors.

549. Rather than the debate being framed in terms of the answers needed to the outstanding questions identified by UNSCOM and the IAEA, including the material for which UNSCOM had been unable to account, the dossier's description of Iraq's capabilities and intent became part of the baseline against which the UK Government measured Iraq's future statements and actions and the success of weapons inspections.

550. As Section 4.3 demonstrates, the judgements remained in place without challenge until the invasion of Iraq in March 2003. Iraq's denials of the capabilities and intent attributed to it were not taken seriously.

551. As the flaws in the construct and the intelligence were exposed after the conflict, the dossier and subsequent statements to Parliament also became the baseline against which the Government's good faith and credibility were judged.

Iraq WMD assessments, October 2002 to March 2003

552. From October 2002 onwards, the JIC focused on two main themes:

- Iraq's attitude to the return of the inspectors and, from 8 November, its compliance with the specific obligations imposed by resolution 1441; and
- Iraq's options, diplomatic and military, including the possible use of chemical and biological weapons and ballistic missiles against Coalition Forces or countries in the region in either pre-emptive attacks or in response to a military attack.

553. In its Assessment of 18 December, the JIC made the judgements in the UK Government September dossier part of the test for Iraq.

554. The judgements about Iraq's capabilities and intentions relied heavily on Iraq's past behaviour being a reliable indicator of its current and future actions.

555. There was no consideration of whether, faced with the prospect of a US-led invasion, Saddam Hussein had taken a different position.

556. The absence of evidence of proscribed programmes and materials relating to the production or delivery of chemical, biological or nuclear weapons was attributed to Iraq's ability to conceal its activities and deceive the inspectors and the difficulties which it had been anticipated the inspectors would encounter.

557. The JIC Assessment of 11 October 2002 stated that a good intelligence flow from inside Iraq, supporting tougher inspections, would be "central to success".

558. A key element of the Assessments was the reporting and intelligence on Iraq's intentions to conceal its activities, deceive the inspectors and obstruct the conduct of inspections, particularly Iraq's attitudes to preventing interviews with officials who were

identified as associated with its proscribed programmes or who had been involved in Iraq's unilateral destruction of its weapons and facilities.

559. The large number of intelligence reports about Iraq's activities were interpreted from the perspective that Iraq's objectives were to conceal its programmes.

560. Similarly, Iraq's actions were consistently interpreted as indicative of deceit.

561. From early 2003, the Government drew heavily on the intelligence reporting of Iraq's activities to deceive and obstruct the inspectors to illustrate its conclusion that Iraq had no intention of complying with the obligations imposed in resolution 1441.

562. The Government also emphasised the reliability of the reporting.

563. The JIC's judgement from August 2002 until 19 March 2003 remained that Iraq might use chemical and biological weapons in response to a military attack.

564. Iraq's statements that it had no weapons or programmes were dismissed as further evidence of a strategy of denial.

565. In addition, the extent to which the JIC's judgements depended on inference and interpretation of Iraq's previous attitudes and behaviour was not recognised.

566. At no stage was the hypothesis that Iraq might not have chemical, biological or nuclear weapons or programmes identified and examined by either the JIC or the policy community.

567. After its 9 September 2002 Assessment, the JIC was not asked to review its judgements on Iraq's capabilities and programmes which underpinned UK thinking. Nor did the JIC itself suggest such a review.

568. As a result there was no formal reassessment of the JIC judgements, and the 9 September Assessment and the 24 September dossier provided part of the baseline for the UK Government's view of Iraq's capabilities and intentions on its chemical, biological, nuclear and ballistic missile programmes.

569. Given the weight which rested on the JIC's judgements about Iraq's possession of WMD and its future intent for the decision in March that military action should, if necessary, be taken to disarm Iraq, a formal reassessment of the JIC's judgements should have taken place.

570. This might have been prompted by Dr Blix's report to the Security Council on 14 February 2003, which demonstrated the developing divergence between the assessments presented by the US and UK. Dr Blix's report of 7 March, which changed the view that Iraqi behaviour was preventing UNMOVIC from carrying out its tasks, should certainly have prompted a review.

The search for WMD

571. Section 4.4 considers the impact of the failure to find stockpiles of WMD in Iraq in the months immediately after the invasion, and of the emerging conclusions of the Iraq Survey Group (ISG), on:

- the Government's response to demands for an independent judge-led inquiry into pre-conflict intelligence on Iraq; and
- the Government's public presentation of the nature of the threat from Saddam Hussein's regime and the decision to go to war.

572. The Inquiry has not sought to comment in detail on the specific conclusions of the ISC, FAC, Hutton and Butler Reports, all of which were published before the withdrawal by SIS in September 2004 of a significant proportion of the intelligence underpinning the JIC Assessments and September 2002 dossier on which UK policy had rested.

573. In addition to the conclusions of those reports, the Inquiry notes the forthright statement in March 2005 of the US Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction. Reporting to President Bush, the Commission stated that "the [US] Intelligence Community was dead wrong in almost all of its pre-war judgments about Iraq's weapons of mass destruction. This was a major intelligence failure."

574. The evidence in Section 4.4 shows that, after the invasion, the UK Government, including the intelligence community, was reluctant to admit, and to recognise publicly, the mounting evidence that there had been failings in the UK's pre-conflict collection, validation, analysis and presentation of intelligence on Iraq's WMD.

575. Despite the failure to identify any evidence of WMD programmes during pre-conflict inspections, the UK Government remained confident that evidence would be found after the Iraqi regime had been removed.

576. Almost immediately after the start of the invasion, UK Ministers and officials sought to lower public expectations of immediate or significant finds of WMD in Iraq.

577. The lack of evidence to support pre-conflict claims about Iraq's WMD challenged the credibility of the Government and the intelligence community, and the legitimacy of the war.

578. The Government and the intelligence community were both concerned about the consequences of the presentational aspects of their pre-war assessments being discredited.

579. By June, the Government had acknowledged the need for a review of the UK's pre-conflict intelligence on Iraq. It responded to demands for an independent, judge-led inquiry by expressing support for the reviews initiated by the ISC and the FAC.

580. The announcement of the Hutton Inquiry into the circumstances surrounding the death of Dr David Kelly on 18 July, reinforced the Government's position that additional reviews were not needed.

581. The Government maintained that position until January 2004, backed by three votes in the House of Commons (on 4 June, 15 July and 22 October 2003) rejecting a succession of Opposition motions calling for an independent inquiry into the use of pre-war intelligence.

582. Mr Blair's initial response to growing criticism of the failure to find WMD was to counsel patience.

583. After the publication of the ISG Interim Report, the Government's focus shifted from finding stockpiles of weapons to emphasising evidence of the Iraqi regime's strategic intent.

584. Once President Bush made clear his decision to set up an independent inquiry, Mr Blair's resistance to a public inquiry became untenable.

585. After the announcement of the Butler Review, the UK Government's focus shifted to the content of the next ISG report, the Status Report.

586. The Government, still concerned about the nature of the public debate on WMD in the UK, sought to ensure that the Status Report included existing ISG material highlighting the strategic intentions of Saddam Hussein's regime and breaches of Security Council resolutions.

587. Mr Blair remained concerned about continuing public and Parliamentary criticism of the pre-conflict intelligence, the failure to find WMD and the decision to invade Iraq. After the reports from the Hutton Inquiry, the ISG and the US Commission, he sought to demonstrate that, although "the exact basis for action was not as we thought", the invasion had still been justified.

588. The ISG's findings were significant, but did not support past statements by the UK and US Governments, which had focused on Iraq's current capabilities and an urgent and growing threat.

589. The explanation for military action put forward by Mr Blair in October 2004 was not the one given before the conflict.

Planning for a post-Saddam Hussein Iraq

The failure to plan or prepare for known risks

590. The information on Iraq available to the UK Government before the invasion provided a clear indication of the potential scale of the post-conflict task.

591. It showed that, in order to achieve the UK's desired end state, any post-conflict administration would need to:

- restore infrastructure that had deteriorated significantly in the decade since 1991, to the point where it was not capable of meeting the needs of the Iraqi people;
- administer a state where the upper echelons of a regime that had been in power since 1968 had been abruptly removed and in which the capabilities of the wider civil administration, many of whose employees were members of the ruling party, were difficult to assess; and
- provide security in a country faced with a number of potential threats, including:
  - internecine violence;
  - terrorism; and
  - Iranian interference.

592. In December 2002, the MOD described the post-conflict phase of operations as "strategically decisive".[201] But when the invasion began, the UK Government was not in a position to conclude that satisfactory plans had been drawn up and preparations made to meet known post-conflict challenges and risks in Iraq and to mitigate the risk of strategic failure.

593. Throughout the planning process, the UK assumed that the US would be responsible for preparing the post-conflict plan, that post-conflict activity would be authorised by the UN Security Council, that agreement would be reached on a significant post-conflict role for the UN and that international partners would step forward to share the post-conflict burden.

594. On that basis, the UK planned to reduce its military contribution in Iraq to medium scale within four months of the start of the invasion[202] and expected not to have to make a substantial commitment to post-conflict administration.[203]

595. Achieving that outcome depended on the UK's ability to persuade the US of the merits of a significant post-conflict role for the UN.

596. The UK could not be certain at any stage in the year before the invasion that it would succeed in that aim.

597. In January 2003, the UK sought to persuade the US of the benefits of UN leadership of Iraq's interim post-conflict civil administration.[204] Officials warned that,

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[201] Paper [SPG], 13 December 2002, 'UK Military Strategic Thinking on Iraq'.
[202] Minute CDS to CJO, 18 March 2003, 'Op TELIC: Authorisation for Military Operations in Iraq' attaching Paper CDS, 'Chief of Defence Staff Execute Directive to the Joint Commander for Operation TELIC (Phases 3 and 4)'.
[203] Minute Straw and Hoon to Prime Minister, 19 March 2003, 'Iraq: UK Military Contribution to post-conflict Iraq'.
[204] Minute Ricketts to Private Secretary [FCO], 7 February 2003, 'Iraq Strategy'.

if the UK failed to persuade the US, it risked "being drawn into a huge commitment of UK resources for a highly complex task of administration and law and order for an uncertain period".

598. By March 2003, having failed to persuade the US of the advantages of a UN-led interim administration, the UK had set the less ambitious goal of persuading the US to accept UN authorisation of a Coalition-led interim administration and an international presence that would include the UN.[205]

599. On 19 March, Mr Blair stated in Parliament that discussions were taking place with the US, UN and others on the role of the UN and post-conflict issues.[206]

600. Discussions continued, but, as the invasion began:

- The UK had not secured US agreement to a Security Council resolution authorising post-conflict administration and could not be sure when, or on what terms, agreement would be possible.
- The extent of the UN's preparations, which had been hindered by the absence of agreement on post-conflict arrangements, remained uncertain. Mr Annan emphasised to Ms Short the need for clarity on US thinking so that UN planning could proceed[207] and told Sir Jeremy Greenstock that he "would not wish to see any arrangement subjugating UN activity to Coalition activity".[208]
- Potential international partners for reconstruction and additional Coalition partners to provide security continued to make their post-conflict contributions conditional on UN authorisation for Phase IV (the military term for post-conflict operations).[209]

601. Despite being aware of the shortcomings of the US plan,[210] strong US resistance to a leading role for the UN,[211] indications that the UN did not want the administration of Iraq to become its responsibility[212] and a warning about the tainted image of the UN in Iraq,[213] at no stage did the UK Government formally consider other policy options, including the possibility of making participation in military action conditional on a satisfactory plan for the post-conflict period, or how to mitigate the known risk that the UK could find itself drawn into a "huge commitment of UK resources" for which no contingency preparations had been made.

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[205] Paper Iraq Planning Unit, 25 March 2003, 'Iraq: Phase IV: Authorising UNSCR'.
[206] House of Commons, *Official Report*, 19 March 2003, columns 931-932.
[207] Telegram 501 UKMIS New York to FCO London, 21 March 2003, 'Iraq Humanitarian/Reconstruction: Clare Short's Visit to New York'.
[208] Telegram 526 UKMIS New York to FCO London, 25 March 2003, 'Iraq Phase IV: UN Dynamics'.
[209] Paper FCO, 25 March 2003, 'Iraq: Phase IV Issues'.
[210] Minute Drummond to Rycroft, 19 March 2003, 'Iraq Ministerial Meeting'.
[211] Minute Ricketts to Private Secretary [FCO], 7 February 2003, 'Iraq Strategy'.
[212] Public hearing, 15 December 2009, page 5.
[213] Paper Middle East Department, 12 December 2002, 'Interim Administrations in Iraq: Why a UN-led Interim Administration would be in the US interest'.

The planning process and decision-making

602. As a junior partner in the Coalition, the UK worked within a planning framework established by the US. It had limited influence over a process dominated increasingly by the US military.

603. The creation of the Ad Hoc Group on Iraq in September 2002 and the Iraq Planning Unit in February 2003 improved co-ordination across government at official level, but neither body carried sufficient authority to establish a unified planning process across the four principal departments involved – the FCO, the MOD, DFID and the Treasury – or between military and civilian planners.

604. Important material, including in the DFID reviews of northern and southern Iraq, and significant pieces of analysis, including the series of MOD Strategic Planning Group (SPG) papers on military strategic thinking, were either not shared outside the originating department, or, as appears to have been the case with the SPG papers, were not routinely available to all those with a direct interest in the contents.

605. Some risks were identified, but departmental ownership of those risks, and responsibility for analysis and mitigation, were not clearly established.

606. When the need to plan and prepare for the worst case was raised, including by MOD officials in advice to Mr Hoon on 6 March 2003,[214] Lieutenant General John Reith, Chief of Joint Operations, in his paper for the Chiefs of Staff on 21 March[215] and in Treasury advice to Mr Brown on 24 March,[216] there is no evidence that any department or individual assumed ownership or was assigned responsibility for analysis or mitigation. No action ensued.

607. In April 2003, Mr Blair set up the Ad Hoc Ministerial Group on Iraq Rehabilitation (AHMGIR), chaired by Mr Straw, to oversee the UK contribution to post-conflict reconstruction.

608. Until the creation of the AHMGIR, Mr Straw, Mr Hoon and Ms Short remained jointly responsible for directing post-conflict planning and preparation.

609. In the absence of a single person responsible for overseeing all aspects of planning and preparation, departments pursued complementary, but separate, objectives. Gaps in UK capabilities were overlooked.

610. The FCO, which focused on policy-making and negotiation, was not equipped by past experience or practice, or by its limited human and financial resources, to prepare for nation-building of the scale required in Iraq, and did not expect to do so.

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[214] Minute Sec(O)4 to PS/Secretary of State [MOD], 6 March 2003, 'Iraq: Aftermath – Medium to Long Term UK Military Commitment'.
[215] Minute Reith to COSSEC, 21 March 2003, 'Phase IV Planning – Taking Stock'.
[216] Minute Dodds to Chancellor, 24 March 2003, 'Iraq: UK Military Contribution to Post-Conflict Iraq'.

611. DFID's focus on poverty reduction and the channelling of assistance through multilateral institutions instilled a reluctance, before the invasion, to engage on anything other than the immediate humanitarian response to conflict.

612. When military planners advised of the need to consider the civilian component as an integral part of the UK's post-conflict deployment, the Government was not equipped to respond. Neither the FCO nor DFID took responsibility for the issue.

613. The shortage of expertise in reconstruction and stabilisation was a constraint on the planning process and on the contribution the UK was able to make to the administration and reconstruction of post-conflict Iraq.

614. The UK Government's post-invasion response to the shortage of deployable experts in stabilisation and post-conflict reconstruction is addressed in Section 10.3.

615. Constraints on UK military capacity are addressed in Sections 6.1 and 6.2.

616. The UK contribution to the post-conflict humanitarian response is assessed in Section 10.1.

617. At no stage did Ministers or senior officials commission the systematic evaluation of different options, incorporating detailed analysis of risk and UK capabilities, military and civilian, which should have been required before the UK committed to any course of action in Iraq.

618. Where policy recommendations were supported by untested assumptions, those assumptions were seldom challenged. When they were, the issue was not always followed through.

619. It was the responsibility of officials to identify, analyse and advise on risk and Ministers' responsibility to ensure that measures to mitigate identifiable risks, including a range of policy options, had been considered before significant decisions were taken on the direction of UK policy.

620. Occasions when that would have been appropriate included:

- after Mr Blair's meeting with Mr Hoon, Mr Straw and others on 23 July 2002;
- after the adoption of resolution 1441;
- before or immediately after the decision to deploy troops in January 2003;
- after the Rock Drill (a US inter-agency rehearsal for post-conflict administration) in February 2003; and
- after Mr Blair's meeting on post-conflict issues on 6 March 2003.

621. There is no indication of formal risk analysis or formal consideration of options associated with any of those events.

622. In his statement to the Inquiry, Mr Blair said:

> "... with hindsight, we now see that the military campaign to defeat Saddam was relatively easy; it was the aftermath that was hard. At the time, of course, we could not know that and a prime focus throughout was the military campaign itself …"[217]

623. The conclusions reached by Mr Blair after the invasion did not require the benefit of hindsight.

624. Mr Blair's long-standing conviction that successful international intervention required long-term commitment had been clearly expressed in his Chicago speech in 1999.

625. That conviction was echoed, in the context of Iraq, in frequent advice to Mr Blair from Ministers and officials.

626. Between early 2002 and the invasion of Iraq in March 2003, Mr Blair received warnings about:

- the significance of the post-conflict phase as the "strategically decisive" phase of the engagement in Iraq (in the SPG paper of 13 December 2002[218]) and the risk that a badly handled aftermath would make intervention a "net failure" (in the letter from Mr Hoon's Private Office to Sir David Manning of 19 November 2002[219]);
- the likelihood of internal conflict in Iraq (including from Mr Powell on 26 September 2002, who warned of the need to stop "a terrible bloodletting of revenge after Saddam goes. Traditional in Iraq after conflict"[220]);
- the potential scale of the political, social, economic and security challenge (including from Sir Christopher Meyer (British Ambassador to the US) on 6 September 2002: "it will probably make pacifying Afghanistan look like child's play"[221]);
- the need for an analysis of whether the benefits of military action outweighed the risk of a protracted and costly nation-building exercise (including from Mr Straw on 8 July 2002: the US "must also understand that we are serious about our conditions for UK involvement"[222]);
- the absence of credible US plans for the immediate post-conflict period and the subsequent reconstruction of Iraq (including from the British Embassy

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[217] Statement Blair, 14 January 2011, page 14.
[218] Paper [SPG], 13 December 2002, 'UK Military Strategic Thinking on Iraq'.
[219] Letter Watkins to Manning, 19 November 2002, 'Iraq: Military Planning after UNSCR 1441'.
[220] Manuscript comment Powell to Manning on Letter McDonald to Manning, 26 September 2002, 'Scenarios for the future of Iraq after Saddam'.
[221] Telegram 1140 Washington to FCO London, 6 September 2002, 'PM's visit to Camp David: Iraq'.
[222] Letter Straw to Prime Minister, 8 July 2002, 'Iraq: Contingency Planning'.

Washington after the Rock Drill on 21 and 22 February 2003: "The inter-agency rehearsal for Phase IV … exposes the enormous scale of the task … Overall, planning is at a very rudimentary stage"[223]);

- the need to agree with the US the nature of the UK contribution to those plans (including in the letter from Mr Hoon's Private Office to Sir David Manning on 28 February 2003: it was "absolutely clear" that the US expected the UK to take leadership of the South-East sector. The UK was "currently at risk of taking on a very substantial commitment that we will have great difficulty in sustaining beyond the immediate conclusion of conflict"[224]); and
- the importance (including in the 'UK overall plan for Phase IV', shown to Mr Blair on 7 March 2003[225]) of:
  - UN authorisation for the military occupation of Iraq, without which there would be no legal cover for certain post-conflict tasks;
  - a UN framework for the administration and reconstruction of Iraq during the transition to Iraqi self-government.

627. Mr Blair told the Chiefs of Staff on 15 January 2003 that "the 'Issue' was aftermath – the Coalition must prevent anarchy and internecine fighting breaking out".[226]

628. In his evidence to the House of Commons Liaison Committee on 21 January 2003, Mr Blair emphasised the importance of the post-conflict phase:

> "You do not engage in military conflict that may produce regime change unless you are prepared to follow through and work in the aftermath of that regime change to ensure the country is stable and the people are properly looked after."[227]

629. On 24 January 2003, Mr Blair told President Bush that the biggest risk they faced was internecine fighting, and that delay would allow time for working up more coherent post-conflict plans.[228]

630. Yet when Mr Blair set out the UK's vision for the future of Iraq in the House of Commons on 18 March 2003, no assessment had been made of whether that vision was achievable, no agreement had been reached with the US on a workable post-conflict plan, UN authorisation had not yet been secured, and there had been no decision on the UN's role in post-conflict Iraq.

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[223] Telegram 235 Washington to FCO London, 24 February 2003, 'Iraq: Day After: Rehearsal of Office of Reconstruction and Humanitarian Assistance'.
[224] Letter Williams to Manning, 28 February 2003, 'Iraq: Military Planning and Preparation' attaching Paper [unattributed], 28 February 2003, 'Iraq: Military Planning Update – 28 February 2003'.
[225] Paper Iraq Planning Unit, 7 March 2003, 'The UK overall plan for Phase IV'.
[226] Minute MA/DCJO to MA/CJO, 15 January 2003, 'Briefing to Prime Minister'.
[227] Liaison Committee, Session 2002-2003, Minutes of Evidence Taken Before the Liaison Committee Tuesday 21 January 2003, Q 117.
[228] Letter Manning to Rice, 24 January 2003, [untitled] attaching 'Note'.

631. UK policy rested on the assumption that:

- the US would provide effective leadership of the immediate post-conflict effort in Iraq;
- the conditions would soon be in place for UK military withdrawal;
- after a short period of US-led, UN-authorised military occupation, the UN would administer and provide a framework for the reconstruction of post-conflict Iraq;
- substantial international support would follow UN authorisation; and
- reconstruction and the political transition to Iraqi rule would proceed in a secure environment.

632. Mr Blair was already aware that those assumptions concealed significant risks:

- UK officials assessed that the Office of Reconstruction and Humanitarian Assistance (ORHA), the US body that would assume responsibility for the immediate post-invasion administration of Iraq, was not up to the task.
- Significant differences remained between UK and US positions on UN involvement, and between the UK and the UN.
- International partners were scarce and thought to be unlikely to come forward in the absence of UN authorisation.
- UK officials recognised that occupying forces would not remain welcome for long and threats to security could quickly escalate.

633. In the year before the invasion, Mr Blair:

- stated his belief in the importance of post-conflict planning on several occasions, including in Cabinet, in Parliament and with President Bush;
- requested advice on aspects of post-conflict Iraq (including for his summer reading pack in July 2002, for his meeting with President Bush on 31 January 2003, and twice in February 2003 after reading the JIC Assessment of southern Iraq and the Adelphi Paper *Iraq at the Crossroads*);
- at the meeting with Mr Hoon and the Chiefs of Staff on 15 January 2003, asked the MOD to consider the "big 'what ifs'" in the specific context of the UK military plan;
- convened a Ministerial meeting on post-conflict issues on 6 March 2003;
- raised concerns about the state of planning with President Bush; and
- succeeded in the narrow goal of securing President Bush's agreement that the UN should be "heavily involved" in "the post-conflict situation", a loose formulation that appeared to bridge the gap between US and UK positions on UN authorisation and the post-conflict role of the UN, but did not address the substantive issues.

634. Mr Blair did not:

- establish clear Ministerial oversight of post-conflict strategy, planning and preparation;
- ensure that Ministers took the decisions needed to prepare a flexible, realistic and fully resourced plan integrating UK military and civilian contributions;
- seek adequate assurances that the UK was in a position to meet its likely obligations in Iraq;
- insist that the UK's strategic objectives for Iraq were tested against anything other than the best case: a well-planned and executed US-led and UN-authorised post-conflict operation in a relatively benign security environment;
- press President Bush for definitive assurances about US post-conflict plans or set out clearly to him the strategic risk in underestimating the post-conflict challenge and failing adequately to prepare for the task; or
- consider, or seek advice on, whether the absence of a satisfactory plan was a sufficient threat to UK strategic objectives to require a reassessment of the terms of the UK engagement in Iraq. Despite concerns about the state of US planning, he did not make agreement on a satisfactory post-conflict plan a condition of UK participation in military action.

635. In the weeks immediately following the invasion, Mr Blair's omissions made it more difficult for the UK Government to take an informed decision on the establishment of the UK's post-conflict Area of Responsibility (AOR) in southern Iraq (addressed in more detail in Section 8).

636. In the short to medium term, his omissions increased the risk that the UK would be unable to respond to the unexpected in Iraq.

637. In the longer term, they reduced the likelihood of achieving the UK's strategic objectives in Iraq.

The post-conflict period

Occupation

LOOTING IN BASRA

638. As described in Section 8, UK forces entered Basra City on the night of 6/7 April 2003 and rapidly gained control, meeting less resistance than anticipated. Once the city was under its control, the UK was responsible, as the Occupying Power, for maintenance of law and order. Within its predominantly Shia Area of Operations, the UK assumed that risks to Coalition Forces would be lower than in the so-called "Sunni triangle" controlled by the US.

639. Before the invasion, the JIC and the DIS had each identified that there was a risk of lawlessness breaking out in Iraq, and that it would be important to deal with it swiftly. Others, including Mr Blair, Sir Kevin Tebbit and the Iraq Policy Unit, had recognised the seriousness of that risk.

640. However, the formal authorisation for action in Iraq issued by Adm Boyce on 18 March contained no instruction on how to establish a safe and secure environment if lawlessness broke out as anticipated. Although it was known that Phase IV would begin quickly, no Rules of Engagement for that phase, including for dealing with lawlessness, were created and promulgated before UK troops entered the country.

641. Both before and during the invasion Lt Gen Reith made the absence of instructions to UK forces covering what to do if faced with lawless behaviour by the Iraqi population in Basra explicit to the Chiefs of Staff.

642. Faced with widespread looting after the invasion, and without instructions, UK commanders had to make their own judgements about what to do. Brigadier Graham Binns, commanding the 7 Armoured Brigade which had taken Basra City, told the Inquiry that he had concluded that "the best way to stop looting was just to get to a point where there was nothing left to loot".[229]

643. Although the implementation of tactical plans to deal with lawlessness was properly the responsibility of in-theatre commanders, it was the responsibility of the Chief of the Defence Staff and the Chief of Joint Operations to ensure that appropriate Rules of Engagement were set, and preparations made, to equip commanders on the ground to deal with it effectively. They should have ensured that those steps were taken.

644. The impact of looting was felt primarily by the Iraqi population rather than by Coalition Forces. The latter initially experienced a "honeymoon period",[230] although the situation was far from stabilised.

645. Lt Gen Reith anticipated that UK forces could be reduced to a medium scale effort by the autumn, when he expected the campaign to have reached "some form of 'steady-state'".[231]

646. The JIC correctly judged on 16 April that the local population had high hopes that the Coalition would rapidly improve their lives and that "resentment of the Coalition ... could grow quickly if it is seen to be ineffective, either politically or militarily. Such resentment could lead to violence."[232]

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[229] Private hearing, 2 June 2010, page 11.
[230] Public hearing Walker, 1 February 2010, page 16.
[231] Minute Reith to SECCOS, 14 April 2003, 'Phase 4: Roulement/Recovery of UK Forces' attaching Paper CJO, 14 April 2003, 'Phase 4 - Roulement/Recovery of UK Land Forces'.
[232] JIC Assessment, 16 April 2003, 'Iraq: The Initial Landscape Post-Saddam'.

647. By the end of April, Mr Hoon had announced that UK troop levels would fall to between 25,000 and 30,000 by the middle of May, from an initial peak of around 46,000.

648. Consequently, by the start of May there was a clearly articulated expectation of a rapid drawdown of UK forces by the autumn despite the identified risk that the consent of the local population was built on potentially vulnerable foundations, which could be undermined rapidly and with serious consequences.

LOOTING IN BAGHDAD

649. In the absence of a functioning Iraqi police force and criminal justice system, and without a clear Coalition Phase IV plan, looting and score-settling became a serious problem in Baghdad soon after the regime fell. The looting of ministry buildings and damage to state-owned infrastructure in particular added to the challenges of the Occupation.

650. Reflecting in June 2004, Mr David Richmond, the Prime Minister's Special Representative on Iraq from March to June 2004, judged that the failure to crack down on looting in Baghdad in April 2003 released "a crime wave which the Coalition has never been able to bring fully under control".[233]

651. After visiting Iraq in early May 2003, General Sir Mike Jackson, Chief of the General Staff, observed:

> "A security vacuum still exists [in Baghdad] ... particularly at night. Looting, revenge killing and subversive activities are rife … Should a bloody and protracted insurgency establish itself in Baghdad, then a ripple effect is likely to occur."[234]

652. Gen Jackson recognised that the UK's ability to maintain the consent of the population in the South depended on a stable and secure Baghdad, and advised:

> "The bottom line is that if we choose not to influence Baghdad we must be confident of the US ability to improve [its tactics] before tolerance is lost and insurgency sets in."

653. Gen Jackson, Major General David Richards (Assistant Chief of the General Staff) and Lieutenant General Sir Anthony Pigott (Deputy Chief of the Defence Staff (Commitments)) all offered advice in favour of deploying the UK's 16 Air Assault Brigade to Baghdad to support Coalition efforts to retrain Iraqi police officers and get them back on patrol.

654. However, the Chiefs of Staff collectively considered that the benefits of making a contribution to the security of Baghdad were outweighed by the risk that UK troops would be "tied down" outside the UK's Area of Responsibility, with adverse impact, and

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[233] Telegram 359 IraqRep to FCO London, 28 June 2004, 'Iraq: Valedictory: The End of Occupation'.
[234] Minute CGS to CDS, 13 May 2003, 'CGS Visit to Op. TELIC 7-10 May 2003'.

advised on 21 May against deploying 16 Air Assault Brigade. The Chiefs of Staff did not conclude that the tasks it was proposed that 16 Air Assault Brigade should undertake were unnecessary, but rather that US troops would complete them.

UK INFLUENCE ON POST-INVASION STRATEGY: RESOLUTION 1483

655. On 21 March 2003, the day after the start of the invasion, Mr Powell and Sir David Manning, two of Mr Blair's closest advisers, offered him advice on how to influence the post-invasion US agenda. Key among their concerns was the need for post-conflict administrative arrangements to have the legitimacy conferred by UN endorsement. Such UK plans for the post-conflict period as had been developed relied on the deployment of an international reconstruction effort to Iraq. Controversy surrounding the launch of the invasion made that challenging to deliver; the absence of UN endorsement would make it close to impossible.

656. Discussion between the US and UK on the content of a new UN Security Council resolution began the same day. Resolution 1483 (2003) was eventually adopted on 22 May.

657. US and UK objectives for the resolution were different, and in several substantive respects the text of resolution 1483 differed from the UK's preferred position.

658. The UK wanted oil revenues to be controlled by an Iraqi body, or failing that by the UN or World Bank, in line with the pre-invasion promise to use them exclusively for the benefit of Iraq. Instead, resolution 1483 placed the power to spend the Development Fund for Iraq into the hands of the Coalition Provisional Authority (CPA), overseen by a monitoring board. That was in line with US objectives, but did not address UK concerns.

659. The UK considered that an Interim Iraqi Administration should have real powers, and not be subordinate to the CPA. Resolution 1483 said that the CPA would retain its responsibilities until an internationally recognised representative government was established. The text did not go so far as to require an interim administration to report formally to the CPA, as the US wished, but that was in effect how the relationship between the CPA and the Governing Council established by resolution 1483 operated.

660. The UK's policy position was that the UN should take the lead in establishing the Interim Iraqi Administration. Resolution 1483 gave the UN a role working with the people of Iraq and the CPA, but did not give it the lead. Evidence considered by the Inquiry suggests that there was consistent reluctance on the part of the UN to take on such a role and the UK position was therefore not wholly realistic.

661. Resolution 1483 formally designated the UK and US as joint Occupying Powers in Iraq. It also set the conditions for the CPA's dominance over post-invasion strategy and policy by handing it control of funding for reconstruction and influence on political development at least equal to that of the UN.

UK INFLUENCE ON THE COALITION PROVISIONAL AUTHORITY

662. By the time resolution 1483 was adopted, the CPA was already operating in Iraq under the leadership of Ambassador L Paul Bremer, reporting to Mr Donald Rumsfeld, the US Defense Secretary. There was no reporting line from the CPA to the UK.

663. The resolution's designation of the US and UK as joint Occupying Powers did not reflect the reality of the Occupation. The UK contribution to the CPA's effort was much smaller than that of the US and was particularly concerned with Basra.

664. The UK took an early decision to concentrate its effort in one geographical area rather than accept a national lead for a particular element of the Coalition effort (such as police reform). However, it was inevitable that Iraq's future would be determined in Baghdad, as both the administrative centre and the place where the power shift from minority Sunni rule to majority Shia rule was going to be most keenly felt. Having decided to concentrate its effort on an area some distance removed from the capital, the UK's ability to influence policy under debate in Baghdad was curtailed.

665. In Baghdad itself, the UK provided only a small proportion of the staff for the military and civilian headquarters. The low numbers were influenced in part by reasonable concerns about the personal legal liabilities of UK staff working initially in ORHA and then in the CPA, and what their deployment might imply about the UK's responsibility for decisions made by those organisations, in the absence of formal consultation or the right of veto.

666. The pre-invasion focus on a leading UN role in Iraq meant that little thought had been given to the status of UK personnel during an occupation which followed an invasion without Security Council authorisation. Better planning, including proper assessment of a variety of different possible scenarios, would have allowed such issues to be worked through at a much earlier stage.

667. There was an urgent need for suitably experienced UK officials ready to deploy to Baghdad, but they had not been identified (see Section 15).

668. No governance arrangements were designed before the invasion which might have enabled officials and Ministers based in London and Washington to manage the implications of a joint occupation involving separate resources of a very different scale. Such arrangements would have provided a means to identify and resolve different perspectives on policy, and to facilitate joint decisions.

669. Once the CPA had been established, policy decisions were made largely in Baghdad, where there was also no formal US/UK governance structure. This created a risk described to the Inquiry by Sir Michael Wood, FCO Legal Adviser from 2001 to 2006, as "the UK being held jointly responsible for acts or omissions of the CPA, without a right to consult and a right of joint decision".[235]

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[235] Statement, 15 March 2011, page 22.

670. To manage that risk, the UK proposed a Memorandum of Understanding (MOU) with the US to establish procedures for working together on issues related to the Occupation, but it could not be agreed. Having supplied the overwhelming majority of the CPA's resources, the US had little incentive to give the UK an influential role in deciding how those resources were to be used, and the UK lacked the will and leverage to insist.

671. In the absence of formal arrangements, there was a clear risk that the UK would be inadequately involved in important decisions, and the UK struggled from the start to have a significant effect on the CPA's policies. This was a source of concern to both Ministers and officials in 2003, but the issue was never resolved.

672. Senior individuals deployed to Iraq by the UK at this time saw themselves either as working for the CPA in support of its objectives and as part of its chain of command, or as UK representatives within the CPA with a remit to seek to influence CPA decisions. No-one formally represented the UK position within the CPA decision-making process, a serious weakness which should have been addressed at an early stage.

673. Managing a joint occupation of such size and complexity effectively and coherently required regular formal and informal discussion and clear decision-making at all levels, both between capitals and in-country. Once attempts to agree an MOU had failed, the chances of constructing such mechanisms were slim.

674. In the absence of an MOU with the US, the UK's influence in Baghdad depended heavily on the personal impact of successive Special Representatives and British Ambassadors to Iraq and the relationships they were able to build with senior US figures.

675. Some instances of important CPA decisions in which the UK played little or no formal part were:

- The decision to issue CPA Order No.2, which "dissolved" (or disbanded) a number of military and other security entities that had operated as part of Saddam Hussein's regime, including the armed forces (see Section 12). This was raised informally by Ambassador Bremer in his first meeting with Mr John Sawers, Mr Blair's Special Representative on Iraq, who – unbriefed – did not at that point take a contrary position. The concept of creating a new army had also been raised by Mr Walt Slocombe, CPA Senior Adviser on National Security and Defense, in discussion with Mr Hoon. Dissolution was a key decision which was to have a significant effect on the alienation of the Sunni community and the development of an insurgency in Iraq, and the terms and timing of this important Order should have been approved by both Washington and London.

- Decisions on how to spend the Development Fund for Iraq, which resolution 1483 gave the CPA the power to make. CPA Regulation No.2 subsequently vested Ambassador Bremer with control of the Fund, effectively placing it under US control. This exacerbated concerns about the under-resourcing of CPA(South) as expressed in Mr Straw's letter to Mr Blair of 5 June 2003 (see Section 10.1).
- The creation of the Iraqi Central Bank as an independent body in July 2003 (see Sections 9.2 and 10.1). This came as a surprise to the UK despite the close involvement of officials from the Treasury in arrangements for Iraq's new currency and budget.
- The creation of a new Iraqi Central Criminal Court (see Section 9.2), the announcement of which UK officials could not delay for long enough to enable the Attorney General to give his view on its legality under the terms of resolution 1483.
- Production of the CPA's 'Vision for Iraq' and 'Achieving the Vision' *(*see Sections 9.2 and 10.1*).* Mr Sawers alerted the FCO to the first document on 6 July when it was already at an advanced stage of drafting, and by 18 July it had been signed off by the Pentagon. No formal UK approval was sought for a document which was intended to provide strategic direction to the Coalition's non-military effort in Iraq.

676. UK involvement in CPA decisions about the scope and implementation of de-Ba'athification policy is considered in Section 11.2.

677. In some areas, the UK was able to affect CPA policy through the influence that Mr Sawers or his successor Sir Jeremy Greenstock exerted on senior US officials. Both used their diplomatic experience to build connections with Iraqi politicians and contribute to the political development of Iraq. Instances of UK influence included:

- Mr Sawers' involvement in the plans for an Interim Iraqi Administration, in respect of which he considered that "much of the thinking is ours".[236]
- Sir Jeremy Greenstock's "two chickens, two eggs" plan, which overcame political stalemate between the CPA and Grand Ayatollah al-Sistani on how the new Iraqi Constitution should be created. The plan led to the 15 November Agreement which set the timetable for transfer of sovereignty to a transitional administration by 30 June 2004.
- Ensuring that negotiations on the content of the Transitional Administrative Law reached a successful conclusion. Sir Jeremy Greenstock told the Inquiry that he had prevented the Kurdish delegation from leaving, "which Bremer wasn't aware of".[237]

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[236] Telegram 028 IraqRep to FCO London, 1 June 2003, 'Iraq: Political Process'.
[237] Private hearing, 26 May 2010, page 64.

- The level of female representation in Iraq's new political structures, including the 25 percent "goal" for members of the National Assembly set by the Transitional Administrative Law, which the UK pursued with some success.

678. In the absence of decision-making arrangements in which the UK had a formal role, too much reliance was placed on communication between Mr Blair and President Bush, one of the very small number of ways of influencing US policy. Some issues were addressed by this route: for instance, using his regular conversations with President Bush, Mr Blair was able, with some success, to urge caution in relation to the US operation in Fallujah in April 2004.

679. But the channel of communication between Prime Minister and President should be reserved for the most strategic and most intractable issues. It is not the right mechanism for day-to-day policy-making or an effective way of making tactical decisions.

680. It is impossible to say whether a greater and more formal UK input to CPA decisions would have led to better outcomes. But it is clear that the UK's ability to influence decisions made by the CPA was not commensurate with its responsibilities as joint Occupying Power.

A DECLINE IN SECURITY

681. From early June 2003, and throughout the summer, there were signs that security in both Baghdad and the South was deteriorating. The MOD's SPG warned that "more organised opposition to the Coalition may be emerging"[238] as discontent about the Coalition's failure to deliver a secure environment began to grow in the Iraqi population.

682. The extent of the decline in Baghdad and central Iraq overshadowed the decline in Multi-National Division (South-East) (MND(SE)). Food shortages and the failure of essential services such as the supply of electricity and water, plus lack of progress in the political process, however, began to erode the relationship between UK forces and the local population. The deterioration was exemplified by attacks on UK forces in Majar al-Kabir in Maysan province on 22 and 24 June.

683. As the summer wore on, authoritative sources in the UK, such as the JIC, began to identify issues with the potential to escalate into conflict and to recognise the likelihood that extremist groups would become more co-ordinated. The constraint imposed on reconstruction activities by the lack of security began to be apparent. Mr Sawers and Sir David Manning expressed concern about whether the UK had sufficient troops deployed in MND(SE), and about the permeability of Maysan's substantial border with Iran.

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[238] Minute SECCOS to PSO/CDS, 10 June 2003, 'OP COS Paper: UK Contribution to Iraq: Strategic Intent and Direction' attaching Paper SPG, 9 June 2003, 'UK contribution to Iraq: strategic intent and direction'.

684. From early July, security was seen in Whitehall as the key concern and was raised by Mr Blair with President Bush.

685. A circular analysis began to develop, in which progress on reconstruction required security to be improved, and improved security required the consent generated by reconstruction activity. Lieutenant General Robert Fry, Deputy Chief of the Defence Staff (Commitments), reported "a decline in Iraqi consent to the Coalition in MND(SE) due to the failure by the Coalition to deliver improvements in essential services" and that Shia leaders were warning of a short grace period before further significant deterioration.

686. By the autumn of 2003, violence was escalating in Baghdad and attacks were becoming more sophisticated. Attacks on the UN in August and September, which injured and killed a number of UN officials including the UN Special Representative for Iraq, prompted some organisations to withdraw their international staff. Although Basra was less turbulent than the capital, the risk of a ripple effect from Baghdad – as identified by Gen Jackson in May – remained.

687. The JIC assessed on 3 September that the security environment would probably worsen over the year ahead. There had been a number of serious attacks on the Coalition in MND(SE), and Islamic "extremists/terrorists"[239] were expected to remain a long-term threat in Iraq. The UK's military and civilian representatives on the ground were reporting a growing insurgency in central Iraq.

688. Despite that evidence, military planning under the leadership of General Sir Michael Walker, Chief of the Defence Staff, proceeded on the basis that the situation in Basra would remain relatively benign.

689. The Inquiry considers that a deterioration in security could and should have been identified by Lt Gen Reith by the end of August 2003 and that the cumulative evidence of a deteriorating security situation should have led him to conclude that the underlying assumptions on which the UK's Iraq campaign was based was over-optimistic, and to instigate a review of the scale of the UK's military effort in Iraq.

690. There were a number of issues that might have been examined by such a review, including:

- whether the UK had sufficient resources in MND(SE) to deal with a worsening security situation; and
- whether the UK should engage outside MND(SE) in the interests of Iraq's overall stability (as had been advocated by Gen Jackson, Maj Gen Richards and Lt Gen Pigott).

691. No such review took place.

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[239] JIC Assessment, 3 September 2003, 'Iraq: Threats to Security'.

692. There was a strong case for reinforcing MND(SE) so that it could handle its high-priority tasks (providing essential security for reconstruction projects, protecting existing infrastructure, guarding key sites and improving border security to inhibit the import of arms from Iran) effectively in changing circumstances. Those tasks all demanded a higher level of manpower than was available. Although additional military personnel were deployed in September 2003, mainly to fill existing gaps in support for reconstruction activities, their numbers were far too small to have a significant impact.

693. The failure to consider the option of reinforcement at this time was a serious omission and Lt Gen Reith and Gen Walker should have ensured that UK force levels in MND(SE) were formally reconsidered in autumn 2003 or at the latest by the end of the year. Increases in UK force levels in order to address the security situation should have been recommended to Ministers. Any opportunity to regain the initiative and pre-empt further deterioration in the security situation was lost.

694. In October, Sir Jeremy Greenstock reported that Lieutenant General Ricardo Sanchez, Commander Combined Joint Task Force-7, had "come to recognise that Coalition operations are at a standstill and that there is a need to regain momentum".[240] Doubts started to build about the chances of credible elections based on a legitimate constitution in the course of 2004 and work began to look for alternatives to the plan set out by Ambassador Bremer. The "bloodiest 48-hour period in Baghdad since March",[241] including an attack on the al-Rashid Hotel in Baghdad's Green Zone, was sufficient to convince some that a pivotal point in the security situation had been reached.

695. When President Bush visited London in November, Mr Blair provided him with a paper written by Sir Jeremy Greenstock which argued that security should be the highest priority in the run-up to June 2004, when the Iraqi Transitional Government would take power. Sir Jeremy suggested that troop levels should be looked at again and highlighted "the dangers we face if we do not get a grip on the security situation" as a topic that President Bush and Mr Blair needed to discuss in stark terms.

696. The constraints within which the UK was operating as a result of the limited scale of forces deployed in Iraq were articulated clearly for the Chiefs of Staff in December. Lt Gen Fry argued that a strategy of "early effect"[242] was needed which prioritised campaign success. Operation TELIC was the UK "Main Effort", but deploying additional resources in a way that was compliant with the Defence Planning Assumptions would require the withdrawal of resources from other operations.

697. On 1 January 2004, Sir Jeremy Greenstock wrote bluntly: "This theatre remains a security crisis."[243]

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[240] Telegram 230 IraqRep to FCO London, 24 October 2003, 'Iraq: Security Update'.
[241] Telegram 1426 Washington to FCO London, 28 October 2003, 'Iraq: US Views 28 October'.
[242] Minute DCDS(C) to COSSEC, 5 December 2003, 'Op TELIC – Review of UK Military Strategy for Iraq'.
[243] Telegram 337 IraqRep to FCO London, 1 January 2004, 'Iraq: Six Final Months of Occupation'.

698. Despite mounting evidence of violent insurgency, the UK's policy of military drawdown in Iraq continued. After force levels had been reviewed in January, the rationale for continued drawdown was based on adjusted criteria by which the success of Security Sector Reform would be judged, meaning that such reform would be implemented "only to applicable standards for Iraq".[244]

THE TURNING POINT

699. February 2004 was the worst month for Coalition casualties since the fall of Saddam Hussein's regime. More than 200 people, mainly Iraqi citizens, were killed in suicide attacks. Attacks on the Iraqi Security Forces were increasing and concerns about Islamic extremists operating in Iraq began to grow. By the end of March, more than 200 attacks targeting Iraqi citizens were being reported each week.

700. In April, there was a sudden escalation in attacks by the Jaysh al-Mahdi (JAM) in Basra, described by the General Officer Commanding MND(SE) as "like a switch had been flicked".[245] In Fallujah, a US offensive which followed the ambush and murder of four security contractors provoked an angry response from the Sunni community.

701. The significant worsening of security, coupled with revelations of abuse by members of the US military of Iraqi detainees held in Abu Ghraib prison, led many of the Inquiry's witnesses to conclude that the spring of 2004 had been a turning point.

702. At the end of April, Mr Blair's analysis was that the key issue in Iraq was not multi-faceted, rather it was "simple: security".[246]

703. Despite the failing security situation in MND(SE) in spring 2004, Gen Walker was explicit that no additional troops were required for the tasks currently assigned to the UK.

704. The Chiefs of Staff maintained the view they had originally reached in November 2003, that HQ Allied Rapid Reaction Corps (ARRC) should not be actively considered for deployment to Iraq, even though:

- Iraq was a higher priority for the UK than Afghanistan;
- security in Iraq was clearly worsening and had been identified by Mr Blair as the key issue; and
- there had been a specific US request for deployment of HQ ARRC.

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[244] Minute Reith to PSO/CDS, 29 January 2004, 'Op TELIC Force Level Review – Jan 04'.
[245] Public hearing Lamb, 9 December 2009, pages 67-68.
[246] Letter Rycroft to Owen, 26 April 2004, 'Iraq: 15 Reports for the Prime Minister'.

Transition

UK INFLUENCE ON US STRATEGY POST-CPA

705. In June 2004, the US and UK ceased to be Occupying Powers in Iraq and the CPA was disbanded. Responsibility for day-to-day interaction on civil affairs with the Iraqi Interim Government on civil affairs passed to the newly appointed British and US Ambassadors.

706. After the handover, the UK's priorities were to maintain the momentum of the political process towards elections in January 2005, and to ensure that the conditions for the drawdown of its forces were achieved.

707. Mr Blair and President Bush continued to discuss Iraq on a regular basis. It continued to be the case that relatively small issues were raised to this level. The UK took false comfort that it was involved in US decision-making from the strength of that relationship.

708. Themes which Mr Blair emphasised to President Bush included the acceleration of Security Sector Reform and the Iraqiisation of security, UN engagement, better outreach to the Sunni community (often referred to as "reconciliation"), provision of direct support to Prime Minister Ayad Allawi and better use of local media to transmit a positive message about the coalition's intentions and actions.

PLANNING FOR WITHDRAWAL

709. By July 2004, the UK envisaged that, providing the necessary criteria were met, there would be a gradual reduction in troop numbers during 2005 leading to final withdrawal in 2006, to be followed by a period of "Strategic Overwatch".

710. The most important of the criteria that would enable coalition troops to withdraw was the ability of the Iraqi Security Forces to take the lead on security (Iraqiisation). Having recognised that a stable and secure environment was the key factor on which progress in Iraq depended, by May 2004 the UK solution was "a better and quicker plan for building Iraqi capacity in the Police, Civil Defence Corps, the Army and the Intelligence Service".[247] This made sense in the long term but was unlikely to meet the requirement to regain control of Iraq rapidly in the face of a mounting insurgency. Reform of the Iraqi Security Forces is addressed in detail in Section 12.

711. By mid-August, the level of attacks against coalition forces had matched the previous peak in April of the same year. In September, Lieutenant General John McColl (Senior British Military Representative – Iraq) judged that the Iraqi Security Forces would not be able to take full responsibility for security before 2006.

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[247] Letter Bowen to Baker, 13 May 2004, 'Iraq: Security'.

712. In September 2004, Gen Walker received a well-argued piece of advice from Lt Gen McColl which made clear that the conditions on which decisions on drawdown were to be based were unlikely to be met in the near future. Despite the warnings in Lt Gen McColl's paper and his advice that "the time is right for the consideration of the substantive issues",[248] the Chiefs of Staff, chaired by Gen Walker, declined to engage in a substantive review of UK options.

713. The Inquiry recognises that the scale of the resources which the UK might have deployed to deal with the issues was substantially less than the US could bring to bear. It is possible that the UK may not have been able to make a real difference, when the key strategic change that might have affected the outcome was the deployment of a much larger force. But proper consideration ought to have been given to what options were available, including for the deployment of additional personnel. Mr Straw raised the need for such a debate with Mr Blair in October.

714. The UK had consistently resisted US requests to deploy additional personnel, which Lt Gen McColl described as having "chipped away at the US/UK relationship",[249] but in October it was agreed that the Black Watch would be deployed to North Babil for 30 days to backfill US forces needed for operations in Fallujah. Approximately 350 personnel from 1st Battalion, the Royal Highland Fusiliers were also deployed to Iraq to provide additional security across MND(SE) during the election period in January and February 2005. The UK remained reluctant to commit any further forces in the longer term: when Dutch forces withdrew from Muthanna province, the UK instead redeployed forces from elsewhere in MND(SE) plus a small amount of additional logistic support.

715. In January 2005, Lt Gen Fry produced a thoughtful and realistic assessment of the prospects for security in Iraq, observing that "we are not on track to deliver the Steady State Criteria (SSC) before the UN mandate expires, or even shortly thereafter".[250] He judged that "only additional military effort by the MNF-I [Multi-National Force – Iraq] as a whole" might be able to get the campaign back on track. Lt Gen Fry identified three possible courses of action for the UK: increasing the UK scale of effort, maintaining the status quo or, if it were judged that the campaign was irretrievable, accepting failure and seeking to mitigate UK liability.

716. The Inquiry endorses Lt Gen Fry's assessment of the options open to the UK at this point and considers that full and proper consideration should have been given to each option by DOP.

717. In his advice to Mr Blair on 21 January, Gen Walker did not expose the assessment made by Lt Gen Fry that only additional military effort by the MNF-I might be able to get the campaign back on track.

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[248] Minute McColl to CDS and CJO, 26 September 2004, 'Report 130 of 26 Sep 04'.
[249] Report McColl to CDS and CJO, 20 October 2004, 'SBMR-I Hauldown Report – Lt Gen McColl'.
[250] Minute DCDS(C) to APS 2/SofS [MOD], 11 January 2005, 'Iraq 2005 – a UK MOD perspective'.

718. On 30 January, elections for the Transitional National Assembly and Provincial Assemblies took place across Iraq. Security arrangements involved 130,000 personnel from the Iraqi Security Forces, supported by 184,500 troops from the MNF-I. The JIC assessed that perhaps fewer than 10 percent of voters had turned out in the Sunni heartlands and judged that "without Sunni engagement in the political process, it will not be possible significantly to undermine the insurgency".

719. In April, the JIC assessed that:

> "A significant Sunni insurgency will continue through 2005 and beyond, but the opportunities for reducing it appear greater than we judged in early February."[251]

THE IMPACT OF AFGHANISTAN

720. In June 2004, the UK had made a public commitment to deploy HQ ARRC to Afghanistan in 2006, based on a recommendation from the Chiefs of Staff and Mr Hoon, and with Mr Straw's support. HQ ARRC was a NATO asset for which the UK was the lead nation and provided 60 percent of its staff.

721. It appears that senior members of the Armed Forces reached the view, throughout 2004 and 2005, that little more would be achieved in MND(SE) and that it would make more sense to concentrate military effort on Afghanistan where it might have greater effect.

722. In February 2005, the UK announced that it would switch its existing military effort in Afghanistan from the north to Helmand province in the south.

723. In 2002, *A New Chapter*, an MOD review of the 1998 *Strategic Defence Review* (SDR), had reaffirmed that the UK's Armed Forces would be unable to support two enduring medium scale military operations at the same time:

> "Since the SDR we have assumed that we should plan to be able to undertake either a single major operation (of a similar scale and duration to our contribution to the Gulf War in 1990-91), or undertake a more extended overseas deployment on a lesser scale (as in the mid-1990s in Bosnia), while retaining the ability to mount a second substantial deployment ... if this were made necessary by a second crisis. We would not, however, expect both deployments to involve war-fighting or to maintain them simultaneously for longer than six months."[252]

724. As described in Section 16.1, since 2002 the Armed Forces had been consistently operating at or above the level of concurrency defined in the 1998 SDR, and the continuation of Op TELIC had placed additional strain on military personnel.

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[251] JIC Assessment, 6 April 2005, 'Iraq: The State of the Insurgency'.
[252] Ministry of Defence, *Strategic Defence Review: A New Chapter*, July 2002, page 14.

725. By May 2005, the UK had been supporting an operation of at least medium scale in Iraq for more than two years. The Ministerial Committee on Defence and Overseas Policy Sub-Committee on Iraq (DOP(I)) recognised that future force levels in Iraq would need to be considered in the context of the requirement to achieve "strategic balance" with commitments in Afghanistan, to ensure that both were properly resourced.

726. In July 2005, DOP agreed proposals for both the transfer of the four provinces in MND(SE) to Iraqi control and for the deployment of the UK Provincial Reconstruction Team then based in northern Afghanistan to Helmand province in the South, along with an infantry battlegroup and full helicopter support – around 2,500 personnel.

727. As described under the heading 'Iraqiisation' below, the proposals to transfer responsibility for security in the four provinces of MND(SE) to Iraqi control were based on high-risk assumptions about the capability of the Iraqi Security Forces to take the lead for security. If those assumptions proved to be inaccurate and the UK was unable to withdraw, agreement to the Helmand deployment in Afghanistan effectively constrained the UK's ability to respond by increasing troop levels in Iraq.

728. In January 2006, Cabinet approved the decision to deploy to Helmand. Dr Reid, the Defence Secretary, announced that the UK was "preparing for a deployment to southern Afghanistan" which included a Provincial Reconstruction Team as "part of a larger, more than 3,300-strong British force providing the security framework".[253]

729. The impact of that decision was summarised neatly by Gen Walker as:

> "Militarily, the UK force structure is already stretched and, with two concurrent medium scale operations in prospect, will soon become exceptionally so in niche areas."[254]

730. Niche capabilities such as helicopter support and Intelligence, Surveillance, Target Acquisition and Reconnaissance (ISTAR) were essential to the successful conduct of operations.

731. From July 2005 onwards, decisions in relation to resources for Iraq were effectively made under the influence of the demands of the UK effort in Afghanistan. Although Iraq remained the stated UK main effort, the Government no longer had the option of a substantial reinforcement of its forces there, should it have considered one necessary. When the US announced in January 2007 that it would send a surge of resources to Iraq, the UK was consequently unable to contemplate a parallel surge of its own.

732. The impact of the decision to deploy to Helmand on the availability of key equipment capabilities for Iraq, and on the level of stretch felt by military personnel, is addressed in Sections 14 and 16.

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[253] House of Commons, *Official Report,* 26 January 2006, columns 1529-1533.
[254] Letter Walker to Richards, 24 January 2006, [untitled].

IRAQIISATION

733. After becoming Defence Secretary in May 2005, Dr Reid had continued the policy of reducing UK troop levels based on the transition of lead responsibility for security to the Iraqi Security Forces (ISF). In one of his early acts as Defence Secretary, he announced the deployment of just over 400 additional personnel to enhance the UK's effort in training the ISF, which would "enable them to take on ever greater responsibility for their own security and so pave the way for UK troops to withdraw".[255]

734. The proposals for transfer of the four provinces in MND(SE) to Iraqi control agreed in July 2005 suggested transition from MNF-I to ISF primacy in Basra from March 2006, based on the assumption that the ISF would, by that point, be capable of taking on responsibility for security in what was likely to remain a very challenging environment.

735. There was sufficient reliable contemporary evidence available, including from the JIC and in reports from commanders in theatre, to demonstrate that the assumption that the ISF would be ready to take the lead in Basra by that point was probably unrealistic.

736. In September 2005, Mr Blair expressed his concerns about ISF capability, following reports of police involvement in attacks on the MNF in Basra. But despite concerns that had been expressed about the capacity of the ISF, Dr Reid recommended that a reduction in UK forces should take place in October or November 2005.

737. A few days after Dr Reid made his recommendation, the Jameat incident in Basra (see Section 12.1) raised questions about the ISF in MND(SE). Officials from the FCO, the MOD and DFID judged that the incident had highlighted the risks to achieving UK objectives in MND(SE), and that those risks had implications for military resources. Nevertheless, assumptions about ISF readiness were not re-examined by Ministers. The incident should have prompted a more searching analysis of whether the conditions necessary for drawdown were likely to be met within the planned timetable. Reluctance to consider the potential implications of the Jameat incident obscured what it had revealed about the security situation in MND(SE).

738. The critical importance of ISF capability in assessing readiness for transfer to Provincial Iraqi Control, on which UK plans to draw down were based, was emphasised by the 'Conditions for Provincial Transfer' published by the Joint Iraqi/MNF Committee to Transfer Security Responsibility, and by Dr Reid, who told DOP(I) that "successful Iraqiisation remains the key".[256] DOP(I) decided that Dr Reid should have lead responsibility for building the capacity of the Iraqi Police Service (IPS) in Basra in addition to his responsibility for the Iraqi Army.

739. In October 2005, Mr Blair asked for a major and sustained push to make progress on the ability of the ISF to take the lead on security. Gen Jackson raised concerns about ISF effectiveness in a minute to Gen Walker, and concluded: "it is not to our credit that

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[255] House of Commons, *Official Report*, 25 May 2005, column 15WS.
[256] Paper Reid, 11 October 2005, 'Iraq: Security Update'.

we have known about the inadequacies of the IPS for so long and yet failed to address them".[257] The Assessments Staff reinforced the lack of progress in reforming the ISF.

740. In October 2005, the Chiefs of Staff made a stark assessment of the insurgency and coalition strategy in Iraq. They concluded that "Ministers needed to be clear that the campaign could potentially be heading for 'strategic failure', with grave national and international consequences if the appropriate actions were not taken".[258] Gen Walker judged that only 5 percent of UK military effort in MND(SE) was devoted to counter-insurgency operations. But neither Air Marshal Sir Glenn Torpy, Commander Joint Operations, nor Gen Walker reassessed UK force requirements in Iraq, based on those two assessments.

741. The security situation at this point should have resulted in a reassessment of the UK troop levels needed to achieve the UK's key outcomes in MND(SE). Although the responsibility for tactical decision-making rested with commanders on the ground, it was for Gen Walker to ensure that those commanders had sufficient resources to deliver.

742. The absence of additional resources placed further pressure on the UK's ability to deliver the conditions required for transfer. At the end of 2005 and in early 2006 there were further indications that the ISF were not ready to operate alone. The MOD reported to the final DOP(I) meeting of 2005 that the capacity of the Iraqi administration and security forces to assume responsibility, acknowledging the challenge of increasing sectarianism and militia infiltration, was one of the key challenges remaining.

743. In March 2006, the JIC again highlighted doubts about the ability of the Iraqi Army to operate without MNF support and concerns about the corruption and infiltration of the IPS.

744. US concerns about UK plans for the transition of Maysan and Muthanna to Iraqi control in May were such that Dr Reid adapted them to include a small residual team providing mentoring and support to the Iraqi Army.

745. Dr Reid continued to press ahead with drawdown and announced that troop levels would reduce in May 2006 from approximately 8,000 to around 7,200 based on "completion of various security sector reform tasks, a reduction in the support levels for those tasks, and recent efficiency measures in theatre".[259] That rationale did not include an assessment of the effect of those tasks on the capability of the ISF.

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[257] Minute CGS to CDS, 18 October 2005, 'CGS visit to Iraq: 10-13 Oct 05'.
[258] Minutes, 18 October 2005, Chiefs of Staff meeting.
[259] Letter Reid to Blair, 9 March 2006, 'Iraq: Force Level Review and Announcement'.

Preparation for withdrawal

A MAJOR DIVERGENCE IN STRATEGY

746. US and UK strategies for Iraq had in effect been on different courses since the UK decision to focus its attention on MND(SE) in 2003. As a result of that decision, the UK had acquired distinctly different priorities from the US. It was only marginally involved in the central tasks of stabilising the Iraqi Government in Baghdad and managing sectarian divisions, while it had come to see its main task in Basra as one of keeping the situation calm while building the case for drawdown.

747. For some time, there had been indications of tension between the US and UK regarding assessments of progress, and differing assumptions about whether plans were needed for long-term bases in Iraq. In May 2006, Mr Blair was told about "rumblings from the US system about UK failure to grip the security situation in what they regard as a strategically vital part of Iraq".[260] Gen Jackson felt compelled to report that:

> "The perception, right or wrong, in some – if not all – US military circles is that the UK is motivated more by the short-term political gain of early withdrawal than by the long-term importance of mission accomplishment; and that, as a result, MND(SE)'s operational posture is too laissez faire and lacks initiative ..."[261]

748. In January 2007, the divergence between US and UK strategies was thrown into sharp relief by President Bush's announcement that the US would adopt a new strategy, of which a prominent feature would be the deployment of a surge of US forces, primarily to Baghdad and its environs. UK assessments of the prospects for the new US policy were bleak, reflecting widespread pessimism about the prospects for Iraq. UK strategy continued to look towards withdrawal.

749. US concerns about the differences in approach were evident. In February 2007, Sir David Manning, British Ambassador to the US, reported that Secretary Rice had asked him "to tell her honestly whether the UK was now making for the exit as fast as possible".[262]

750. The divergence in strategies was also illustrated by the conditions-based process through which the four provinces in MND(SE) were transferred to Provincial Iraqi Control (PIC) during 2007. Although each transfer was signed off by senior members of the US military, there was persistent reporting of US concerns about readiness for PIC, whether the conditions had actually been met and the wider impact of transfer.

751. The US was also uncomfortable about arrangements made by the UK with a militia group in Basra which allowed the safe exit of UK troops from their main base in the city.

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[260] Minute Phillipson to Prime Minister, 2 May 2006, 'VTC with President Bush, 1615 2 May 2006'.
[261] Minute CGS to CDS, 22 May 2006, 'CGS visit to Iraq: 15-18 May 06'.
[262] Letter Manning to Hayes, 1 February 2007, 'Conversation with the US Secretary of State, 31 January 2007'.

A POSSIBLE CIVIL WAR

752. By March 2006, senior members of the UK military were considering the possibility of civil war in Iraq, prompted by rising levels of sectarian violence and concerns that the Iraqi Government was "not ... perceived as even-handed in security issues".[263] The risk of civil war had been acknowledged by Prime Minister Ibrahim Ja'afari in the wake of the bombing of the al-Askari mosque in February. Although there was general agreement that the situation in Iraq did not constitute civil war, the risk that one might develop was considered to be real.

753. At this time, the presence in Iraq of the MNF was authorised by resolution 1637 (2005). The exchange of letters between Prime Minister Ja'afari and the President of the Security Council which accompanied the resolution clearly identified providing security for the Iraqi people as the reason why a continued MNF presence was necessary.

754. In late April, FCO officials were concerned that security in Basra was declining and that a determined and sustained effort, including a more assertive military posture, would be required to deliver the UK's objective of transferring Basra to Iraqi control by late 2006 or early 2007.

755. Accounts from mid-2006 suggested that security in MND(SE) was a significant concern, characterised by "steady, if generally unspectacular, decline"[264] and increased militia activity. The UK military's approach had generated US concern and the security situation was limiting UK civilian activity.

756. Gen Jackson's assessment in May of the short-term security prospects in Iraq was bleak. He judged that "what we will leave behind will not look much like strategic success. Ten years hence our strategy may fully bear fruit."[265]

757. After visiting Iraq in early May, Air Chief Marshal Sir Jock Stirrup, Chief of the Defence Staff, advised Dr Reid that there should be no change to the operational approach and that there were "compelling reasons" why the UK should "press on" with handing over security to Iraq, including to permit the UK's continuing build-up in Afghanistan.[266] ACM Stirrup identified the risk that UK withdrawal from Basra would be seen as a "strategic failure" and suggested that "astute conditioning of the UK public may be necessary" to avoid that.

758. ACM Stirrup's view that the UK should press ahead with drawdown despite the security challenges in Basra was not consistent with Government policy that withdrawal should be conditions-based.

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[263] Minute Houghton to CDS, 5 March 2006, 'SBMR-I Weekly Report (201) 5 March 06'.
[264] Minute senior government official specialising in the Middle East to Dowse, 12 May 2006, 'Situation in Basrah'.
[265] Minute CGS to CDS, 22 May 2006, 'CGS visit to Iraq: 15-18 May 06'.
[266] Minute Stirrup to SofS [MOD], 8 May 2006, 'CDS Visit to Iraq and Afghanistan – 5-7 May 06'.

759. ACM Stirrup's acceptance that the "law of diminishing returns" was "now firmly in play" and that there was "an increasing risk" that UK forces would "become part of the problem, rather than the solution" had some validity: it was clear from accounts of the situation in Basra that UK forces were not preventing a steady decline in security. ACM Stirrup was also right to advise Dr Reid that the MNF in Iraq faced a "multifaceted", sophisticated and dangerous enemy; that serious issues remained in Basra (militia activity, poor governance, insecurity); and that it was possible the UK would be accused of strategic failure.

760. The established policy was that UK forces would withdraw as the capabilities of the ISF increased until responsibility could be handed over to the Iraqi Government. ACM Stirrup's proposed remedy of continued drawdown and managing public opinion did not mitigate the risk of strategic failure he described.

761. In the summer of 2006, in recognition of the need to stabilise Basra and prepare it for transition to Iraqi control, the UK developed the Basra Security Plan, "a plan to improve Basra through operations, high impact reconstruction and SSR [Security Sector Reform] ... lasting for up to six months".[267] The military element of the plan became known as Operation SALAMANCA and included operations against militia groups.

762. In August 2006, ACM Stirrup was asked to give direction on both seeking US help for Op SALAMANCA and the possibility of deploying UK forces to support US operations outside MND(SE).

763. While ACM Stirrup stressed the importance of senior Iraqi political support if Op SALAMANCA was to be a success, Lieutenant General Nicholas Houghton, the Senior British Military Representative – Iraq, indicated a concern that even with US support the capabilities available in MND(SE) might not be sufficient successfully to deliver Op SALAMANCA.

764. ACM Stirrup directed that it was acceptable for the UK to make use of US enablers, such as aviation, in MND(SE), but that, in general, commitments in MND(SE) were to be met by existing MND(SE) personnel (including contractors) and any shortfalls were to be identified and considered appropriately.

765. ACM Stirrup also directed that the deployment of UK troops to Multi-National Division (Centre South):

> "... crossed a clear policy 'red line' and seemed counter-intuitive, given that consideration was also being given to obtaining US forces for MND(SE). The UK needed to draw down its force levels as soon as practicable, both in MND(SE) and elsewhere."[268]

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[267] Minute Burke-Davies to APS/Secretary of State [MOD], 24 August 2006, 'Iraq: Op SALAMANCA'.
[268] Minutes, 2 August 2006, Chiefs of Staff meeting.

766. The decision not to allow the use of US support in Basra was an important one. The Inquiry considers that the question of what was needed to make Op SALAMANCA a success should have been addressed directly by ACM Stirrup, whose response instead precluded proper consideration of whether additional UK resources would be required.

767. There was continuing resistance to any suggestion that UK forces should operate outside MND(SE) and there may have been concern that US participation in Op SALAMANCA would have led to an obligation on the UK to engage more outside MND(SE). This might not, as ACM Stirrup observed, be consistent with a commitment to drawdown, but might have reduced the risk of strategic failure.

768. The nature of Op SALAMANCA was constrained by the Iraqi Government in September 2006, so that the eventual operation (renamed Operation SINBAD) left "Basra in the hands of the militant militia and death squads, with the ISF unable to impose, let alone maintain, the rule of law".[269] This contributed to the conditions which led the UK into negotiations with JAM in early 2007.

769. Attempts were subsequently made to present Op SINBAD as equivalent to the 2007 US surge. Although there was some resemblance between the "Clear, Hold, Build" tactics to be used by US surge forces and the UK's tactics for Op SINBAD, the UK operation did not deploy sufficient additional resources to conduct "Hold" and "Build" phases with anything like the same strategic effect. The additional 360 troops deployed by the UK could not have had the same effect as the more than 20,000 troops surged into Baghdad and its environs by the US.

770. At the end of 2006, tensions between the military and civilian teams in MND(SE) became explicit. In a report to Mr Blair, Major General Richard Shirreff, General Officer Commanding MND(SE), diagnosed that the existing arrangement, in which the Provincial Reconstruction Team was located in Kuwait, "lacks unity of command and unity of purpose"[270] and proposed the establishment of a "Joint Inter-Agency Task Force" in Basra led by the General Officer Commanding MND(SE).

771. ACM Stirrup's advice to Mr Blair was that it was "too late" to implement Maj Gen Shirreff's proposal. That may have been the right conclusion, but the effect was to deter consideration of a real problem and of ways in which military and civilian operations in MND(SE) could be better aligned.

772. The adequacy of UK force levels in Iraq and the effectiveness of the UK's efforts in MND(SE) were explicitly questioned in Maj Gen Shirreff's end of tour report.

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[269] Minute Shirreff, 21 September 2006, 'GOC MND(SE) – Southern Iraq Update – 21 September 2006'.
[270] Letter Shirreff to Blair, 29 December 2006, [untitled].

FORCE LEVEL REVIEW

773. The balance of forces between Iraq and Afghanistan was reviewed by DOP in February 2007 on the basis that the UK could only sustain the enduring operational deployment of eight battlegroups.

774. ACM Stirrup's "strong advice",[271] with which DOP agreed, was that the UK should provide two additional battlegroups to the International Security Assistance Force in Afghanistan, reducing the Iraq to Afghanistan battlegroup ratio from 6:2 to 5:3 and then 4:4.

775. This advice did not include an assessment of either the actual state of security in Basra or the impact on the UK's ability to deliver its objectives (including that drawdown should be conditions-based) and responsibilities under resolution 1723 (2006). The advice did identify US "nervousness" about the UK proposals.

776. In early May, Sir Nigel Sheinwald, Mr Blair's Foreign Policy Adviser, sought ACM Stirrup's advice on the future of the UK military presence in Iraq. ACM Stirrup advised that the UK should press ahead with drawdown from Iraq on the basis that there was little more the UK could achieve. There was "no militarily useful mission".[272]

777. Mr Blair was concerned about the implications of ACM Stirrup's position unless the political circumstances in Basra changed first. He commented: "it will be very hard to present as anything other than a total withdrawal ... it cd be very dangerous for the stability of Iraq, & the US will, rightly, be v. concerned."[273]

778. After visiting Basra again in mid-May, ACM Stirrup continued to recommend the drawdown of UK forces. But other contemporary evidence indicated a more negative picture of circumstances in Basra than ACM Stirrup's view that:

> "... the Iraqis are increasingly in a position to take on responsibility for their own problems and therefore they might wish to look to propose the south of the country as a model through which we can recommend a drawdown of forces."[274]

779. In July 2007, FCO and MOD officials recognised that leaving Basra Palace would mean moving to PIC in fact if not in name. Mr Brown, who had become Prime Minister in June, was keen that the gap between leaving the Palace and transfer to PIC should be as small as possible, since UK situational awareness and ability to conduct operations in Basra would be limited once the Palace was no longer in use.

780. During a visit to Iraq at the start of July, ACM Stirrup sought to convince senior US officers that Basra was ready for transfer to PIC on the basis that it would not be possible to demonstrate readiness until after the transfer had taken place.

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[271] Paper MOD officials, 13 February 2007, 'Iraq and Afghanistan: Balancing Military Effort in 2007'.
[272] Minute Sheinwald to Prime Minister, 3 May 2007, 'Iraq'.
[273] Manuscript comment Blair on Minute Sheinwald to Prime Minister, 3 May 2007, 'Iraq'.
[274] Minute Poffley to PSSC/SofS [MOD], 17 May 2007, 'CDS visit to Iraq 13-16 May 07'.

General David Petraeus, Commanding General MNF-I, and Ambassador Ryan Crocker, US Ambassador to Iraq, remained "circumspect" on the timing of PIC.[275] They considered that there remained "significant problems" associated with "unstable politics" and "JAM infiltration" in Basra.

781. As they reached the end of their respective tours of duty, both Major General Jonathan Shaw, General Officer Commanding MND(SE) from January to August 2007, and Lieutenant General William Rollo, Senior British Military Representative – Iraq from July 2007 to March 2008, identified the impact of limited resources on the UK's military effort and questioned the drive for continued drawdown in Iraq in order to prioritise resources for Helmand. Maj Gen Shaw wrote: "We have been hamstrung for resources throughout the tour, driven by the rising strategic significance of the Afghan deployment."[276]

782. During a visit to Iraq in October 2007, ACM Stirrup was briefed by Major General Graham Binns, General Office Commanding MND(SE) from August 2007 to February 2008, that the ISF might have only limited ability to cope in the event that JAM resumed combat operations. The JIC and others also identified continued weaknesses in the ISF. Their "ability and willingness to maintain security in the South remains patchy and dependent on MNF training, logistic and specialist air support".[277]

THE BEGINNING OF THE END

783. On 27 February 2008, the JIC assessed security prospects in the South at the request of the Permanent Joint Headquarters (PJHQ): security in Basra remained a concern.

784. In March 2008, Prime Minister Maliki instigated the Charge of the Knights to tackle militia groups in Basra. That such an important operation came as a surprise was an indication of the distance between the UK and Iraqi Governments at this point.

785. When the Charge of the Knights began, the UK found itself to be both compromised in the eyes of the Iraqi Government and unable to offer significant operational support, as a result of the tactical decision to negotiate with JAM1 and the absence of situational awareness in Basra after withdrawing from the Basra Palace site.

786. On 1 April, ACM Stirrup briefed the Overseas and Defence Sub-Committee of the National Security, International Relations and Development Committee (NSID(OD)) that the UK military task would be complete by the end of 2008; its timetable would not be affected by the Charge of the Knights.

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[275] Minute Kyd to PS/SofS [MOD], 5 July 2007, 'CDS visit to Iraq 1-3 Jul 07'.
[276] Letter Shaw to Houghton, 14 August 2007, 'Post operation report Shawforce Jan-Aug 07'.
[277] JIC Assessment, 27 February 2008, 'Iraq: Security Prospects in the South'.

787. ACM Stirrup's conclusion that there was no need to review UK drawdown plans was premature in the light of both the level of uncertainty generated by the Charge of the Knights and continued questions about the ability of the ISF to take the security lead in Basra.

Did the UK achieve its objectives in Iraq?

788. From mid-2005 onwards, various senior individuals – officials, military officers and Ministers – began to consider whether the UK was heading towards "strategic failure" in Iraq.

789. The term "strategic failure" was variously used to mean:

- the development of a widespread sectarian conflict or civil war in Iraq;
- "victory" for terrorist groups;
- collapse of the democratic process;
- failure to achieve the UK's objectives;
- failure to achieve a stable and secure environment in Basra;
- the collapse of the UK/Iraq relationship;
- the division of Iraq and the end of its existence as a nation state;
- damage to the UK's military and political reputation; and
- damage to the relationship between the US and UK.

790. None of the contemporary accounts that the Inquiry has considered reached the conclusion that strategic failure was inevitable, although most recognised that without some form of corrective action it was a serious risk.

791. Although the UK revisited its Iraq strategy with considerable frequency, no substantial change in approach was ever implemented: UK troop numbers continued to reduce; the size of the civilian deployment varied very little; the Iraqiisation of security and handover of responsibility to the Iraqi Government remained key objectives.

792. The Iraq of 2009 certainly did not meet the UK's objectives as described in January 2003: it fell far short of strategic success. Although the borders of Iraq were the same as they had been in 2003, deep sectarian divisions threatened both stability and unity. Those divisions were not created by the coalition, but they were exacerbated by its decisions on de-Ba'athification and on demobilisation of the Iraqi Army and were not addressed by an effective programme of reconciliation.

793. In January 2009, the JIC judged "internal political failures that could lead to renewed violence within and between Iraq's Sunni, Shia and Kurdish communities"[278] to be the greatest strategic threat to Iraq's stability.

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[278] JIC Assessment, 28 January 2009, 'Iraq: Threats to Stability and UK Mission Change in 2009'.

794. The fragility of the situation in Basra, which had been the focus of UK effort in MND(SE), was clear. The JIC assessed that threats remained from Iranian-backed JAM Special Groups, and the Iraqi Security Forces remained reliant on support from Multi-National Forces to address weaknesses in leadership and tactical support. Even as UK troops withdrew from Basra, the US was sufficiently concerned to deploy its own forces there, to secure the border and protect supply lines.

795. In 2009, Iraq did have a democratically elected Parliament, in which many of Iraq's communities were represented. But, as demonstrated by the protracted process of negotiating agreements on the status of US and then UK forces in Iraq, and the continued absence of a much-needed Hydrocarbons Law, representation did not translate into effective government. In 2008, Transparency International judged Iraq to be the third most corrupt country in the world, and in mid-2009 the Assessments Staff judged that Government ministries were "riddled with" corruption.[279]

796. By 2009, it had been demonstrated that some elements of the UK's 2003 objectives for Iraq were misjudged. No evidence had been identified that Iraq possessed weapons of mass destruction, with which it might threaten its neighbours and the international community more widely. But in the years between 2003 and 2009, events in Iraq had undermined regional stability, including by allowing Al Qaida space in which to operate and unsecured borders across which its members might move.

797. The gap between the ambitious objectives with which the UK entered Iraq and the resources that the Government was prepared to commit to the task was substantial from the start. Even with more resources it would have been difficult to achieve those objectives, as a result of the circumstances of the invasion, the lack of international support, the inadequacy of planning and preparation, and the inability to deliver law and order. The lack of security hampered progress at every turn. It is therefore not surprising that, despite the considerable efforts made by UK civilian and military personnel over this period, the results were meagre.

798. The Inquiry has not been able to identify alternative approaches that would have guaranteed greater success in the circumstances of March 2003. What can be said is that a number of opportunities for the sort of candid reappraisal of policies that would have better aligned objectives and resources did not take place. There was no serious consideration of more radical options, such as an early withdrawal or else a substantial increase in effort. The Inquiry has identified a number of moments, especially during the first year of the Occupation, when it would have been possible to conduct a substantial reappraisal. None took place.

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[279] CIG Assessment, 21 July 2009, 'How Corrupt is Iraq?'

Key findings

Development of UK strategy and options, 9/11 to early January 2002

799. The following key findings are from Section 3.1:

- After the attacks on the US on 9/11, Mr Blair declared that the UK would stand "shoulder to shoulder" with the US to defeat and eradicate international terrorism.
- Mr Blair took an active and leading role throughout the autumn of 2001 in building a coalition to act against that threat, including taking military action against the Taliban regime in Afghanistan.
- Mr Blair also emphasised the potential risk of terrorists acquiring and using a nuclear, biological or chemical weapon, and the dangers of inaction.
- In relation to Iraq, Mr Blair sought to influence US policy and prevent precipitate military action by the US, which he considered would undermine the success of the coalition which had been established for action against international terrorism. He recommended identifying an alternative policy which would command widespread international support.
- In December 2001, Mr Blair suggested a strategy for regime change in Iraq that would build over time, including "if necessary" taking military action without losing international support.
- The tactics chosen by Mr Blair were to emphasise the threat which Iraq might pose, rather than a more balanced consideration of both Iraq's capabilities and intent; and to offer the UK's support for President Bush in an effort to influence his decisions on how to proceed.
- That remained Mr Blair's approach in the months that followed.

Development of UK strategy and options, January to April 2002 – "axis of evil" to Crawford

800. The following key findings are from Section 3.2:

- The UK continued to pursue implementation of the "smarter" economic sanctions regime in the first months of 2002, but continuing divisions between Permanent Members of the Security Council meant there was no agreement on the way forward.
- In public statements at the end of February and in the first week of March 2002, Mr Blair and Mr Straw set out the view that Iraq was a threat which had to be dealt with.
- At Cabinet on 7 March, Mr Blair and Mr Straw emphasised that no decisions had been taken and Cabinet was not being asked to take decisions. Cabinet endorsed the conclusion that Iraq's weapons of mass destruction (WMD)

programmes posed a threat to peace and endorsed a strategy of engaging closely with the US Government in order to shape policy and its presentation.

- At Crawford, Mr Blair offered President Bush a partnership in dealing urgently with the threat posed by Saddam Hussein. He proposed that the UK and US should pursue a strategy based on an ultimatum calling on Iraq to permit the return of weapons inspectors or face the consequences.
- Following his meeting with President Bush, Mr Blair stated that Saddam Hussein had to be confronted and brought back into compliance with the UN.
- The acceptance of the possibility that the UK might participate in a military invasion of Iraq was a profound change in UK thinking. Although no decisions had been taken, that became the basis for contingency planning in the months ahead.

Development of UK strategy and options, April to July 2002

801. The following key findings are from Section 3.3:

- By July 2002, the UK Government had concluded that President Bush was impatient to move on Iraq and that the US might take military action in circumstances that would be difficult for the UK.
- Mr Blair's Note to President Bush of 28 July sought to persuade President Bush to use the UN to build a coalition for action by seeking a partnership with the US and setting out a framework for action.
- Mr Blair told President Bush that the UN was the simplest way to encapsulate a "casus belli" in some defining way, with an ultimatum to Iraq once military forces started to build up in October. That might be backed by a UN resolution.
- Mr Blair's Note, which had not been discussed or agreed with his colleagues, set the UK on a path leading to diplomatic activity in the UN and the possibility of participation in military action in a way that would make it very difficult for the UK subsequently to withdraw its support for the US.

Development of UK strategy and options, late July to 14 September 2002

802. The following key findings are from Section 3.4:

- In discussions with the US over the summer of 2002, Mr Blair and Mr Straw sought to persuade the US Administration to secure multilateral support before taking action on Iraq; and to do so through the UN. They proposed a strategy in which the first objective was to offer Iraq the opportunity and last chance to comply with its obligations to disarm.
- If Iraq did not take that opportunity and military action was required, the UK was seeking to establish conditions whereby such action would command multilateral support and be taken with the authority of the Security Council.

- Mr Blair also decided to publish an explanation of why action was needed to deal with Iraq; and to recall Parliament to debate the issue.
- The UK made a significant contribution to President Bush's decision, announced on 12 September, to take the issue of Iraq back to the UN.
- Statements made by China, France and Russia after President Bush's speech highlighted the different positions of the five Permanent Members of the Security Council, in particular about the role of the Council in deciding whether military action was justified. As a result, the negotiation of resolution 1441 was complex and difficult.

Development of UK strategy and options, September to November 2002 – the negotiation of resolution 1441

803. The following key findings are from Section 3.5:

- The declared objective of the US and UK was to obtain international support within the framework of the UN for a strategy of coercive diplomacy for the disarmament of Iraq. For the UK, regime change was a means to achieve disarmament, not an objective in its own right.
- The negotiation of resolution 1441 reflected a broad consensus in the UN Security Council on the need to achieve the disarmament of Iraq.
- To secure consensus in the Security Council despite the different positions of the US and France and Russia, resolution 1441 was a compromise containing drafting 'fixes'.
- That created deliberate ambiguities on a number of key issues including: the level of non-compliance with resolution 1441 which would constitute a material breach; by whom that determination would be made; and whether there would be a second resolution explicitly authorising the use of force.

Development of UK strategy and options, November 2002 to January 2003

804. The following key findings are from Section 3.6:

- Following the adoption of resolution 1441, the UK was pursuing a strategy of coercive diplomacy to secure the disarmament of Iraq. The hope was that this might be achieved by peaceful means, but views differed on how likely that would be.
- The UK Government remained convinced that Iraq had retained prohibited weapons and was pursuing chemical, biological and ballistic missile programmes in contravention of its obligations to disarm; and that the absence of evidence of weapons and programmes was the result of a successful policy of concealment.

- By early January 2003, Mr Blair had concluded that Iraq had had "no change of heart" and military action to remove Saddam Hussein's regime was likely to be required to disarm Iraq.
- The US Administration was planning military action no later than early March.
- Mr Blair and Mr Straw concluded that a second UN resolution would be essential to secure domestic and international support for military action. In the absence of a "smoking gun", that would require more time and a series of reports from the UN inspectors which established a pattern of Iraqi non-compliance with its obligations.
- Mr Blair secured President Bush's support for a second resolution but did not secure agreement that the inspections process should continue until the end of March or early April. That left little time for the inspections process to provide the evidence that would be needed to achieve international agreement on the way ahead.

Development of UK strategy and options, 1 February to 7 March 2003

805. The following key findings are from Section 3.7:

- By the time the Security Council met on 7 March 2003 there were deep divisions within it on the way ahead on Iraq.
- Following President Bush's agreement to support a second resolution to help Mr Blair, Mr Blair and Mr Straw continued during February and early March 2003 to develop the position that Saddam Hussein was not co-operating as required by resolution 1441 (2002) and, if that situation continued, a second resolution should be adopted stating that Iraq had failed to take the final opportunity offered by the Security Council.
- On 6 February, Mr Blair said that the UK would consider military action without a further resolution only if the inspectors reported that they could not do their job and a resolution was vetoed unreasonably. The UK would not take military action without a majority in the Security Council.
- Mr Blair's proposals, on 19 February, for a side statement defining tough tests for Iraq's co-operation and a deadline of 14 March for a vote by the Security Council, were not agreed by the US.
- The initial draft of a US, UK and Spanish resolution tabled on 24 February, which simply invited the Security Council to decide that Iraq had failed to take the final opportunity offered by resolution 1441, failed to attract support.
- Throughout February, the divisions in the Security Council widened.
- France, Germany and Russia set out their common position on 10 and 24 February. Their joint Memorandum of 24 February called for a programme of continued and reinforced inspections with a clear timeline and a military build-up to exert maximum pressure on Iraq to disarm.

- The reports to the Security Council by the IAEA reported increasing indications of Iraqi co-operation. On 7 March, Dr ElBaradei reported that there was no indication that Iraq had resumed nuclear activities and that it should be able to provide the Security Council with an assessment of Iraq's activities in the near future.
- Dr Blix reported to the Security Council on 7 March that there had been an acceleration of initiatives from Iraq and, while they did not constitute immediate co-operation, they were welcome. UNMOVIC would be proposing a work programme for the Security Council's approval, based on key tasks for Iraq to address. It would take months to verify sites and items, analyse documents, interview relevant personnel and draw conclusions.
- A revised draft US, UK and Spanish resolution, tabled after the reports by Dr Blix and Dr ElBaradei on 7 March and proposing a deadline of 17 March for Iraq to demonstrate full co-operation, also failed to attract support.
- China, France and Russia all stated that they did not favour a resolution authorising the use of force and that the Security Council should maintain its efforts to find a peaceful solution.
- Sir Jeremy Greenstock advised that a "side statement" with defined benchmarks for Iraqi co-operation could be needed to secure support from Mexico and Chile.
- Mr Blair told President Bush that he would need a majority of nine votes in the Security Council for Parliamentary approval for UK military action.

Iraq WMD assessments, pre-July 2002

806. The following key findings are from Section 4.1:

- The ingrained belief that Saddam Hussein's regime retained chemical and biological warfare capabilities, was determined to preserve and if possible enhance its capabilities, including at some point in the future a nuclear capability, and was pursuing an active policy of deception and concealment, had underpinned the UK Government's policy towards Iraq since the Gulf Conflict ended in 1991.
- Iraq's chemical, biological and ballistic missile programmes were seen as a threat to international peace and security in the Middle East, but overall, the threat from Iraq was viewed as less serious than that from other key countries of concern – Iran, Libya and North Korea.
- The Assessments issued by the Joint Intelligence Committee (JIC) reflected the uncertainties within the intelligence community about the detail of Iraq's activities.
- The statements prepared for, and used by, the UK Government in public from late 2001 onwards conveyed more certainty than the JIC Assessments about Iraq's proscribed activities and the potential threat they posed.

- The tendency to refer in public statements only to Iraq's "weapons of mass destruction" was likely to have created the impression that Iraq posed a greater threat than the detailed JIC Assessments would have supported.
- There was nothing in the JIC Assessments issued before July 2002 that would have raised any questions in policy-makers' minds about the core construct of Iraq's capabilities and intent. Indeed, from May 2001 onwards, the perception conveyed was that Iraqi activity could have increased since the departure of the weapons inspectors, funded by Iraq's growing illicit income from circumventing the sanctions regime.
- In the light of sensitivities about their content and significance, publication of documents on 'Iraq's Weapons of Mass Destruction', 'Weapons Inspections' and 'Abuse of Human Rights' was postponed until the policy on Iraq was clearer.

Iraq WMD assessments, July to September 2002

807. The following key findings are from Section 4.2:

- The urgency and certainty with which the Government stated that Iraq was a threat which had to be dealt with fuelled the demand for publication of the dossier and led to Mr Blair's decision to publish it in September, separate from any decision on the way ahead.
- The dossier was designed to "make the case" and secure Parliamentary and public support for the Government's position that action was urgently required to secure Iraq's disarmament.
- The JIC accepted ownership of the dossier and agreed its content. There is no evidence that intelligence was improperly included in the dossier or that No.10 improperly influenced the text.
- The assessed intelligence had not established beyond doubt either that Saddam Hussein had continued to produce chemical and biological weapons or that efforts to develop nuclear weapons continued. The JIC should have made that clear to Mr Blair.
- In his statement to Parliament on 24 September 2002, Mr Blair presented Iraq's past, current and potential future capabilities as evidence of the severity of the potential threat from Iraq's weapons of mass destruction; and that at some point in the future that threat would become a reality.
- The dossier's description of Iraq's capabilities and intent became part of the baseline against which the UK Government measured Iraq's future statements and actions and the success of weapons inspections.
- The widespread perception that the September 2002 dossier overstated the firmness of the evidence has produced a damaging legacy which may make it more difficult to secure support for Government policy, including military action, where the evidence depends on inferential judgements drawn from intelligence.

- There are lessons which should be implemented in using information from JIC Assessments to underpin policy decisions.

Iraq WMD assessments, October 2002 to March 2003

808. The following key findings are from Section 4.3:

- The ingrained belief already described in this Section underpinned the UK Government's position that Iraq was a threat that had to be dealt with and it needed to disarm or be disarmed. That remained the case up to and beyond the decision to invade Iraq in March 2003.
- The judgements about Iraq's capabilities and intentions relied too heavily on Iraq's past behaviour being a reliable indicator of its current and future actions.
- There was no consideration of whether, faced with the prospect of a US-led invasion, Saddam Hussein had taken a different position.
- The JIC made the judgements in the UK Government September dossier part of the test for Iraq.
- Iraq's statements that it had no weapons or programmes were dismissed as further evidence of a strategy of denial.
- The extent to which the JIC's judgements depended on inference and interpretation of Iraq's previous attitudes and behaviour was not recognised.
- At no stage was the hypothesis that Iraq might no longer have chemical, biological or nuclear weapons or programmes identified and examined by either the JIC or the policy community.
- A formal reassessment of the JIC's judgements should have taken place after Dr Blix's report to the Security Council on 14 February 2003 or, at the very latest, after his report of 7 March.
- Intelligence and assessments made by the JIC about Iraq's capabilities and intent continued to be used to prepare briefing material to support Government statements in a way which conveyed certainty without acknowledging the limitations of the intelligence.
- The independence and impartiality of the JIC remains of the utmost importance.
- SIS had a responsibility to ensure that key recipients of its reporting were informed in a timely way when doubts arose about key sources and when, subsequently, intelligence was withdrawn.

The search for WMD

809. The following key findings are from Section 4.4:

- The search for evidence of WMD in Iraq was started during the military campaign by Exploitation Task Force-75 and was carried forward from June 2003 by the Iraq Survey Group (ISG). The UK participated in both.

- As the insurgency developed, the ISG's operating conditions became increasingly difficult. There was competition for resources between counter-terrorism operations and the search for WMD evidence, and some ISG staff were diverted to the former.
- Mr Blair took a close interest in the work of the ISG and the presentation of its reports and the wider narrative about WMD. He raised the subject with President Bush.
- The Government was confident that pre-conflict assessments of Iraq's WMD capabilities would be confirmed once Saddam Hussein's regime had been removed.
- It quickly became apparent that it was unlikely that significant stockpiles would be found. This led to challenges to the credibility of both the Government and the intelligence community.
- There were soon demands for an independent judge-led inquiry into the pre-conflict intelligence.
- The Government was quick to acknowledge the need for a review, rejecting an independent inquiry in favour of reviews initiated by the House of Commons Foreign Affairs Committee and the Intelligence and Security Committee of Parliament.
- The Government's reluctance to establish an independent public inquiry became untenable in January 2004 when President Bush announced his own decision to set up an independent inquiry in the US.
- Faced with criticism of the pre-conflict intelligence and the absence of evidence of a current Iraqi WMD capability, Mr Blair sought to defend the decision to take military action by emphasising instead:
  - Saddam Hussein's strategic intent;
  - the regime's breaches of Security Council resolutions; and
  - the positive impact of military action in Iraq on global counter-proliferation efforts.
- The ISG's principal findings – that Iraq's WMD capability had mostly been destroyed in 1991 but that it had been Saddam Hussein's strategic intent to preserve the capability to reconstitute his WMD – were significant, but did not support statements made by the UK and US Governments before the invasion, which had focused on Iraq's current capabilities and an urgent and growing threat.
- The explanation for military action put forward by Mr Blair in October 2004 drew on the ISG's findings, but was not the explanation given before the conflict.

Advice on the legal basis for military action, November 2002 to March 2003

810. The following key findings are from Section 5:

- On 9 December, formal 'instructions' to provide advice were sent to Lord Goldsmith. They were sent by the FCO on behalf of the FCO and the MOD as well as No.10. The instructions made it clear that Lord Goldsmith should not provide an immediate response.
- Until 27 February, No.10 could not have been sure that Lord Goldsmith would advise that there was a basis on which military action against Iraq could be taken in the absence of a further decision of the Security Council.
- Lord Goldsmith's formal advice of 7 March set out alternative interpretations of the legal effect of resolution 1441. While Lord Goldsmith remained "of the opinion that the safest legal course would be to secure a second resolution", he concluded (paragraph 28) that "a reasonable case can be made that resolution 1441 was capable of reviving the authorisation in resolution 678 without a further resolution".
- Lord Goldsmith wrote that a reasonable case did not mean that if the matter ever came to court, he would be confident that the court would agree with this view. He judged a court might well conclude that OPs 4 and 12 required a further Security Council decision in order to revive the authorisation in resolution 678.
- At a meeting on 11 March, there was concern that the advice did not offer a clear indication that military action would be lawful. Lord Goldsmith was asked, after the meeting, by Admiral Boyce on behalf of the Armed Forces, and by the Treasury Solicitor, Ms Juliet Wheldon, in respect of the Civil Service, to give a clear-cut answer on whether military action would be lawful rather than unlawful.
- Lord Goldsmith concluded on 13 March that, on balance, the "better view" was that the conditions for the operation of the revival argument were met in this case, meaning that there was a lawful basis for the use of force without a further resolution beyond resolution 1441.
- Mr Brummell wrote to Mr Rycroft on 14 March:

  > "It is an essential part of the legal basis for military action without a further resolution of the Security Council that there is strong evidence that Iraq has failed to comply with and co-operate fully in the implementation of resolution 1441 and has thus failed to take the final opportunity offered by the Security Council in that resolution. The Attorney General understands that it is unequivocally the Prime Minister's view that Iraq has committed further material breaches as specified in [operative] paragraph 4 of resolution 1441, but as this is a judgment for the Prime Minister, the Attorney would be grateful for confirmation that this is the case."

- Mr Rycroft replied to Mr Brummell on 15 March:

  > "This is to confirm that it is indeed the Prime Minister's unequivocal view that Iraq is in further material breach of its obligations, as in OP4 [operative paragraph 4] of UNSCR 1441, because of 'false statements or omissions in the declarations submitted by Iraq pursuant to this resolution and failure to comply with, and co-operate fully in the interpretation of, this resolution'."

- Senior Ministers should have considered the question posed in Mr Brummell's letter of 14 March, either in the Defence and Overseas Policy Committee or a "War Cabinet", on the basis of formal advice. Such a Committee should then have reported its conclusions to Cabinet before its Members were asked to endorse the Government's policy.
- Cabinet was provided with the text of Lord Goldsmith's Written Answer to Baroness Ramsey setting out the legal basis for military action.
- That document represented a statement of the Government's legal position – it did not explain the legal basis of the conclusion that Iraq had failed to take "the final opportunity" to comply with its disarmament obligations offered by resolution 1441.
- Cabinet was not provided with written advice which set out, as the advice of 7 March had done, the conflicting arguments regarding the legal effect of resolution 1441 and whether, in particular, it authorised military action without a further resolution of the Security Council.
- The advice should have been provided to Ministers and senior officials whose responsibilities were directly engaged and should have been made available to Cabinet.

Development of the military options for an invasion of Iraq

811. The following key findings are from Section 6.1:

- The size and composition of a UK military contribution to the US-led invasion of Iraq was largely discretionary. The US wanted some UK capabilities (including Special Forces), to use UK bases, and the involvement of the UK military to avoid the perception of unilateral US military action. The primary impetus to maximise the size of the UK contribution and the recommendations on its composition came from the Armed Forces, with the agreement of Mr Hoon.
- From late February 2002, the UK judged that Saddam Hussein's regime could only be removed by a US-led invasion.
- In April 2002, the MOD advised that, if the US mounted a major military operation, the UK should contribute a division comprising three brigades. That was perceived to be commensurate with the UK's capabilities and the demands of the campaign. Anything smaller risked being compared adversely to the UK's contribution to the liberation of Kuwait in 1991.

- The MOD saw a significant military contribution as a means of influencing US decisions.
- Mr Blair and Mr Hoon wanted to keep open the option of contributing significant forces for ground operations as long as possible, but between May and mid-October consistently pushed back against US assumptions that the UK would provide a division.
- Air and maritime forces were offered to the US for planning purposes in September.
- The MOD advised in October that the UK was at risk of being excluded from US plans unless it offered ground forces, "Package 3", on the same basis as air and maritime forces. That could also significantly reduce the UK's vulnerability to US requests to provide a substantial and costly contribution to post-conflict operations.
- From August until December 2002, other commitments meant that UK planning for Package 3 was based on providing a divisional headquarters and an armoured brigade for operations in northern Iraq. That was seen as the maximum practicable contribution the UK could generate within the predicted timescales for US action.
- The deployment was dependent on Turkey's agreement to the transit of UK forces.
- Mr Blair agreed to offer Package 3 on 31 October 2002.
- That decision and its potential consequences were not formally considered by a Cabinet Committee or reported to Cabinet.
- In December 2002, the deployment of 3 Commando Brigade was identified as a way for the UK to make a valuable contribution in the initial stages of a land campaign if transit through Turkey was refused. The operational risks were not explicitly addressed.
- Following a visit to Turkey on 7 to 8 January 2003, Mr Hoon concluded that there would be no agreement to the deployment of UK ground forces through Turkey.
- By that time, in any case, the US had asked the UK to deploy for operations in southern Iraq.

Military planning for the invasion, January to March 2003

812. The following key findings are from Section 6.2:

- The decisions taken between mid-December 2002 and mid-January 2003 to increase the combat force deployed to three brigades and bring forward the date on which UK forces might participate in combat operations compressed the timescales available for preparation.

- The decision to deploy a large scale force for potential combat operations was taken without collective Ministerial consideration of the decision and its implications.
- The large scale force deployed was a one-shot capability. It would have been difficult to sustain the force if combat operations had been delayed until autumn 2003 or longer, and it constrained the capabilities which were available for a UK military contribution to post-conflict operations.

Military equipment (pre-conflict)

813. The following key findings are from Section 6.3:

- The decisions taken between mid-December 2002 and mid-January 2003 to increase combat forces and bring forward the date on which UK forces might participate in combat operations compressed the timescales available for preparation.
- The achievements made in preparing the forces in the time available were very considerable, but the deployment of forces more quickly than anticipated in the Defence Planning Assumptions meant that there were some serious equipment shortfalls when conflict began.
- Those shortfalls were exacerbated by the lack of an effective asset tracking system, a lesson from previous operations and exercises that the MOD had identified but not adequately addressed.
- Ministers were not fully aware of the risks inherent in the decisions and the MOD and PJHQ were not fully aware of the situation on the ground during the conflict.

Planning for a post-Saddam Hussein Iraq

814. The following key findings are from Section 6.4, and relate to evidence in Sections 6.4 and 6.5:

- Before the invasion of Iraq, Ministers, senior officials and the UK military recognised that post-conflict civilian and military operations were likely to be the strategically decisive phase of the Coalition's engagement in Iraq.
- UK planning and preparation for the post-conflict phase of operations, which rested on the assumption that the UK would be able quickly to reduce its military presence in Iraq and deploy only a minimal number of civilians, were wholly inadequate.
- The information available to the Government before the invasion provided a clear indication of the potential scale of the post-conflict task and the significant risks associated with the UK's proposed approach.
- Foreseeable risks included post-conflict political disintegration and extremist violence in Iraq, the inadequacy of US plans, the UK's inability to exert significant influence on US planning and, in the absence of UN authorisation

for the administration and reconstruction of post-conflict Iraq, the reluctance of potential international partners to contribute to the post-conflict effort.

- The Government, which lacked both clear Ministerial oversight of post-conflict strategy, planning and preparation, and effective co-ordination between government departments, failed to analyse or manage those risks adequately.
- Mr Blair, who recognised the significance of the post-conflict phase, did not press President Bush for definite assurances about US plans, did not consider or seek advice on whether the absence of a satisfactory plan called for reassessment of the terms of the UK's engagement and did not make agreement on such a plan a condition of UK participation in military action.

The invasion

815. The following key findings are from Section 8:

- It took less than a month to achieve the departure of Saddam Hussein and the fall of Baghdad.
- The decision to advance into Basra was made by military commanders on the ground.
- The UK was unprepared for the media response to the initial difficulties. It had also underestimated the need for sustained communication of key strategic messages to inform public opinion about the objectives and progress of the military campaign, including in Iraq.
- For any future military operations, arrangements to agree and disseminate key strategic messages need to be put in place, in both London and on the ground, before operations begin.
- The UK acceded to the post-invasion US request that it assume leadership of a military Area of Responsibility (AOR) encompassing four provinces in southern Iraq, a position it then held for six years, without a formal Ministerial decision and without carrying out a robust analysis of the strategic implications for the UK or the military's capacity to support the UK's potential obligations in the region.

The post-conflict period

816. The following key findings are from Section 9.8, and relate to evidence in Sections 9.1 to 9.7:

- Between 2003 and 2009, the UK's most consistent strategic objective in relation to Iraq was to reduce the level of its deployed forces.
- The UK struggled from the start to have a decisive effect on the Coalition Provisional Authority's (CPA's) policies, even though it was fully implicated in its decisions as joint Occupying Power.

- US and UK strategies for Iraq began to diverge almost immediately after the conflict. Although the differences were managed, by early 2007 the UK was finding it difficult to play down the divergence, which was, by that point, striking.
- The UK missed clear opportunities to reconsider its military approach in Multi-National Division (South-East).
- Throughout 2004 and 2005, it appears that senior members of the Armed Forces reached the view that little more would be achieved in MND(SE) and that it would make more sense to concentrate military effort on Afghanistan where it might have greater effect.
- From July 2005 onwards, decisions in relation to resources for Iraq were made under the influence of the demands of the UK effort in Afghanistan. Although Iraq remained the stated UK main effort, the Government no longer had the option of a substantial reinforcement of its forces there.
- The UK's plans to reduce troop levels depended on the transition of lead responsibility for security to the Iraqi Security Forces, even as the latter's ability to take on that responsibility was in question.
- The UK spent time and energy on rewriting strategies, which tended to describe a desired end state without setting out how it would be reached.
- UK forces withdrew from Iraq in 2009 in circumstances which did not meet objectives defined in January 2003.

Reconstruction

817. The following key findings are from Section 10.4, and relate to evidence in Sections 10.1 to 10.3:

- The UK failed to plan or prepare for the major reconstruction programme required in Iraq.
- Reconstruction was the third pillar in a succession of UK strategies for Iraq. The Government never resolved how reconstruction would support broader UK objectives.
- Following the resignation of Ms Clare Short, the International Development Secretary, and the adoption of UN Security Council resolution 1483 in May 2003, DFID assumed leadership of the UK's reconstruction effort in Iraq. DFID would subsequently define, within the framework established by the Government, the scope and nature of that effort.
- At key points, DFID should have considered strategic questions about the scale, focus and purpose of the UK's reconstruction effort in Iraq.
- The US-led Coalition Provisional Authority excluded the UK from discussions on oil policy and on disbursements from the Development Fund for Iraq.
- Many of the failures which affected pre-invasion planning and preparation persisted throughout the post-conflict period. They included poor

inter-departmental co-ordination, inadequate civilian military co-operation and a failure to use resources coherently.

- An unstable and insecure environment made it increasingly difficult to make progress on reconstruction. Although staff and contractors developed innovative ways to deliver projects and manage risks, the constraints were never overcome. Witnesses to the Inquiry identified some successes, in particular in building the capacity of central Iraqi Government institutions and the provincial government in Basra.
- Lessons learned through successive reviews of the UK approach to post-conflict reconstruction and stabilisation, in Iraq and elsewhere, were not applied in Iraq.

De-Ba'athification

818. The following key findings are from Section 11.2, and relate to evidence in Section 11.1:

- Early decisions on the form of de-Ba'athification and its implementation had a significant and lasting negative impact on Iraq.
- Limiting de-Ba'athification to the top three tiers of the party, rather than extending it to the fourth, would have had the potential to be far less damaging to Iraq's post-invasion recovery and political stability.
- The UK's ability to influence the CPA decision on the scope of the policy was limited and informal.
- The UK chose not to act on its well-founded misgivings about handing over the implementation of de-Ba'athification policy to the Governing Council.

Security Sector Reform

819. The following key findings are from Section 12.2, and relate to evidence in Section 12.1:

- Between 2003 and 2009, there was no coherent US/UK strategy for Security Sector Reform (SSR).
- The UK began work on SSR in Iraq without a proper understanding of what it entailed and hugely underestimated the magnitude of the task.
- The UK was unable to influence the US or engage it in a way that produced an Iraq-wide approach.
- There was no qualitative way for the UK to measure progress. The focus on the quantity of officers trained for the Iraqi Security Forces, rather than the quality of officers, was simplistic and gave a misleading sense of comfort.
- After 2006, the UK's determination to withdraw from Iraq meant that aspirations for the Iraqi Security Forces were lowered to what would be "good enough" for Iraq. It was never clear what that meant in practice.

- The development of the Iraqi Army was considerably more successful than that of the Iraqi Police Service. But the UK was still aware before it withdrew from Iraq that the Iraqi Army had not been sufficiently tested. The UK was not confident that the Iraqi Army could maintain security without support.

Resources

820. The following key findings are from Section 13.2, and relate to evidence in Section 13.1:

- The direct cost of the conflict in Iraq was at least £9.2bn (the equivalent of £11.83bn in 2016). In total, 89 percent of that was spent on military operations.
- The Government's decision to take part in military action against Iraq was not affected by consideration of the potential financial cost to the UK of the invasion or the post-conflict period.
- Ministers were not provided with estimates of military conflict and post-conflict costs, or with advice on their affordability, when decisions were taken on the scale of the UK's military contribution to a US-led invasion of Iraq, and on the UK's role in the post-conflict period. They should have been.
- There was no articulated need for additional financial resources for military operations in Iraq that was not met.
- The arrangements for funding military Urgent Operational Requirements and other military costs worked as intended, and did not constrain the UK military's ability to conduct operations in Iraq.
- The controls imposed by the Treasury on the MOD's budget in September 2003 did not constrain the UK military's ability to conduct operations in Iraq.
- The Government was slow to recognise that Iraq was an enduring operation, and to adapt its funding arrangements to support both military operations and civilian activities.
- The arrangements for securing funding for civilian activities could be slow and unpredictable. Some high-priority civilian activities were funded late or only in part.

Military equipment (post-conflict)

821. The following key findings are from Section 14.2, and relate to evidence in Section 14.1:

- Between 2003 and 2009, UK forces in Iraq faced gaps in some key capability areas, including protected mobility, Intelligence, Surveillance, Target Acquisition and Reconnaissance (ISTAR) and helicopter support.
- It was not sufficiently clear which person or department within the MOD had responsibility for identifying and articulating capability gaps.

- Delays in providing adequate medium weight Protected Patrol Vehicles (PPVs) and the failure to meet the needs of UK forces in MND(SE) for ISTAR and helicopters should not have been tolerated.
- The MOD was slow in responding to the developing threat in Iraq from Improvised Explosive Devices (IEDs). The range of protected mobility options available to commanders in MND(SE) was limited. Although work had begun before 2002 to source an additional PPV, it was only ordered in July 2006 following Ministerial intervention.
- Funding was not a direct barrier to the identification and deployment of additional solutions to the medium weight PPV gap. But it appears that the longer-term focus of the Executive Committee of the Army Board on the Future Rapid Effect System programme inhibited it from addressing the more immediate issue related to medium weight PPV capability.
- The decision to deploy troops to Afghanistan had a material impact on the availability of key capabilities for deployment to Iraq, particularly helicopters and ISTAR.

Civilian personnel

822. The following key findings are from Section 15.2, and relate to evidence in Section 15.1:

- Before the invasion of Iraq, the Government had made only minimal preparations for the deployment of civilian personnel.
- There was an enduring gap between the Government's civilian capacity and the level of its ambition in Iraq.
- There was no overarching consideration by the Government of the extent to which civilians could be effective in a highly insecure environment, or of the security assets needed for civilians to do their jobs effectively.
- The evidence seen by the Inquiry indicates that the Government recognised its duty of care to UK-based and locally engaged civilians in Iraq. A significant effort was made to keep civilians safe in a dangerous environment.

Service Personnel

823. The following key findings are from Section 16.4, and relate to evidence in Sections 16.1 to 16.3:

- In 2002, the UK military was already operating at, and in some cases beyond, the limits of the guidelines agreed in the 1998 *Strategic Defence Review*. As a result, the Harmony Guidelines were being breached for some units and specialist trades.
- The Government's decision to contribute a military force to a US-led invasion of Iraq inevitably increased the risk that more Service Personnel would be put

in breach of the Harmony Guidelines. The issue of the potential pressure on Service Personnel was not a consideration in the decision.

- The MOD planned and prepared effectively to provide medical care in support of Operation TELIC.
- There were major improvements in the provision of medical care, mental healthcare and rehabilitative care available to Service Personnel over the course of Op TELIC.
- Most of the contacts between the MOD and bereaved families were conducted with sensitivity. In a few cases, they were not. The MOD progressively improved how it engaged with and supported bereaved families, in part driven by consistent public and Ministerial pressure.
- The Government's decision in 2006 to deploy a second medium scale force to Helmand province in Afghanistan further increased the pressure on Service Personnel, on elements of the MOD's welfare, medical and investigative systems, and the coronial system.
- Much of the MOD's and the Government's effort from 2006 was focused on addressing those pressures.
- The MOD should have planned and prepared to address those pressures, rather than react to them.
- The Government should have acted sooner to address the backlog of inquests into the deaths of Service Personnel. The support it did provide, in June 2006, cleared the backlog.
- The MOD made a number of improvements to the Board of Inquiry process, but some proposals for more substantive reform (including the introduction of an independent member) were not fully explored. The MOD significantly improved the way it communicated with and supported bereaved families in relation to military investigations and inquests.
- The MOD was less effective at providing support to Service Personnel who were mobilised individually (a category which included almost all Reservists) and their families, than to formed units.

Civilian casualties

824. The following key findings are from Section 17:

- The Inquiry considers that a Government has a responsibility to make every reasonable effort to understand the likely and actual effects of its military actions on civilians.
- In the months before the invasion, Mr Blair emphasised the need to minimise the number of civilian casualties arising from an invasion of Iraq. The MOD's responses offered reassurance based on the tight targeting procedures governing the air campaign.

- The MOD made only a broad estimate of direct civilian casualties arising from an attack on Iraq, based on previous operations.
- With hindsight, greater efforts should have been made in the post-conflict period to determine the number of civilian casualties and the broader effects of military operations on civilians. More time was devoted to the question of which department should have responsibility for the issue of civilian casualties than it was to efforts to determine the actual number.
- The Government's consideration of the issue of Iraqi civilian casualties was driven by its concern to rebut accusations that Coalition Forces were responsible for the deaths of large numbers of civilians, and to sustain domestic support for operations in Iraq.

Lessons

825. In a number of Sections of this Report, the Inquiry has set out explicit lessons. They relate in particular to those elements of the UK's engagement in Iraq which might be replicated in future operations.

826. The decision to join the US-led invasion of Iraq in 2003 was the product of a particular set of circumstances which are unlikely to be repeated. Unlike other instances in which military force has been used, the invasion was not prompted by the aggression of another country or an unfolding humanitarian disaster. The lessons drawn by the Inquiry on the pre-conflict element of this Report are therefore largely context-specific and embedded in its conclusions. Lessons on collective Ministerial decision-making, where the principles identified are enduring ones, are an exception. They, and other lessons which have general application, are set out below.

The decision to go to war

827. In a democratic system, public support and understanding for a major military operation are essential. It is therefore important to guard against overstating what military action might achieve and against any tendency to play down the risks. A realistic assessment of the possibilities and limitations of armed force, and of the challenges of intervening in the affairs of other States, should help any future UK Government manage expectations, including its own.

828. When the potential for military action arises, the Government should not commit to a firm political objective before it is clear that it can be achieved. Regular reassessment is essential, to ensure that the assumptions upon which policy is being made and implemented remain correct.

829. Once an issue becomes a matter for the Security Council, the UK Government cannot expect to retain control of how it is to be discussed and eventually decided unless it is able to work with the interests and agendas of other Member States. In relation to Iraq, the independent role of the inspectors was a further dimension.

830. A military timetable should not be allowed to dictate a diplomatic timetable. If a strategy of coercive diplomacy is being pursued, forces should be deployed in such a way that the threat of action can be increased or decreased according to the diplomatic situation and the policy can be sustained for as long as necessary.

831. The issue of influencing the US, both at the strategic and at the operational level, was a constant preoccupation at all levels of the UK Government.

832. Prime Ministers will always wish to exercise their own political judgement on how to handle the relationship with the US. It will depend on personal relationships as well as on the nature of the issues being addressed. On all these matters of strategy and diplomacy, the Inquiry recognises that there is no standard formula that will be appropriate in all cases.

833. Whether or not influence has been exercised can be difficult to ascertain, even in retrospect. The views of allies are most likely to make a difference when they come in one side of an internal debate, and there are a number of instances where the UK arguments did make a difference to the formation and implementation of US policy. The US and UK are close allies, but the relationship between the two is unequal.

834. The exercise of influence will always involve a combination of identifying the prerequisites for success in a shared endeavour, and a degree of bargaining to make sure that the approach meets the national interest. In situations like the run-up to the invasion of Iraq:

- If certain measures are identified as prerequisite for success then their importance should be underlined from the start. There are no prizes for sharing a failure.
- Those measures that are most important should be pursued persistently and consistently.
- If it is assumed that a consequence of making a contribution in one area is that a further contribution would not be required in another, then that should be made explicit.
- Influence should not be set as an objective in itself. The exercise of influence is a means to an end.

Weapons of mass destruction

835. There will continue to be demands for factual evidence to explain the background to controversial policy decisions including, where appropriate, the explicit and public use of assessed intelligence.

836. The Inquiry shares the Butler Review's conclusions that it was a mistake not to see the risk of combining in the September dossier the JIC's assessment of intelligence and other evidence with the interpretation and presentation of the evidence in order to make the case for policy action.

837. The nature of the two functions is fundamentally different. As can be seen from the JIC Assessments quoted in, and published with, this report, they contain careful language intended to ensure that no more weight is put on the evidence than it can bear. Organising the evidence in order to present an argument in the language of Ministerial statements produces a quite different type of document.

838. The widespread perception that the September 2002 dossier overstated the firmness of the evidence about Iraq's capabilities and intentions in order to influence opinion and "make the case" for action to disarm Iraq has produced a damaging legacy, including undermining trust and confidence in Government statements, particularly those which rely on intelligence which cannot be independently verified.

839. As a result, in situations where the policy response may involve military action and the evidence, at least in part, depends on inferential judgements drawn from necessarily incomplete intelligence, it may be more difficult to secure support for the Government's position and agreement to action.

840. The explicit and public use of material from JIC Assessments to underpin policy decisions will be infrequent. But, from the evidence on the compilation of the September dossier, the lessons for any similar exercise in future would be:

- The need for clear separation of the responsibility for analysis and assessment of intelligence from the responsibility for making the argument for a policy.
- The importance of precision in describing the position. In the case of the September dossier, for instance, the term "programme" was used to describe disparate activities at very different stages of maturity. There was a "programme" to extend the range of the Al Samoud missile. There was no "programme" in any meaningful sense to develop and produce nuclear weapons. Use of the shorthand CW or BW in relation to Iraq's capability obscured whether the reference was to weapons or warfare. Constant use of the term "weapons of mass destruction" without further clarification obscured the differences between the potential impact of nuclear, biological and chemical weapons and the ability to deliver them effectively. For example, there would be a considerable difference between the effects of an artillery shell filled with mustard gas, which is a battlefield weapon, and a long-range ballistic missile with a chemical or biological warhead, which is a weapon of terror.
- The need to identify and accurately describe the confidence and robustness of the evidence base. There may be evidence which is "authoritative" or which puts an issue "beyond doubt"; but there are unlikely to be many circumstances when those descriptions could properly be applied to inferential judgements relying on intelligence.
- The need to be explicit about the likelihood of events. The possibility of Iraq producing and using an improvised nuclear device was, rightly, omitted from the dossier. But the claim that Iraq could build a nuclear weapon within one to two

years if it obtained fissile material and other essential components from foreign sources was included without addressing how feasible and likely that would be. In addition, the Executive Summary gave prominence to the International Institute of Strategic Studies suggestion that Iraq would be able to assemble nuclear weapons within months if it could obtain fissile material, without reference to the material in the main text of the dossier which made clear that the UK took a very different view.

- The need to be scrupulous in discriminating between facts and knowledge on the one hand and opinion, judgement or belief on the other.
- The need for vigilance to avoid unwittingly crossing the line from supposition to certainty, including by constant repetition of received wisdom.

841. When assessed intelligence is explicitly and publicly used to support a policy decision, there would be benefit in subjecting that assessment and the underpinning intelligence to subsequent scrutiny, by a suitable, independent body, such as the Intelligence and Security Committee, with a view to identifying lessons for the future.

842. In the context of the lessons from the preparation of the September 2002 dossier, the Inquiry identifies in Section 4.2 the benefits of separating the responsibilities for assessment of intelligence from setting out the arguments in support of a policy.

843. The evidence in Section 4.3 reinforces that lesson. It shows that the intelligence and assessments made by the JIC about Iraq's capabilities and intent continued to be used to prepare briefing material to support Government statements in a way which conveyed certainty without acknowledging the limitations of the intelligence.

844. The independence and impartiality of the JIC remains of the utmost importance.

845. As the Foreign Affairs Committee report in July 2003 pointed out, the late Sir Percy Cradock wrote in his history of the JIC that:

> "Ideally, intelligence and policy should be close but distinct. Too distinct and assessments become an in-growing, self-regarding activity, producing little or no work of interest to the decision-makers ... Too close a link and policy begins to play back on estimates, producing the answers the policy makers would like ... The analysts become courtiers, whereas their proper function is to report their findings ... without fear or favour. The best arrangement is intelligence and policy in separate but adjoining rooms, with communicating doors and thin partition walls ..."[280]

846. Mr Straw told the FAC in 2003:

> "The reason why we have a Joint Intelligence Committee which is separate from the intelligence agencies is precisely so that those who are obtaining the intelligence are

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[280] Cradock, Sir Percy. *Know your enemy – How the Joint Intelligence Committee saw the World*. John Murray, 2002.

> not then directly making the assessment upon it. That is one of the very important strengths of our system compared with most other systems around the world."[281]

847. The FAC endorsed those sentiments.[282] It stated that the JIC has a "vital role in safeguarding the independence and impartiality of intelligence"; and that the "independence and impartiality of its own role" was "of the utmost importance". It recommended that Ministers should "bear in mind at all times the importance of ensuring that the JIC is free of all political pressure".

848. In its response to the FAC, the Government stated:

> "We agree. The JIC plays a crucial role in providing the Government with objective assessments on a range of issues of importance to national interests."[283]

The invasion of Iraq

849. The military plan for the invasion of Iraq depended for success on a rapid advance on Baghdad, including convincing the Iraqi population of the Coalition's determination to remove the regime.

850. By the end of March, the Government had recognised the need for sustained communication of key strategic messages and improved capabilities to reach a range of audiences in the UK, Iraq and the wider international community. But there was clearly a need for more robust arrangements to integrate Coalition efforts in the UK, US and the forces deployed in Iraq.

851. The reaction of the media and the Iraqi population to perceived difficulties encountered within days of the start of an operation, which was planned to last up to 125 days, might have been anticipated if there had been more rigorous examination of possible scenarios pre-conflict and the media had better understood the original concept of operations and the nature of the Coalition responses to the situations they encountered once the campaign began.

852. The difficulty and complexity of successfully delivering distinct strategic messages to each of the audiences a government needs to reach should not be underestimated. For any future military operations, arrangements tailored to meet the circumstances of each operation need to be put in place in both London and on the ground before operations begin.

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[281] Ninth Report from the Foreign Affairs Committee, Session 2002-2003, 7 July 2003, *The Decision to go to War in Iraq,* HC 813-1, paragraph 153.
[282] Ninth Report from the Foreign Affairs Committee, Session 2002-2003, 7 July 2003, *The Decision to go to War in Iraq,* HC 813-1, paragraphs 156-157.
[283] Foreign Secretary, November 2003, *The Decision to go to War in Iraq Response of the Secretary of State for Foreign and Commonwealth Affairs,* November 2003, Cm6062, paragraph 27.

853. When the UK acceded to the US request that it assume leadership of a military Area of Responsibility encompassing four provinces in southern Iraq, it did so without a robust analysis either of the strategic implications for the UK or of the military's capacity to support the UK's potential obligations in the region.

854. A step of such magnitude should be taken deliberately and having considered the wider strategic and resource implications and contingent liabilities.

855. That requires all government departments whose responsibilities will be engaged to have been formally involved in providing Ministers with coherent inter-departmental advice before decisions are taken; the proper function of the Cabinet Committee system.

The post-conflict period

856. The UK had not participated in an opposed invasion and full-scale occupation of a sovereign State (followed by shared responsibility for security and reconstruction over a long period) since the end of the Second World War. The particular circumstances of Op TELIC are unlikely to recur. Nevertheless, there are lessons to be drawn about major operations abroad and the UK's approach to armed intervention.

857. The UK did not achieve its objectives, despite the best efforts and acceptance of risk in a dangerous environment by military and civilian personnel.

858. Although the UK expected to be involved in Iraq for a lengthy period after the conflict, the Government was unprepared for the role in which the UK found itself from April 2003. Much of what went wrong stemmed from that lack of preparation.

859. In any undertaking of this kind, certain fundamental elements are of vital importance:

- the best possible appreciation of the theatre of operations, including the political, cultural and ethnic background, and the state of society, the economy and infrastructure;
- a hard-headed assessment of risks;
- objectives which are realistic within that context, and if necessary limited – rather than idealistic and based on optimistic assumptions; and
- allocation of the resources necessary for the task – both military and civil.

860. All of these elements were lacking in the UK's approach to its role in post-conflict Iraq.

861. Where responsibility is to be shared, it is essential to have written agreement in advance on how decision-making and governance will operate within an alliance or coalition. The UK normally acts with allies, as it did in Iraq. Within the NATO Alliance, the rules and mechanisms for decision-taking and the sharing of responsibility have been developed over time and are well understood. The Coalition in Iraq, by contrast,

was an ad hoc alliance. The UK tried to establish some governance principles in the Memorandum of Understanding proposed to the US, but did not press the point. This led the UK into the uncomfortable and unsatisfactory situation of accepting shared responsibility without the ability to make a formal input to the process of decision-making.

862. As Iraq showed, the pattern set in the initial stage of an intervention is crucial. The maximum impact needs to be made in the early weeks and months, or opportunities missed may be lost for ever. It is very difficult to recover from a slow or damaging start.

863. Ground truth is vital. Over-optimistic assessments lead to bad decisions. Senior decision-makers – Ministers, Chiefs of Staff, senior officials – must have a flow of accurate and frank reporting. A "can do" attitude is laudably ingrained in the UK Armed Forces – a determination to get on with the job, however difficult the circumstances – but this can prevent ground truth from reaching senior ears. At times in Iraq, the bearers of bad tidings were not heard. On several occasions, decision-makers visiting Iraq (including the Prime Minister, the Foreign Secretary and the Chief of the General Staff) found the situation on the ground to be much worse than had been reported to them. Effective audit mechanisms need to be used to counter optimism bias, whether through changes in the culture of reporting, use of multiple channels of information – internal and external – or use of visits.

864. It is important to retain a flexible margin of resources – in personnel, equipment and financing – and the ability to change tactics to deal with adverse developments on the ground. In Iraq, that flexibility was lost after the parallel deployment to Helmand province in Afghanistan, which both constrained the supply of equipment (such as ISTAR) and took away the option of an effective reinforcement. Any decision to deploy to the limit of capabilities entails a high level of risk. In relation to Iraq, the risks involved in the parallel deployment of two enduring medium scale operations were not examined with sufficient rigour and challenge.

865. The management, in Whitehall, of a cross-government effort on the scale which was required in Iraq is a complex task. It needs dedicated leadership by someone with time, energy and influence. It cannot realistically be done by a Prime Minister alone, but requires a senior Minister with lead responsibility who has access to the Prime Minister and is therefore able to call on his or her influence in resolving problems or conflicts. A coherent inter-departmental effort, supported by a structure able to hold departments to account, is required to support such a Minister.

Reconstruction

866. The starting point for all discussions of reconstruction in circumstances comparable to those in Iraq between 2003 and 2009 must be that this is an area where progress will be extremely difficult.

867. Better planning and preparation for a post-Saddam Hussein Iraq would not necessarily have prevented the events that unfolded in Iraq between 2003 and 2009. It would not have been possible for the UK to prepare for every eventuality. Better plans and preparation could have mitigated some of the risks to which the UK and Iraq were exposed between 2003 and 2009 and increased the likelihood of achieving the outcomes desired by the UK and the Iraqi people.

868. From late 2003, successive reviews of the UK's approach to post-conflict reconstruction, later expanded to include the broader concept of stabilisation, resulted in a series of changes to the UK's approach to post-conflict operations. Despite those changes, many of the shortcomings that characterised the UK Government's approach to pre-conflict planning and preparation in 2002 and early 2003 persisted after the invasion.

869. The UK Government's new strategic framework for stabilisation, the new machinery for inter-departmental co-ordination and the enhanced resources now available for stabilisation operations continue to evolve. If future changes are to increase the effectiveness of UK operations, they must address the lessons for planning, preparation and implementation derived from the Iraq experience.

870. The lessons identified by the Inquiry apply to both the planning and preparation for post-conflict operations, of which reconstruction is a major but not the sole component, and to post-conflict operations themselves.

871. Analysis of the available material must draw on multiple perspectives, reflect dissenting views, identify risk – including that associated with any gaps in knowledge – and consider a range of options.

872. Information must be shared as widely across departments as is necessary to support that approach.

873. Gathering information and analysis of the nature and scale of the potential task should be systematic and as thorough as possible, and should capture the views and aspirations of local communities.

874. Plans derived from that analysis should:

- incorporate a range of options appropriate to different contingencies;
- reflect a realistic assessment of UK (and partners') resources and capabilities;
- integrate civilian and military objectives and capabilities in support of a single UK strategy;
- be exposed to scrutiny and challenge at Ministerial, senior official and expert level;
- be reviewed regularly and, if the strategic context, risk profile or projected cost changes significantly, be revised.

875. A government must prepare for a range of scenarios, not just the best case, and should not assume that it will be able to improvise.

876. Where the UK is the junior partner and is unable during planning or implementation to secure the outcome it requires, it should take stock of whether to attach conditions to continued participation and whether further involvement would be consistent with the UK's strategic interest.

877. Public statements on the extent of the UK's ambition should reflect a realistic assessment of what is achievable. To do otherwise is to risk even greater disillusionment and a loss of UK credibility.

878. Departmental priorities and interests will inevitably continue to diverge even where an inter-departmental body with a cross-government role, currently the Stabilisation Unit (SU), is in place. Therefore, co-operation between departments needs continual reinforcement at official and Ministerial levels.

879. The Head of the SU must be sufficiently senior and the SU enjoy recognition inside and outside government as a centre of excellence in its field if the Unit is to have credibility and influence in No.10, the National Security Council, the Treasury, the FCO, DFID and the MOD, and with the military.

De-Ba'athification

880. After the fall of a repressive regime, steps inevitably have to be taken to prevent those closely identified with that regime from continuing to hold positions of influence in public life. The development of plans which minimise undesired consequences, which are administered with justice and which are based on a robust understanding of the social context in which they will be implemented, should be an essential part of preparation for any post-conflict phase. This should include measures designed to address concerns within the wider population, including those of the victims of the old regime, and to promote reconciliation.

881. It is vital to define carefully the scope of such measures. Bringing too many or too few individuals within scope of measures like de-Ba'athification can have far-reaching consequences for public sector capacity and for the restoration of public trust in the institutions of government.

882. It is also important to think through the administrative implications of the measures to be applied and the process for their implementation.

883. The potential for abuse means that it is essential to have thought-through forms of oversight that are as impartial and non-partisan as possible.

Security Sector Reform

884. An SSR strategy should define the functions of different elements of the relevant security sector and the structures needed to perform those functions. Considering those questions should drive a robust debate about how security requirements might change over time.

885. An understanding of the many different models that exist internationally for internal security, policing and criminal justice is essential. But those models cannot be considered in isolation because what works in one country will not necessarily work in another which may have very different traditions. It is therefore critical for the SSR strategy to take full account of the history, culture and inherited practices of the country or region in question. The strategy also needs to be informed by the views and aspirations of the local population.

886. A strategy should set out the desired operating standard for each function and state how that differs, if at all, from what exists. In doing so, the strategy should specify where capacity needs to be developed and inform a serious assessment of how the material resources available could best be deployed.

887. It is essential that the UK has an appropriate way to measure the success of any SSR plan. If a clear strategy is in place and has taken account of the views of the local population, the indicators of that success should be obvious. It should rarely concentrate on a one-dimensional set of numbers but instead be a more qualitative and rounded assessment.

Resources

888. The direction in the Ministerial Code that the estimate of a cost of a proposal should be included in the memorandum submitted to Cabinet or a Ministerial Committee applies equally to military operations. When evaluating military options it is appropriate to consider financial risk alongside other forms of risk. While governments will rarely wish to preclude options solely on the basis of cost, they must also recognise that, over time, cost may become an issue and make it difficult to sustain a military operation over the longer term.

889. Strategies and plans must define the resources required to deliver objectives, identify the budget(s) that will provide those resources, and confirm that those resources are available.

890. In developing strategies and plans for civilian/military operations, a government should address the impact of the different mechanisms used to fund military operations and civilian activities and the extent to which those mechanisms provide perverse incentives for military action by making it easier to secure funding for agreed military operations than for civilian activities.

891. A government should also address its explicit and implicit financial policy that, while there should be no constraint on the provision of funding for military operations, it is reasonable that for the same civilian/military operation, departments should find funding for new civilian activities from within their existing budgets, which are likely to be fully allocated to existing departmental priorities.

892. A government is likely to embark on major civilian/military operations such as Iraq only rarely.

893. A government should recognise that, in such operations, the civilian components (including diplomatic activity, reconstruction and Security Sector Reform) will be critical for strategic success, may be very substantial, and must be properly resourced.

894. One arrangement would be to create a budget for the civilian components of the operation, under the direction of a senior Minister with lead responsibility and in support of a coherent UK strategy. Once allocations were made from that budget to individual departments, the allocations would be managed within departments' legal and policy constraints. Such an arrangement should:

- ensure that UK strategy was resourced;
- promote joint working;
- minimise the potential for gaming;
- be able to respond to in-year priorities; and
- reduce the amount of time that Ministers and senior officials need to spend arguing about funding individual activities.

895. The Inquiry recognises that, since 2003, significant changes have been made to the UK's strategic and operational approach to reconstruction and stabilisation, including to the arrangements for funding such operations.

Military equipment (post-conflict)

896. In deciding to undertake concurrent operations in Iraq and Afghanistan, the UK knowingly exceeded the Defence Planning Assumptions. All resources from that point onwards were going to be stretched. Any decision which commits the UK to extended operations in excess of the Defence Planning Assumptions should be based on the most rigorous analysis of its potential implications, including for the availability of relevant capabilities for UK forces.

897. At the start of Op TELIC, the MOD knew that it had capability gaps in relation to protected mobility and ISTAR and that either could have a significant impact on operations. Known gaps in such capabilities should always be clearly communicated to Ministers.

898. The MOD should be pro-active in seeking to understand and articulate new or additional equipment requirements. The MOD told the Inquiry that there was no simple

answer to the question of where the primary responsibility for identifying capability gaps lay during Op TELIC. That is unacceptable. The roles and responsibilities for identifying and articulating capability gaps in enduring operations must be clearly defined, communicated and understood by those concerned. It is possible that this has been addressed after the period covered by this Inquiry.

899. Those responsible for making decisions on the investment in military capabilities should continually evaluate whether the balance between current operational requirements and long-term defence programmes is right, particularly to meet an evolving threat on current operations.

900. During the first four years of Op TELIC, there was no clear statement of policy setting out the acceptable level of risk to UK forces and who was responsible for managing that risk. The MOD has suggested to the Inquiry that successive policies defining risk ownership and governance more clearly have addressed that absence, and that wider MOD risk management processes have also been revised. In any future operation the level of force protection required to meet the assessed threat needs to be addressed explicitly.

Civilian personnel

901. The Inquiry recognises that, since 2003, significant changes have been made to the UK's strategic and operational approach to reconstruction and stabilisation. Some of those changes, including the establishment of a deployable UK civilian stand-by capability, are the direct result of lessons learned from serious shortcomings in the deployment of civilian personnel in post-conflict Iraq.

902. The effectiveness of the UK civilian effort in post-conflict Iraq was compromised by a range of factors, including the absence of effective cross-government co-ordination on risk, duty of care and the terms and conditions applicable to personnel serving in Iraq.

903. The difficult working conditions for civilians in Iraq were reflected in short tour lengths and frequent leave breaks. Different departments adopted different arrangements throughout the Iraq campaign, leading to concerns about breaks in continuity, loss of momentum, lack of institutional memory and insufficient local knowledge.

904. Different departments will continue to deploy civilian staff in different roles. Standardisation of all aspects of those deployments may not be appropriate, but greater harmonisation of departmental policies should be considered wherever possible. The same approach should be applied to locally engaged (LE) staff.

905. At all stages, including planning, departments must give full consideration to their responsibilities and duty of care towards LE staff, who have an essential contribution to make and will face particular risks in insecure environments.

906. All civilian deployments should be assessed and reviewed against a single, rigorous, cross-government framework for risk management. The framework should provide the means for the Government as a whole to strike an effective balance between security and operational effectiveness, and to take timely decisions on the provision of appropriate security measures.

907. Standardising tour lengths for civilians deployed by different departments would have eased the overall administrative burden and, perhaps, some of the tensions between individuals from different government departments serving in Iraq. But the environment was difficult and individuals' resilience and circumstances varied. The introduction of the option to extend a tour of duty was an appropriate response.

908. Throughout any operation of this kind, departments should maintain two procedures for the systematic debriefing of staff returning to the UK: one to meet duty of care obligations, the other to learn lessons from their experience.

909. In order to identify individuals with the right skills, there must be clarity about the roles they are to perform. Wherever possible, individuals should be recruited for and deployed to clearly defined roles appropriate to their skills and seniority. They must be provided with the equipment needed to perform those roles to a high standard.

910. The Government should consider the introduction of a mechanism for responding to a surge in demand for a particular language capability.

911. The Inquiry views the inability of the FCO, the MOD and DFID to confirm how many civilian personnel were deployed to or employed in Iraq, in which locations and in what roles, as a serious failure. Data management systems must provide accurate information on the names, roles and locations of all staff for whom departments have duty of care responsibilities.

Timeline of events

Before 2001

2 August 1990	Saddam Hussein invades Kuwait
29 November 1990	Security Council adopts resolution 678
3 April 1991	Security Council adopts resolution 687
December 1998	Operation Desert Fox
2 June 1999	Ministerial Committee on Defence and Overseas Policy approves a policy of continuing containment
17 December 1999	Security Council adopts resolution 1284

2001

23 February	Mr Blair and President Bush agree on the need for a policy on Iraq which would be more widely supported in the Middle East
11 September	Al Qaida attacks the World Trade Center and the Pentagon
26 November	President Bush calls for weapons inspectors to return to Iraq

2002

29 January	President Bush makes his “axis of evil” speech
7 March	Cabinet discusses Iraq strategy
5-7 April	Mr Blair and President Bush meet in Crawford; Mr Blair makes his College Station speech
23 July	Mr Blair holds a meeting on Iraq policy
28 July	Mr Blair sends a Note to President Bush beginning “I will be with you, whatever”
6/7 September	Mr Blair and President Bush meet at Camp David
12 September	President Bush says he would put Iraqi non-compliance to the UN, paving the way for resolution 1441
24 September	Parliament recalled; dossier published
10/11 October	US Congress authorises use of force in Iraq
31 October	Decision to offer “Package 3” for planning purposes
8 November	Security Council adopts resolution 1441
13 November	Iraq announces it will comply with resolution 1441

2003

14 January	Lord Goldsmith gives his draft legal advice to Mr Blair
17 January	Decision in principle to deploy UK forces in southern Iraq
27 January	Dr Blix and Dr ElBaradei report to the Security Council
31 January	Mr Blair and President Bush meet in Washington
5 February	Secretary Powell’s presentation to the Security Council
14 February	Dr Blix and Dr ElBaradei report to the Security Council

15 February	Stop the War protests held
24 February	UK/US/Spain table draft second resolution
7 March	Lord Goldsmith's advice on the legality of military action in Iraq; Dr Blix and Dr ElBaradei report to the Security Council
12 March	Recognition that the second resolution would not secure the support of a majority of the Security Council
13 March	Lord Goldsmith reaches his "better view" that invasion is legal
16 March	Azores Summit
17 March	Last Cabinet meeting before the invasion agrees Parliament should be asked to endorse the use of military action against Iraq
18 March	Parliamentary debate and vote on Iraq

Night of 19/20 March: invasion of Iraq begins

7 April	UK troops enter Basra
16 April	General Franks issues his "Freedom Message to the Iraqi People"
1 May	President Bush declares "Mission Accomplished"
16 May	Coalition Provisional Authority Order No.1 (de-Ba'athification of Iraqi Society)
22 May	Security Council adopts resolution 1483
23 May	Coalition Provisional Authority Order No.2 dissolves some Iraqi military and security structures
13 July	Inauguration of the Governing Council
19 August	Bomb attack on UN HQ at the Canal Hotel in Baghdad
23/24 October	Madrid Donors Conference
15 November	Timetable for creation of a transitional Iraqi administration announced
13 December	Capture of Saddam Hussein by US forces

2004

1 March	Transitional Administrative Law agreed
31 March	Ambush of four US security contractors sparks unrest in Fallujah
Late April	Photos of prisoner abuse at Abu Ghraib published
8 June	Security Council adopts resolution 1546
28 June	End of Occupation: inauguration of Iraqi Interim Government (Prime Minister Allawi)
29 June	Mr Blair announces HQ ARRC will deploy to Afghanistan

2005

30 January	Elections to the Transitional National Assembly
3 May	Iraqi Transitional Government takes power (Prime Minister Ja'afari)
21 July	Decision to deploy Provincial Reconstruction Team and military support to Helmand province, Afghanistan
15 October	Referendum on the Iraqi Constitution
19 October	US announces new "Clear-Hold-Build" strategy for Iraq
15 December	Parliamentary elections in Iraq

2006

26 January	Cabinet approves deployment to Helmand province
April to June	Formation of Maliki government
1 May	UK forces become responsible for Helmand
28 September	Op SINBAD begins in Basra
End October	Majority of UK civilian staff withdrawn from the Basra Palace site

2007

10 January	President Bush announces the US "surge"
27 June	Mr Blair leaves office; Mr Brown becomes Prime Minister
13 August	Start of reduction of Jaysh al-Mahdi violence against UK forces

2/3 September	UK forces leave the Basra Palace site
16 December	Basra transitions to Provincial Iraqi Control

2008

25 March	Start of Prime Minister Maliki's Charge of the Knights
18 December	Mr Brown announces plans to withdraw the majority of UK troops

2009 onwards

30 April 2009	Completion of the main UK military mission in Iraq
15 October 2009	UK/Iraq Training and Maritime Support Agreement ratified
22 May 2011	Departure of the last UK naval training team from Iraq


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EXHIBIT 1B

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SECTION 5

ADVICE ON THE LEGAL BASIS FOR MILITARY ACTION, NOVEMBER 2002 TO MARCH 2003

Contents

Introduction and key findings

1. This section describes:

- how advice was sought from Lord Goldsmith, the Attorney General, regarding the interpretation of UN Security Council resolution 1441 (2002) and the manner in which that advice was provided;
- the events and other influences that affected the timing of the advice;
- the written advice provided by Lord Goldsmith in January 2003;
- Lord Goldsmith's discussions with Sir Jeremy Greenstock, UK Permanent Representative to the UN in New York, in January 2003, his exchanges with Mr Jack Straw, the Foreign Secretary, in early February, and his meeting with US lawyers in February 2003;
- Lord Goldsmith's written advice of 7 March 2003;
- the legal basis on which the UK ultimately decided to participate in military action against Iraq; and
- the presentation of the Government's legal position to Cabinet and to Parliament on 17 March 2003.

2. Finally, this section sets out the Inquiry's conclusions regarding these events and the legal basis on which the UK decided to participate in military action against Iraq.

Key findings

- On 9 December, formal "instructions" to provide advice were sent to Lord Goldsmith. They were sent by the FCO on behalf of the FCO and the MOD as well as No.10. The instructions made clear that Lord Goldsmith should not provide an immediate response.
- Until 27 February, No.10 could not have been sure that Lord Goldsmith would advise that there was a basis on which military action against Iraq could be taken in the absence of a further decision of the Security Council.
- Lord Goldsmith's formal advice of 7 March set out alternative interpretations of the legal effect of resolution 1441. While Lord Goldsmith remained "of the opinion that the safest legal course would be to secure a second resolution", he concluded (paragraph 28) that "a reasonable case can be made that resolution 1441 was capable of reviving the authorisation in resolution 678 without a further resolution".
- Lord Goldsmith wrote that a reasonable case did not mean that if the matter ever came to court, he would be confident that the court would agree with this view. He judged a court might well conclude that OPs 4 and 12 required a further Security Council decision in order to revive the authorisation in resolution 678.
- At a meeting on 11 March, there was concern that the advice did not offer a clear indication that military action would be lawful. Lord Goldsmith was asked, after the meeting, by Admiral Boyce on behalf of the Armed Forces, and by the Treasury Solicitor, Ms Juliet Wheldon, in respect of the Civil Service, to give a clear-cut answer on whether military action would be lawful rather than unlawful.

- Lord Goldsmith concluded on 13 March that, on balance, the "better view" was that the conditions for the operation of the revival argument were met in this case, meaning that there was a lawful basis for the use of force without a further resolution beyond resolution 1441.
- Mr Brummell wrote to Mr Rycroft on 14 March:

  "It is an essential part of the legal basis for military action without a further resolution of the Security Council that there is strong evidence that Iraq has failed to comply with and co-operate fully in the implementation of resolution 1441 and has thus failed to take the final opportunity offered by the Security Council in that resolution. The Attorney General understands that it is unequivocally the Prime Minister's view that Iraq has committed further material breaches as specified in [operative] paragraph 4 of resolution 1441, but as this is a judgment for the Prime Minister, the Attorney would be grateful for confirmation that this is the case."

- Mr Rycroft replied to Mr Brummell on 15 March:

  "This is to confirm that it is indeed the Prime Minister's unequivocal view that Iraq is in further material breach of its obligations, as in OP4 [operative paragraph 4] of UNSCR 1441, because of 'false statements or omissions in the declarations submitted by Iraq pursuant to this resolution and failure to comply with, and co-operate fully in the interpretation of, this resolution'."

- Senior Ministers should have considered the question posed in Mr Brummell's letter of 14 March, either in the Defence and Overseas Policy Committee or a "War Cabinet", on the basis of formal advice. Such a Committee should then have reported its conclusions to Cabinet before its Members were asked to endorse the Government's policy.
- Cabinet was provided with the text of Lord Goldsmith's Written Answer to Baroness Ramsey setting out the legal basis for military action.
- That document represented a statement of the Government's legal position – it did not explain the legal basis of the conclusion that Iraq had failed to take "the final opportunity" to comply with its disarmament obligations offered by resolution 1441.
- Cabinet was not provided with written advice which set out, as the advice of 7 March had done, the conflicting arguments regarding the legal effect of resolution 1441 and whether, in particular, it authorised military action without a further resolution of the Security Council.
- The advice should have been provided to Ministers and senior officials whose responsibilities were directly engaged and should have been made available to Cabinet.

UNSCR 1441

3. On 8 November the United Nations Security Council unanimously adopted resolution 1441 (2002).

4. Section 3.5 includes:

- a description of the negotiation of the resolution;

- details of the legal advice offered by FCO Legal Advisers and by Lord Goldsmith during the course of those negotiations; and
- the provisions of the resolution and the statements made by Members of the Security Council on adoption.

Discussion, debate and advice, November to December 2002

Lord Goldsmith's conversations with Mr Powell and Mr Straw, November 2002

5. After resolution 1441 was adopted, Lord Goldsmith warned both No.10 and Mr Straw that he was "not optimistic" about the legal position for military action in response to an Iraqi breach without a second Security Council resolution. He offered to provide immediate advice.

6. Mr Jonathan Powell, Mr Blair's Chief of Staff, assured Lord Goldsmith that his views were known in No.10. The issue would be for consideration in the longer term in the event of a report to the Security Council of a serious breach. He suggested a meeting "some time before Christmas".

7. Lord Goldsmith telephoned Mr Powell on Monday, 11 November and conveyed his congratulations to No.10 for having secured such a tough resolution.[1] Lord Goldsmith "mentioned the possibility of Iraq finding itself in breach of resolution 1441 at some future stage but with no second Security Council resolution"; a "matter to which he had said he would give further consideration" following his meeting with Mr Blair on 22 October.

8. Lord Goldsmith also mentioned the "Chinese whispers" that had "come to his attention … which suggested that he took an optimistic view of the legal position that would obtain if such a situation arose". The "true position was that he was not at all optimistic".

9. Lord Goldsmith suggested that "against this background, it was desirable for him to provide advice on this issue now".

10. Mr Powell noted what Lord Goldsmith said, "but was at pains" to assure him that "No.10 were under no illusion as to the Attorney's views" on that point. Mr Powell thought that as "it was most unlikely that Iraq would not in the first instance accept resolution 1441, this was an issue for consideration in the longer term, in the event that at some stage in the future we are faced with a breach by Iraq of resolution 1441 and the matter is referred to the Security Council at that time".

11. Mr Powell proposed a meeting some time before Christmas to discuss the issue.

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[1] Minute Brummell, 11 November 2002, 'Iraq: Note of telephone conversation between the Attorney General and Jonathan Powell – Monday, 11 November 2002'.

12. Lord Goldsmith told Mr Powell that, in the meantime, he would obtain and consider the statements made by members of the Security Council when resolution 1441 was adopted.

13. Asked whether he recollected Lord Goldsmith wishing to provide written advice and being discouraged from doing so, Mr Powell told the Inquiry:

> "No, he gave written advice – I don't know if you would call it written advice, he expressed his opinions …"
>
> …
>
> "On a number of occasions before 1441 and after 1441, he set out his views in writing on it, yes."[2]

14. Lord Goldsmith told Mr Straw that the key question would be whether Iraq's non-compliance amounted to a material breach and who was to make that determination.

15. Lord Goldsmith's initial view was that, notwithstanding the deliberate ambiguity in the language of resolution 1441, the question of whether or not there was a serious breach was for the Security Council alone to answer.

16. Lord Goldsmith suggested that it would be desirable for him to provide advice on the position if, at some point in the future, Iraq "found itself" in material breach of resolution 1441 but the Security Council had not adopted a further resolution.

17. Mr Straw agreed that formal "instructions" should be prepared asking for Lord Goldsmith's advice.

18. Mr Straw telephoned Lord Goldsmith on 12 November, suggesting that resolution 1441 "made life easier" for the Government.[3]

19. Lord Goldsmith agreed that it was an excellent achievement but added that he would "need to study the resolution, together with the report of the debate and the statements made".

20. In relation to "the possibility of Iraq finding itself in breach of resolution 1441 at some future stage" but without a second resolution, Lord Goldsmith reported that he had told Mr Powell that he was "pessimistic as to whether there would be a sound legal basis … for the use of force". Mr Powell had suggested a meeting before Christmas to discuss the issues. Lord Goldsmith "indicated" to Mr Straw that "he would propose to give a more definitive view … at that stage".

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[2] Public hearing, 18 January 2010, pages 103-104.
[3] Minute Brummell, 12 November 2002, 'Iraq: Note of telephone conversation between the Foreign Secretary and the Attorney General'.

21. Mr Straw shared Mr Powell's view that it was unlikely that Iraq would refuse to accept resolution 1441. He suggested two particular issues warranted further consideration:

- First, both France and Russia had insisted that, in the event of an Iraqi breach, the matter should be referred back to the Security Council for further consideration before a decision on military action. The "UK's current understanding was that it was unlikely that, if it came to a vote, there would be any veto by France … If there were to be any veto … this was likely to be only by Russia."
- Secondly, Mr Straw would be "interested" in Lord Goldsmith's views on "the effect of a resolution being adopted by the House of Commons … following the contemplated debate on Iraq". Mr Straw identified two options: a resolution endorsing 1441 and one including "an acknowledgement that there would inevitably be military action if peaceful resolution of the issue were not possible". His preference was for the former.

22. Lord Goldsmith's initial view was that, leaving aside the political advantages, a resolution of the House of Commons:

> "… 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 … countries who are members of the Security Council were also to adopt such a resolution. But he thought that … would be a rather subtle and speculative argument."

23. Mr Straw thought that military action was some way further down the track but, "if Iraq were to be found in breach" of resolution 1441, it would be "essential … we act pretty swiftly to take military action". One of the reasons "was that there might well be a need for less military force if action was swift".

24. Lord Goldsmith "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".

25. Mr Straw "pointed out that it was clear to him that the US – despite its bellicose rhetoric – would not wish to go to war for nothing".

26. Mr Straw "mentioned that, reading resolution 1441 again as a layman, it was pretty clear that the Security Council were basically telling Iraq – *'Comply or else'*." In response to Lord Goldsmith's observation that "the question was who was to decide the 'or else'", Mr Straw pointed out that resolution 1441 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 … [it] did not … 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."

27. Lord Goldsmith told Mr Straw it "seemed implicit" in resolution 1441 that, in the event of non-compliance, "it would be for the Security Council to decide whether Iraq" was in "material breach".

28. Mr Straw suggested that "the reality was that members of the Security Council had had to agree and 'coalesce' around a particular form of words … 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". That "allowed for 'a range of possibilities', including:

- "the possibility that there would have to be a second resolution; and
- "the possibility that there might be a general consensus or desire [amongst the five Permanent Members of the Security Council] for military action, but a preference (in particular by Russia) that there should be no second resolution …"

29. Mr Straw again suggested that:

"… it was necessary to look at the negotiating background. For example … [President] Jaques 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 … did not appear in the resolution … [W]hat France and Russia were virtually saying was that they understood that there might well be a breach, but 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."

30. Lord Goldsmith responded 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 …"

31. Mr Straw "said that there would be a danger in going for a second resolution" because, "if it were not obtained, then we would be in a worse position". He "wondered if there was any alternative option" between a general discussion in the Security Council and the adoption of a resolution determining a material breach.

32. Lord Goldsmith said that it "could be possible for a valid determination to be made by means of a Presidential Statement".

33. Mr Straw and Lord Goldsmith agreed that the "different options should be explored":

> "Mr Straw … would arrange for all the details of the negotiating history … 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."

34. On timing, Mr Straw "thought the crunch point" would come soon after 8 December, the deadline for Iraq to make its declaration on its weapons of mass destruction (WMD) programmes. There was a "high likelihood/probability that Iraq would produce only a 'partial declaration', with the likelihood that soon after … a report of Iraq's inadequate/incomplete/inaccurate declaration would be made to the Security Council (pursuant to OP [operative paragraph] 4)".

35. Asked about the conversations with Mr Powell and Mr Straw on 11 and 12 November 2002, Lord Goldsmith told the Inquiry:

> "There is … I see this quite a lot in government … also the problem that sometimes the qualifications to what you have said don't seem to be heard as clearly as you intended them to be. I have heard the expression about the 'yes, but' and the 'but' is forgotten, in another context … [S]ometimes, therefore, you have to shout the 'but' rather harder than you would normally, to make sure it is not forgotten."[4]

36. Asked whether the Chinese whispers came from No.10, Lord Goldsmith replied:

> "Wherever the 'Chinese whispers' had been coming from, what mattered was their view, and each time I did say, 'I want this to be understood', the response I always got was, 'Yes, that is understood', and sometimes afterwards you wondered if that's the way everyone was acting."[5]

37. Lord Goldsmith told the Inquiry that the conversation with Mr Straw on 12 November was the point when it was agreed that he would receive a formal request for advice:

> "I think there was an important moment after [resolution] 1441 when I had a conversation with Mr Straw and I hadn't at that stage received what I would call instructions."[6]

38. Lord Goldsmith told the Inquiry that barristers work by receiving "instructions"; that is, a request to advise, including the detail of the question and the supporting materials, often with the instructing solicitor's views expressed. He said:

> "… until I had had that, particularly the Foreign Office Legal Adviser's point of view, and been able to analyse that, I wasn't really in a position to give a definitive point of view … So I think there then came this moment when it was agreed that I would

[4] Public hearing, 27 January 2010, pages 54-55.
[5] Public hearing, 27 January 2010, page 55.
[6] Public hearing, 27 January 2010, page 56.

receive this request for advice and that finally came at some stage in December. Until that had arrived, I couldn't actually start to form a definitive view anyway."[7]

39. The letter of instructions for Lord Goldsmith was not sent until 9 December and did not include the point of view of Mr Michael Wood, the Foreign and Commonwealth Office (FCO) Legal Adviser.

Cabinet, 14 November 2002

40. Mr Straw told Cabinet on 14 November that, while the Security Council would need to be reconvened to discuss any breach in the event of Iraqi non-compliance, the key aspect of resolution 1441 was that military action could be taken without a further resolution.

41. That statement reflected the position Mr Straw had taken in his discussion with Lord Goldsmith on 12 November, but it did not fully reflect the advice Mr Straw had been given by the Mr Wood on 6 November or the concerns Lord Goldsmith had expressed on 12 November.

42. The advice given by Mr Wood is described in Section 3.5.

43. In the discussion of Iraq and the adoption of resolution 1441 in Cabinet on 14 November, Mr Straw stated that a "key aspect of the resolution was that there was no requirement for a second resolution before action was taken against Iraq in the event of its non-compliance, although reconvening the Security Council to discuss any breach was clearly stated".[8]

44. Lord Goldsmith was not present at that Cabinet meeting.

"Material breach" and the need for advice

45. Concerns about the differences between the UK and the US on what would constitute a material breach, the US stance of "zero tolerance" and the debate in the US on "triggers" for military action were already emerging.

46. Mr Blair and Mr Straw, and their most senior officials, were clearly aware that difficult and controversial questions had yet to be resolved in relation to:

- **what would constitute a further material breach and how and by whom that would be determined;**
- **the issue of whether a further resolution would be needed to authorise force; and**
- **the implications of a veto.**

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[7] Public hearing, 27 January 2010, pages 55-56.
[8] Cabinet Conclusions, 14 November 2002.

47. Mr Geoff Hoon, the Defence Secretary, did not regard the position that "we would know a material breach when we see it" as a suitable basis for planning. Mr Hoon's view was that agreement with the US on what constituted a trigger for military action was needed quickly.

48. The papers produced before Mr Straw's meeting held in his Private Office on 20 November recognised that Lord Goldsmith's advice would be needed to clarify those issues; and that it would be useful to seek Lord Goldsmith's advice sooner rather than later.

49. There is, however, no evidence of a discussion about the right timing for seeking Lord Goldsmith's views.

50. A debate on what might constitute a material breach and what actions by Iraq might trigger a military response had begun in the US before the adoption of resolution 1441.

The concept of "material breach"

The concept of "material breach" is central to the revival argument.

Material breach is a term derived from Article 60 of the Vienna Convention on the Law of Treaties, 1969. In that context a material breach is said to consist in a repudiation of the treaty or a violation of a provision essential to the accomplishment of the object or purpose of the treaty.

A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

A material breach of a multilateral treaty by one of the parties entitles the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part, or to terminate it either in relations between themselves and the defaulting State or entirely.

Resolution 707 (1991) was the first resolution in relation to Iraq to use the formulation, condemning:

> "Iraq's serious violation of a number of its obligations under section C of resolution 687 (1991) and of its undertakings to cooperate with the Special Commission and the International Atomic Energy Agency, which constitutes a material breach of the relevant provisions of that resolution 687 which established a cease-fire and provided the conditions essential to the restoration of peace and security in the region."

51. On 7 November, reporting conversations with senior officials in the US Administration, Mr Tony Brenton, Deputy Head of Mission at the British Embassy Washington, said that the hawks in Washington saw the resolution as a defeat and warned that they would be "looking for the least breach of its terms as a justification for resuming the countdown to war".[9]

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[9] Minute Brenton to Gooderham, 7 November 2002, 'Iraq'.

52. Sir David Manning, Mr Blair's Foreign Policy Adviser and Head of the Cabinet Office Overseas and Defence Secretariat (OD Sec), subsequently spoke to Dr Condoleezza Rice, President Bush's National Security Advisor, on 15 November.[10] Sir David stated that the UK and the US should not be drawn on "hypothetical scenarios" about what would constitute a material breach. Reflecting Mr Blair's words to President Bush at Camp David on 7 September that, "If Saddam Hussein was obviously in breach we would know", Sir David added that "the Security Council would know a material breach when it saw it". He reported that the US Administration would continue to insist on "zero tolerance" to keep up the pressure on Saddam Hussein.

53. A paper on what might constitute a material breach, which highlighted "a number of difficult questions … on which we will need to consult the Attorney General", was prepared by the FCO and sent to Sir David Manning (and to Sir Jeremy Greenstock on 15 November.[11]

54. The paper stated that "Most, if not all members of the Council will be inclined" to take the view that a "material breach" should be interpreted in the light of the Vienna Convention. Dr Hans Blix, the Executive Chairman of the UN Monitoring, Verification and Inspection Commission (UNMOVIC), had "made it clear" that he would "be using a similar definition for the purposes of reporting under OP11". The paper stated that it was not for Dr Blix to determine what constituted a material breach, "but his decision (or not) to report to the Council and the terms in which he reports" would "be influential".

55. The FCO paper stated that the US was "becoming more and more inclined to interpret the 1441 definition downwards" and that: "Although, some weeks ago, NSC [National Security Council] indicated that they would not regard trivial omissions in Iraq's declaration (or minor problems encountered by the UNMOVIC) as triggers for the use of force, more recently DoD [Department of Defense] have indicated that they want to test Saddam early." It also drew attention to President Bush's remarks on 8 November, which it described as "zero tolerance" and his warning against "unproductive debates" about what would constitute an Iraqi violation.

56. An examination of past practice on seven separate occasions since 1991 showed that the Council had determined Iraq to be in material breach of its obligations where there seemed "to have been a conviction that an Iraqi act would seriously impede inspectors in the fulfilment of their mandate and therefore undermine an essential condition of the cease-fire".

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[10] Letter Manning to McDonald, 15 November 2002, 'Iraq: Conversation with Condi Rice'.
[11] Letter Sinclair to Manning, 15 November 2002, 'Iraq: Material Breach' attaching Paper, 'Iraq: A Material Breach'.

57. Against that background, the FCO listed the following incidents as ones which the UK would consider to be material breaches:

- "Any incident sufficiently serious to demonstrate that Iraq had no real intention of complying", such as "an Iraqi decision to expel UNMOVIC, or to refuse access to a particular site, parts of a site or important information", "discovery by UNMOVIC/IAEA [International Atomic Energy Agency] of a concealed weapons programme, or of a cache of WMD material not declared …"
- "Efforts to constrain UNMOVIC/IAEA's operations in significant ways contrary to the provisions of SCR 1441 (2002) … and other relevant resolutions. Systematic efforts to deter, obstruct or intimidate the interview process would need to be particularly carefully watched."
- "Systematic Iraqi harassment of inspectors … which jeopardised their ability to fulfil their duties …"
- Failure to accept resolution 1441.
- "A pattern of relatively minor Iraqi obstructions of UNMOVIC/IAEA."

58. On the last point, the FCO paper added:

> "We would not take the view that a short (hours) delay in giving UNMOVIC access to a site would constitute a material breach unless there was clear evidence that the Iraqis used such a delay to smuggle information out of a site or to coach potential witnesses. But repeated incidents of such obstruction, even without evidence of accompanying Iraqi deception, would cumulatively indicate that the Iraqis were not fully co-operating, and thus cast doubt upon whether UNMOVIC would ever be able to implement its mandate properly."

59. The FCO stated that a similar US list would "probably … be even tougher". "Given the opportunity" in the resolution for the US to make its own report to the Council, the UK needed "to be clear in our own minds where the dividing lines" were. The paper recommended that the UK would need to work out "where to draw our red lines" with the US; and that "in the interests of maintaining maximum Council support for use of force, we should try to persuade the Americans to focus on the more serious possible violations, or to establish a pattern of minor obstruction".

60. The FCO did not address the issue of whether a Council decision would be needed "to determine that Iraq's actions justify the serious consequences referred to in OP13 of 1441". That would be "a matter on which we will need the Attorney's views".

61. An undated, unsigned document, headed 'Background on material breach' and received in No.10 around 20 November 2002, raised the need to address three, primarily legal, issues:

- the need to clarify whether OP4 "must be construed" in the light of the Vienna Convention and past practice as that suggested "a much higher bar than the US";
- the need to seek Lord Goldsmith's advice "on how OPs 1 and 2 (and 13) and the declaration of material breach they contain – affect the legal situation of Iraq and our authority to use force"; and specifically whether it could be argued that "1441 itself (especially OPs 1, 2 and 13 taken together) contains a conditional authority to use force … which will be fully uncovered once that Council discussion has taken place"; and
- "What happens if a second resolution is vetoed?"[12]

62. The document appears to have drawn on the analysis in the FCO paper of 15 November.

63. On the second issue, the author wrote:

> "If this [the argument that 1441 contains a conditional authority to use force] has merit (and the most we can hope for in the absence of an express Chapter VII authorisation is a reasonable argument) it would be helpful to know that now. We would not have to impale ourselves and Ministers on the difficult point of what happens if the US/UK try and fail to get an express authorisation.
>
> "… we think London seriously needs to consider revising its thinking on 1441.
>
> "… from the point of view of OP4 the question is 'What does Iraq have to do to put itself beyond the protection of the law? At what point does its conduct amount to material breach?' Innocent until proved guilty.
>
> "But if you come at it through OPs 1 and 2 the question is 'When has Iraq blown its last chance? (regardless of whether OP4 is ever breached)'. Compliance with OP4 is strictly irrelevant: Iraq is guilty but released on a suspended sentence/parole. This seems to us to have huge presentational angles – as well as whatever legal deductions can be made. **If we are not careful, we are in danger of losing the key advantage of the resolution and turning a provision which we thought of deleting as unnecessary into the main operational paragraph of the text …**"

64. Someone in No.10 wrote: "Is this, tho' a hidden trigger? (We and the US denied that there was one in 1441.)"[13]

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[12] Paper [unattributed and undated], 'Background on material breach'.
[13] Manuscript comment on Paper [unattributed and undated], 'Background on material breach'.

65. On what would happen in the event of a veto, the author of the document wrote that it was:

> "… probably too difficult [to say] at this stage – everything depends on the circs … But knowing the answer to the legal implications of 1441 … would either (i) leave us no worse off than we are – if the AG [Attorney General] thinks the argument doesn't run or (ii) radically improve the situation if the AG thinks we have a case."

66. Mr Matthew Rycroft, Mr Blair's Private Secretary for Foreign Affairs, commented to Sir David Manning that the document was:

> "… helpful. Of course a S[ecurity] C[ouncil] discussion is needed if there is a material breach. But as the PM has said all along that discussion must be in the context of an understanding that action must follow."[14]

67. On 15 November, Mr Peter Watkins, Mr Hoon's Principal Private Secretary, sent Sir David Manning an update on military discussions with the US setting out the themes which had emerged.[15] Mr Watkins registered a number of concerns including:

> "Lack of clarity in US thinking about possible triggers for military action needs to be resolved quickly …"

68. Mr Watkins added:

> "To some extent, triggers are now under Saddam's control and so cannot be slotted into any firm timetable. Moreover, what constitutes a 'violation' and/or 'material breach' remains undefined: many in the US are reduced to saying 'we'll know when we see it', which is not a suitable base for planning."

69. Mr Hoon believed that the UK response should include working "quickly to reach an agreed US/UK view on triggers … well before we are confronted with it in practice".

70. A copy of the letter was sent to Mr Straw's Private Office.

71. Mr Straw held a Private Office meeting on 20 November to discuss Iraq policy with Sir Michael Jay, the FCO Permanent Under Secretary (PUS), Sir Jeremy Greenstock, Sir David Manning and Mr Peter Ricketts, FCO Political Director.[16]

72. Sir Jeremy told Mr Straw that he "believed we could get a second resolution provided the Americans did not go for material breach too early". The "facts to convince nine members of the Security Council" would be needed. He thought that the Council "would not … need much persuading".

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[14] Manuscript comment Rycroft to Manning, 20 November 2002, on Paper [unattributed and undated], 'Background on Material Breach'.
[15] Letter Watkins to Manning, 19 November 2002, 'Iraq: Military Planning after UNSCR 1441'.
[16] Minute McDonald to Gray, 20 November 2002, 'Iraq: Follow-up to SCR 1441'.

73. Sir Jeremy proposed that "When the time came", the UK should put down a draft resolution and, "if we could show that we had done everything possible, then we would be in the best possible position if – in the end – there were no resolution".

74. Sir David suggested that France should be invited to co-sponsor the resolution. Mr Straw agreed.

75. Sir Jeremy advised that "the real strength" of resolution 1441 lay in its first two operative paragraphs: OP1 reaffirming Iraq's material breach up to the adoption of 1441, and OP2 suspending that material breach to give Iraq a final opportunity. Sir Jeremy stated that OP4 (and 11 and 12) were, therefore, not needed to reach the "serious consequences" in OP13. He was already using that argument in the Security Council and cautioned Mr Straw that focusing too much on OP4 brought a danger of weakening OPs 1 and 2.

76. Sir Michael Jay took a different view, advising that the UK could use all the OPs in resolution 1441. Mr Straw agreed that it would be a mistake to focus exclusively on OPs 1 and 2.

77. Given the reference to "London" and the content of Sir Jeremy's advice to Mr Straw in the Private office meeting on 20 November, the unsigned and undated document 'Background on material breach' was most probably produced in the UK Mission in New York.

House of Commons debate on Iraq, 25 November 2002

78. When the House of Commons debated Iraq on 25 November, it voted to "support" resolution 1441 and agreed that if the Government of Iraq failed "to comply fully" with its provisions, "the Security Council should meet in order to consider the situation and the need for full compliance".

79. Mr Straw assured Parliament that a material breach would need to be serious.

80. Mr Straw's interpretation was consistent with the advice given to him by FCO Legal Advisers, and properly recognised the need for a material breach to be sufficiently serious to undermine the basis for the cease-fire in resolution 687 (1991).

81. But Mr Straw explicitly did not address the role of the Security Council in assessing whether any report of non-compliance or obstruction would amount to a material breach.

82. Mr Straw's reference to a judgement having "to be made against the real circumstances that arise" highlighted the problem created by the drafting of that clause in OP4 of resolution 1441.

83. As Lord Goldsmith's subsequent advice confirmed, whether a specific failure to comply with the requirements placed upon Iraq by the resolution would amount to a material breach would have to be judged in the particular circumstances of Iraq's response.

84. On 25 November, the House of Commons debated resolution 1441 (2002) and the Government motion:

> "That this House supports UNSCR 1441 as unanimously adopted by the UN Security Council; agrees that the Government of Iraq must comply fully with all provisions of the resolution; and agrees that, if it fails to do so, the Security Council should meet in order to consider the situation and the need for full compliance."[17]

85. Mr Straw's draft opening statement was sent to No.10 for comment. Mr Powell questioned two points in the text:

- a statement that the UK would prefer a second resolution, which Mr Powell described as "not our position up to now"; and
- that we didn't "absolutely need one [a second resolution]", which Mr Powell commented would "force the Attorney General to break cover".[18]

86. Mr Blair commented that he did not "see this as such a problem".[19]

87. In his opening speech, Mr Straw set out the inspection process and the answers to four "key questions" which arose from the resolution:

- What constituted a material breach? Mr Straw referred to operative paragraph 4 of the resolution, but went on to say: "As with any definition of that type, it is never possible to give an exhaustive list of all the conceivable behaviours that it covers. That judgement has to be made against the real circumstances that arise, but I reassure the House that material breach means something significant: some behaviour or pattern of behaviour that is serious. Among such breaches could be action by the Government of Iraq seriously to obstruct or impede the inspectors, to intimidate witnesses, or a pattern of behaviour where any single action appears relatively minor but the actions as a whole add up to something deliberate and more significant: something that shows Iraq's intention not to comply."[20]
- Who would decide what happened if there was a material breach? Mr Straw argued that if a "material breach" was reported to the Security Council, "the decision on whether there had been a material breach will effectively have been

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[17] House of Commons, *Official Report*, 25 November 2002, column 47.
[18] Email Powell to Manning, 23 November 2002, 'Jack's Iraq Statement'.
[19] Manuscript comment Blair on Email Powell to Manning, 23 November 2002, 'Jack's Iraq Statement'.
[20] House of Commons, *Official Report*, 25 November 2002, column 51.

made by the Iraqis … there will be no decision to be made. The Security Council will undoubtedly then act."

- Would there be a second Security Council resolution if military action proved necessary? Mr Straw stated: "the moment there is any evidence of a material breach … there will be a meeting of the Security Council at which it is … open for any member to move any resolution … Our preference is for a Security Council resolution, and I hope we would move it."
- If military action was necessary, would the House of Commons be able to vote on it and, if so, when? Mr Straw stated: "No decision on military action has yet been taken … and I fervently hope that none will be necessary … Any decision … to take military action will be put to the House as soon as possible after it has been taken … the Government have no difficulty about the idea of a substantive motion on military action … at the appropriate time … [I]f we can and if it is safe to do so, we will propose a resolution seeking the House's approval of decisions … before military action takes place."[21]

FCO advice, 6 December 2002

88. The FCO advised on 6 December that there was no agreement in the Security Council on precise criteria for what would constitute a material breach. Each case would need to be considered in the light of the circumstances.

89. The UK position remained that deficiencies in Iraq's declaration on its WMD programmes could not constitute a casus belli but if an "audit" by the inspectors subsequently discovered significant discrepancies in the declaration, that could constitute a material breach.

90. The FCO position was, increasingly, shifting from a single specific incident demonstrating a material breach, to the need to establish a pattern of non-co-operation over time demonstrating that Iraq had no intention of complying with its obligations.

91. In response to a request from Sir David Manning on 29 November, Mr Straw's office provided advice on handling the Iraqi declaration.[22] The FCO also provided a refined version of the advice in its letter to Sir David of 15 November about what might comprise a material breach.

92. That was further refined in a letter from Mr Straw's office on 6 December responding to Sir David's request for further advice on what would constitute a "trigger" for action.[23]

93. The FCO stated that a material breach could not "be a minor violation but must be a violation of a provision essential to achieving the object or purpose of the original

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[21] House of Commons, *Official Report*, 25 November 2002, column 49.
[22] Letter Sinclair to Manning, 29 November 2002, 'Iraq: 8 December Declaration'.
[23] Letter McDonald to Manning, 6 December 2002, 'Iraq: Material Breach'.

Gulf War [1991] cease-fire". That position had been reflected in Mr Straw's remarks in the House of Commons on 25 November. The FCO expected most members of the Security Council to take a similar view.

94. Consistent with the advice sent to Sir David on 15 and 29 November, the FCO wrote that there were two broad areas where Iraqi behaviour could amount to a material breach:

- **Non-compliance with its disarmament obligations** – if Iraq concealed WMD. Evidence might take the form of discovery of WMD material not included in the declaration or evidence which Iraq could not satisfactorily explain which clearly pointed to a concealed WMD programme (e.g. a yellowcake receipt).
- **Non-co-operation with UNMOVIC/IAEA** – if Iraq's behaviour demonstrated that it had no intention of co-operating fully with UNMOVIC in fulfilling its mandate under resolution 1441 (2002) or other relevant resolutions. Evidence might comprise a single incident such as denying access to a particular site, information or personnel. Evidence of coaching witnesses or smuggling information out of potential sites would be "pretty damming". Attempts to impede the removal and destruction of WMD or related material would potentially be a material breach.

95. The FCO view was that there would be no need for "a single specific instance". A "pattern of lower level incidents" could amount to a demonstration of non-co-operation sufficiently serious to constitute a material breach. Indications of concealment could include "a series of unanswered questions identified by UNMOVIC/IAEA which suggested a concealed WMD programme" or "failure … to demonstrate convincingly that the WMD material identified by UNSCOM [United Nations Special Commission] in 1998 had been destroyed and properly accounted for"; "Much would depend on the circumstances and whether the incidents demonstrated deliberate non-co-operation rather than inefficiency or confusion."

96. The FCO concluded that there were:

> "… bound to be grey areas over whether Iraqi failures are sufficiently serious to constitute a material breach. There is no agreement in the Council on the precise criteria. We would need in each case to look at the particular circumstances. Moreover, some incidents of non-compliance may be susceptible to remedial action by UNMOVIC/IAEA (e.g. by destroying weapons etc). In such cases, those seeking to trigger enforcement action would need to explain how such action would be necessary to enforce Iraqi compliance."

Obtaining Lord Goldsmith's opinion

Instructions for Lord Goldsmith to advise

97. On 9 December, after receipt of the Iraqi declaration, the FCO issued a formal request seeking Lord Goldsmith's advice on whether a further decision by the Security Council would be required before force could be used to secure Iraq's compliance with its disarmament obligations.

98. Mr Wood set out the "two broad views" on the interpretation of resolution 1441 and whether a further decision was required by the Security Council to authorise the use of force.

99. Mr Straw asked Mr Wood to make clear to Lord Goldsmith that his advice was not needed "now".

100. Several drafts of the instructions for Lord Goldsmith were prepared and circulated within the FCO.

101. Mr Wood sought the views of senior FCO officials on 21 November, including Sir Michael Jay and Mr Iain Macleod, the Legal Counsellor in the UK Permanent Mission to the UN in New York (UKMIS New York). He also wrote that he planned to give Mr Straw the opportunity to comment on the draft the following week.[24]

102. Ms Cathy Adams, Legal Counsellor to Lord Goldsmith between 2002 and 2005, informed Lord Goldsmith on 29 November that the letter from Mr Wood had "been in gestation for a couple of weeks now and I understand the original draft has been subject to extensive comments from UKMIS New York".[25]

103. Mr Stephen Pattison, Head of FCO UN Department, told the Inquiry that all those people involved in Mr Ricketts' core group saw the draft instructions, but very few officials commented from a sense that it was for the lawyers to sort out, and that officials should not give the impression of interfering.[26]

104. Sir Michael Wood told the Inquiry:

> "… I received extensive comments from UKMIS New York, conveyed to me by Iain Macleod and as I understood it, reflecting Sir Jeremy Greenstock's views. These essentially concerned the alternative arguments to which they attached importance, based in part on the negotiating history of the resolution. As I recall, I incorporated all or virtually all of UKMIS's suggestions into my letter …
>
> "I do not recall receiving comments on the draft from other quarters."[27]

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[24] Minute Wood to Ricketts, 21 November 2002, 'Iraq: SCR 1441: Letter to LSLO'.
[25] Minute Adams to Attorney General, 29 November 2002, 'Iraq'.
[26] Public hearing, 31 January 2011, pages 48-49.
[27] Statement, 15 March 2011, page 19.

105. Mr Wood's letter incorporating instructions for Lord Goldsmith was sent to Ms Adams on 9 December 2002, with a copy to Mr Martin Hemming, the MOD Legal Adviser.[28] It briefly described the provisions of resolution 1441, the history of the negotiation and adoption of resolution 1441 and subsequent developments, and the legal background.

106. Mr Wood wrote:

> "The main legal issue raised by the resolution … is whether a further decision by the Security Council would be required before force could lawfully be used to ensure Iraqi compliance with its disarmament obligations. (This question is often put in the form 'Is a second resolution required?', but a further decision by the Council could take other forms, in particular it could be a statement made on behalf of the Council or its members.)"

107. Describing resolution 1441 as a "consensus text" and stating that, "as is often the case, the drafting leaves something to be desired", Mr Wood wrote (paragraph 5 of his letter) that there were two broad views of the interpretation of resolution 1441:

- the first was that resolution 1441 "does not authorise the use of force or revive the Council's earlier authorisation; a further Council decision is needed for that"; and
- the second was that "taking account of previous Council practice, the negotiating history and the statements made on adoption", resolution 1441 "can be read as meaning that the Council has already conditionally authorised the use of force against Iraq; the conditions being (a) that Iraq fails to take the final opportunity if it has been offered and (b) that there is Council discussion (not necessarily a decision) under paragraph 12 of the resolution. If these conditions are met, the material breach is uncovered and (on the 'revival of authorisation' argument based on Security Council resolutions 678 (1990) and 687 (1991)) force can be taken to be authorised under SCR 1441."

The revival argument

The UK justification for the use of military force against Iraq in 1993 and in December 1998 (Operation Desert Fox) relied on the concept that the use of force authorised in resolution 678 (1990) could be "revived" by a Security Council determination that Iraq was in "material breach" of the cease-fire provisions in resolution 687 (1991).

Resolution 678, adopted on 29 November 1990, demanded:

> "… that Iraq comply fully with resolution 660 (1990) [which required its immediate withdrawal from Kuwait] and all subsequent resolutions"; and
>
> "unless Iraq on or before 15 January 1991 fully" implemented those resolutions, authorised:

[28] Letter Wood to Adams, 9 December 2002, 'Iraq: Security Council Resolution 1441 (2002)'.

> "… Member States co-operating with the Government of Kuwait … to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area."

The resolution stated that the Security Council was "acting under Chapter VII of the Charter". Chapter VII is the only part of the United Nations Charter governing the use of force, and it does so in the context of: "Action with respect to threats to the peace, breaches of the peace, and acts of aggression."

After the suspension of hostilities at the end of February 1991, resolutions 686 and 687 of 1991 contained a number of demands which Iraq had to fulfil in relation to the cessation of hostilities and the commencement of reparations.

The obligations included provisions in relation to:

- the Iraq/Kuwait border;
- repatriation of Kuwaiti nationals and property, and the payment of compensation by Iraq;
- sanctions; and
- disarmament of WMD, and inspections.

It was expressly stated that the authority to use force in resolution 678 (1990) remained valid during the period required for Iraq to comply with those demands.

In resolution 707 of August 1991 the Security Council condemned Iraq's serious violations of its disarmament obligations as a "material breach" of the relevant provisions of resolution 687 (1991), "which established a cease-fire and provided the conditions essential to the restoration of peace and security in the region".

In January 1993, two further serious incidents arose in relation to Iraq's implementation of resolution 687 (1991). This led to the adoption of two further Presidential Statements, on 8 and 11 January, which contained a direct warning of serious consequences.[29] Within days the US, UK and France carried out air and missile strikes on Iraq.

In August 1992, Dr Carl-August Fleischhauer, then the UN Legal Counsel, provided advice to the UN Secretary-General on the legal and procedural basis for the use of force against Iraq.[30]

The key elements of Dr. Fleischhauer's advice included:

- The authorisation to use all necessary means in resolution 678 (1990) was limited to the achievement of the objectives in that resolution - "to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area" - but was not limited in time; it was not addressed to a defined group of states except for "the vague notion of 'states cooperating with Kuwait'", and it was clear by the words "all necessary means" that it was understood to include the use of armed force.

[29] Presidential Statement, S/25081, 8 January 1993; Presidential Statement, S/25091, 11 January 1993.
[30] Zacklin R, The United Nations Secretariat And The Use of Force In A Unipolar World, Hersch Lauterpacht Memorial Lectures, University of Cambridge, 22 January 2008. The advice of the UN Legal Counsel can be sought by the Secretary-General, and by the organs of the UN, but not by the Member States, who rely on their own legal advisers. It is not determinative and does not bind Member States.

- Resolution 687 (1991) permitted the conclusion that once the Security Council was satisfied that Iraq had complied with all its obligations under the resolution, the authorisation to use force would lapse. But resolution 687 (1991) did not itself terminate that authorisation, expressly or by inference. That followed from the fact that the preambular paragraphs (PPs) of resolution 687 (1991) affirmed all the Security Council's previous resolutions on Iraq, including resolution 678 (1990).
- A cease-fire is by its nature a transitory measure but, during its duration, the cease-fire superseded the ability to implement the authorisation to use force. The promise contained in the cease-fire to cease hostilities under certain conditions created an international obligation, which, as long as those conditions pertained, excluded the recourse to armed force. Under general international law the obligation created could be terminated only if the conditions on which it had been established were violated. In other words, the authority to use force had been suspended, but not terminated. A sufficiently serious violation of Iraq's obligations under resolution 687 (1991) could withdraw the basis for the cease-fire and re-open the way to a renewed use of force. That possibility was not limited by the passage of time that had then elapsed.
- Authority to use force could be revived in circumstances where a two-part pre-condition was met: the Security Council should be in agreement that there was a violation of the obligations undertaken by Iraq; and the Security Council considered the violation sufficiently serious to destroy the basis of the cease-fire.
- Those findings need not be in the form of a resolution, but could be recorded in the form of a Presidential Statement. But the content must make clear that the Council considered that the violation of resolution 687 (1991) was such that all means deemed appropriate by Member States were justified in order to bring Iraq back into compliance with resolution 687 (1991). Under no circumstances should the assessment of that condition be left to individual Member States; since the original authorisation came from the Council, the return to it should also come from that source and not be left to the subjective evaluation made by individual Member States and their Governments.

In January 1993, two further serious incidents arose in relation to Iraq's implementation of resolution 687 (1991), which led to the adoption of two further Presidential Statements on 8 and 11 January.[31]

Unlike resolution 707 (1991) and the Presidential Statements in 1992, in which the warning of serious consequences had been conveyed in indirect language, the statements in 1993 contained a direct warning of serious consequences. Within days the US, UK and France carried out air and missile strikes on Iraq.

On 14 January 1993, in relation to military action on the previous day, the UN Secretary-General was reported as having said:

> "The raid yesterday, and the forces which carried out the raid, have received a mandate from the Security Council, according to resolution 678 and the cause of the raid was the violation by Iraq of resolution 687 concerning the cease-fire. So, as Secretary-General of the United Nations, I can say that this action was taken and conforms to the resolutions of the Security Council and conforms to the Charter of the United Nations."[32]

[31] Presidential Statement, S/25081, 8 January 1993; Presidential Statement, S/25091, 11 January 1993.
[32] Paper FCO, 17 March 2003, 'Iraq: Legal Basis for the Use of Force'.

In essence, the statement was an explicit acknowledgement that the authority to use force in resolution 678 (1990) had been "revived".

From June 1997, Iraq had begun to interfere with the activities of the UN Special Commission (UNSCOM), which had been established to monitor Iraq's WMD. Reports of Iraqi failures to comply with the obligations in resolution 687 (1991) were made by UNSCOM to the UN Security Council (see Section 2.2). Several resolutions were adopted and Presidential Statements were issued condemning Iraqi actions.

In March 1998, the Security Council adopted resolution 1154, stating that the Council was acting under Chapter VII of the Charter, and stressing the need for Iraq to comply with its obligations to provide access to UNSCOM in order to implement resolution 687 (1991). It stated that "any violation would have severest consequences for Iraq". That resolution did not, however, make a finding that Iraq was in breach of its obligations.

In October 1998, Dr Richard Butler, UNSCOM's Executive Chairman, reported to the Security Council that Iraq had suspended its co-operation; Iraq's decision to suspend co-operation made it "impossible for the Commission to implement its disarmament and monitoring rights and responsibilities".[33]

On 5 November, the Security Council adopted resolution 1205, condemning Iraq's decision to cease co-operation with UNSCOM as a "flagrant violation" of resolution 687 (1991) and other relevant resolutions. In the final paragraph of the resolution the Security Council decided "in accordance with its primary responsibility under the Charter for the maintenance of international peace and security, to remain actively seized of the matter".

Diplomatic contact between the UN and Iraq continued, as did discussions within the Security Council, but on 16 December 1998, the US and UK launched air attacks against Iraq, Operation Desert Fox.

Mr John Morris (Attorney General from 1997 to 1999), supported by Lord Falconer (as Solicitor General), advised Mr Blair in November 1997:

> "Charles [Lord Falconer] and I remain of the view that, in the circumstances presently prevailing, an essential precondition of the renewed use of force to compel compliance with the cease-fire conditions is that the Security Council has, in whatever language – whether expressly or impliedly – stated that there has been a breach of the cease-fire conditions and that the Council considers the breach sufficiently grave to undermine the basis or effective operation of the cease-fire."[34]

108. Recognising that "final decisions" could "only be made in the light of circumstances at the time (including what transpires in the Council)", Mr Wood addressed the provisions of the resolution and the rules for their interpretation. As regards the latter, he wrote:

> "The rules for treaty interpretation set out in Articles 31 to 33 of the Vienna Convention on the Law of Treaties are a useful starting point, but these have to be applied in a way that takes into account the different nature of resolutions of the

[33] Letter Executive Chairman of UNSCOM to President of the Security Council, 2 November 1998, 'S/1998/1032'.
[34] Minute Goldsmith to Prime Minister, 30 July 2002, 'Iraq'.

Security Council. The basic principle to be derived from the Vienna Convention is that a Security Council resolution is to be interpreted in good faith in accordance with the ordinary meaning given to its terms in their context and in the light of its object and purpose."

The Vienna Convention on the Law of Treaties Articles 31-33

"ARTICLE 31: GENERAL RULE OF INTERPRETATION

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

"ARTICLE 32: SUPPLEMENTARY MEANS OF INTERPRETATION

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd.

> "ARTICLE 33: INTERPRETATION OF TREATIES AUTHENTICATED IN TWO OR MORE LANGUAGES
>
> When a treaty has been authenticated in two or more languages the text of each version is equally authoritative unless the parties to the treaty have agreed otherwise.
>
> The terms of each version are presumed to have the same meaning.
>
> If a difference in meaning should emerge, the meaning which best reconciles the texts, having regard to the objects of the treaty, shall be the meaning adopted."

109. Referring to a number of telegrams describing the formal and informal negotiation of the resolution, Mr Wood cautioned:

> "If the matter were ever brought to court, none of these records would be likely to be acceptable as travaux preparatoires[35] of the resolution, since they are not independent or agreed records, and the meetings themselves were behind closed doors."

110. Mr Wood set out the arguments relevant to the two broad views of the interpretation of resolution 1441. For the first, Mr Wood identified the considerations which suggested that, taken as a whole, the resolution meant that, in the event of non-compliance, the Council itself would decide what action was needed.

111. In relation to the second, Mr Wood wrote: "UKMIS New York are of the view that this argument is consistent with the negotiating history, and requires serious consideration". He set out four supporting points for the second view before identifying a number of "possible difficulties".

112. Mr Wood concluded: "Whichever line of argument is adopted" it would "still be necessary" to address what "type of Iraqi non-compliance" would be "of a magnitude which would undermine the cease-fire". He also re-stated the governing principles of necessity and proportionality for the use of force.

113. On receipt of Mr Wood's letter of 9 December, Ms Adams prepared advice for Lord Goldsmith, including a full set of background papers.[36]

114. Addressing the "two alternative views" on the legal effect of resolution 1441, Ms Adams wrote that, while Mr Wood did not "say so expressly", she understood Mr Wood believed the first view, that resolution 1441 "does not authorise the use of force

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[35] The expression used in the French version of the Vienna Convention in place of "preparatory work". *Travaux préparatoires* are regarded as useful for the interpretation of treaties when the evidence as regards particular words or phrases reveals a common understanding: *Kasikili/Sedudu Island (Botswana/ Namibia)* ICJ Reports 1999 at pp. 1074-1075, 1101; *Avena and Other Mexican Nationals (Mexico v. United States of America)* ICJ Reports 2004 at p. 49; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* ICJ Reports 2007 at para. 194.

[36] Minute Adams to Attorney General, 11 December 2002, 'Iraq: Interpretation of Resolution 1441'.

expressly or revive the authorisation in resolution 678 (1990)", to be "the better analysis of the resolution".

115. Commenting on the way in which Mr Wood had addressed the "second view", that resolution 1441 had conditionally authorised the use of force, Ms Adams wrote: "I am not convinced that he puts the arguments in support of this view at their strongest."

116. Setting out an alternative analysis, Ms Adams wrote that "one thing is clearer following adoption" of resolution 1441:

> "… the existence of the 'revival argument' did not seem to be doubted within the Security Council. The whole basis of the negotiation … was that the words 'material breach' and 'serious consequences' were code for authorising the use of force. There is now therefore a much sounder basis for relying on the revival argument than previously.
>
> "… [T]he question of whether resolution 1441 alone satisfies the conditions for reviving the authorisation in resolution 678 without a further decision of the Council is far from clear from the text … It is therefore not easy to ascertain the intention of the Security Council."

117. Ms Adams continued:

> "What advice you give … may therefore depend on the view you take as to your role in advising on use of force issues. For example, you might give a different answer to the question: what is the better interpretation of resolution 1441? than to the question: can it reasonably be argued that resolution 1441 is capable of authorising the use of force without a further Council decision?
>
> "You have previously indicated that you are not entirely comfortable with advising that 'there is a respectable argument' that the use of force is lawful, given your quasi-judicial role in this area. Previous Law Officers have of course advised in these terms …"

118. Ms Adams concluded:

> "For my own part, I think that the first view is the better interpretation, but that the arguments in favour of the second view are probably as strong as the legal case for relying on the revival argument in December 1998 when the UK participated in Operation Desert Fox."

119. Ms Adams wrote that she understood the statement that Lord Goldsmith's advice was not "required now" reflected Mr Straw's views, and:

> "While it is certainly true that definitive advice could not be given at this stage on whether a further Council decision is required (because such advice would need to take account of all the circumstances at the time, including further discussions in the Council), there is no reason why advice could not be given now on whether

resolution 1441 is capable in any circumstances of being interpreted as authorising the use of force without a further Security Council decision."

120. Ms Adams added:

"… I think a serious issue for consideration is whether, if you were to reach the view that resolution 1441 was under no circumstances capable of being interpreted as authorising force without a further Council decision … this should be relayed to the Foreign Office and No.10."

121. Observing that "the Foreign Secretary (and other Ministers) have gone beyond the neutral line suggested … stating that resolution 1441 does not 'necessarily' require a further Council decision", Ms Adams suggested that if Lord Goldsmith was "not minded" to give advice: "An alternative option … might be for me to reply to Michael [Wood]'s letter confirming that you do not propose to advise at this stage, but stressing the need for neutrality in HMG's public line for so long as you have not advised on the interpretation of the resolution."

122. Lord Goldsmith told the Inquiry that the instructions set out both arguments "without expressing a view between them, although I think I knew what view Sir Michael took about it".[37]

123. Mr Straw told the Inquiry that he had asked Mr Wood to ensure Lord Goldsmith was given a balanced view.[38]

124. Mr Straw added that, if Sir Michael had thought there was only one view, that was "what he would have written" to Lord Goldsmith. Mr Straw stated that he:

"… had no input, as far as I recall – and we have been through the records – whatsoever in what he [Sir Michael] wrote to the Attorney General. Quite properly. I don't think I, so far as I recall, ever saw the letter until after it had been written, and that's entirely proper.

"If his view had been, 'There is no doubt we require a second resolution' … then that's what he should have written, but he didn't."[39]

125. In his statement for the Inquiry, Mr Pattison wrote:

"With hindsight, the letter … probably steered [Lord Goldsmith] in a particular direction: although it set out competing interpretations of SCR 1441, it was loaded in favour of one."[40]

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[37] Public hearing, 27 January 2010, page 62.
[38] Public hearing, 8 February 2010, page 13.
[39] Public hearing, 8 February 2010, page 15.
[40] Statement, January 2011, paragraph 35.

126. Sir Michael Wood disagreed with Mr Pattison's conclusion:

> "This is not so. I set out the arguments as fairly as I could, taking full account of extensive comments from UKMIS New York."[41]

127. Sir Michael wrote in his statement:

> "I was instructed … that the Foreign Secretary was content for me to send the letter provided I did not include in the letter a statement of my own view of the law; and provided that I made it clear in the letter that no advice was needed at present. I was not happy with these instructions …
>
> "There are broadly two ways for a departmental lawyer to consult the Attorney: by setting out the different possibilities, without expressing a view; or, and this is much more common and usually more helpful, by setting out the differing possibilities and giving a view. In the present case, I was instructed to do the former, though the Attorney was anyway well aware of my views."

128. In the final version of the "instructions" for Lord Goldsmith, Mr Wood wrote:

> "No advice is required now. Any decisions in the future would clearly need to take account of all the circumstances, including any further deliberation in the Security Council."[42]

129. In his statement for the Inquiry, Lord Goldsmith wrote that he had been told that it was the view of Mr Straw that the instructions of 9 December should make clear that no advice was needed at that time.[43]

130. The Inquiry sought the views of a number of witnesses about whether Lord Goldsmith's advice should have been available at an earlier stage.

131. In his statement to the Inquiry, Sir Michael Wood wrote that he did not agree with Mr Straw's view that advice was not needed until later:

> "While it may not have been essential to have advice at that time, it was in my view highly desirable … FCO Legal Advisers were in a very uncomfortable position … We were having to advise on whether SCR 1441 authorised the use of force without a further decision of the Security Council without the benefit of the Attorney's advice. It would have been possible for the Attorney to have given advice on the meaning of SCR 1441 soon after its adoption, since all the relevant considerations were then known, though that advice would no doubt have had to be kept under review in the light of developments."[44]

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[41] Statement, 15 March 2011, page 19.
[42] Letter Wood to Adams, 9 December 2002, 'Iraq: Security Council Resolution 1441 (2002)'.
[43] Statement, 17 January 2011, paragraph 1.12.
[44] Statement, 15 March 2011, page 20.

132. Sir Michael added that he had explained in a meeting with Lord Goldsmith "as late as January 2003" that his "position within the FCO was becoming very difficult" since he was still having to advise Mr Straw and others "without being able to refer to" Lord Goldsmith's advice, even though he was "aware of his [Lord Goldsmith's] thinking at that time".

133. Sir Michael told the Inquiry:

> "… it was certainly a problem for me within the Foreign Office, because I was having to react to public statements by Ministers, to prepare briefings for people, on the basis of my views, without having a definitive view from the Attorney, although I think I know what his thinking was at that time.
>
> "So I think it was a problem in terms of giving legal advice within the Foreign Office … in the broader sense … it was a problem for government as a whole, because they really needed advice, even if they didn't want it at that stage, in order to develop their policy in the weeks leading up to the failure to get the second resolution."[45]

134. Asked what he meant, Sir Michael added:

> "I think it was clear to me that the Attorney would give advice when he was asked for it, and there were various stages when he was not asked for it … [M]y impression was that there was a reluctance in some quarters to seek the Attorney's advice too early."[46]

135. Asked whether it would have helped if his advice had been provided earlier, Lord Goldsmith told the Inquiry that he did not think so. He said he had:

> "… been at pains, as you have seen, to try to make sure that those who were moulding the policy didn't have a misunderstanding about, at least, what my view might be and I had been involved …"[47]

136. Lord Goldsmith added:

> "My view was, if I thought it was necessary for a Minister to know, I would tell them, whether they wanted to hear it or not."

137. Asked if he had been involved at the right time in terms of policy development, Lord Goldsmith stated:

> "I don't know. I don't know what difference, if any, it would have made. My own view is that it is right that the Senior Legal Adviser, and all Legal Advisers, should be involved in the policy development, because that helps Ministers, once you

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[45] Public hearing, 26 January 2010, page 39.
[46] Public hearing, 26 January 2010, page 40.
[47] Public hearing, 27 January 2010, page 101.

understand what their objectives are, to reach a way of achieving those which is lawful …"[48]

138. Asked about whether the legal issues were folded into the developing policy questions, Lord Goldsmith replied:

"I think in the event that did happen. As you have heard, on two occasions I insisted on offering a view, even though it wasn't being asked for, to make sure the policy, as it were, took account of that."[49]

139. Ms Elizabeth Wilmshurst, a Deputy FCO Legal Adviser, identified a particular risk that arose from the lateness of the definitive advice:

"… on the process of obtaining the Law Officers' advice, it was clearly far from satisfactory, and it seemed to have been left right until the end, the request to him for his formal opinion, as if it was simply an impediment that had to be got over before the policy could be implemented, and perhaps a lesson to be learned is that, if the Law Officers' advice needs to be obtained, as it always does for the use of force issues, then it should be obtained before the deployment of substantial forces. For the Attorney to have advised that the conflict would have been unlawful without a second resolution would have been very difficult at that stage without handing Saddam Hussein a massive public relations advantage. It was extraordinary, frankly, to leave the request to him so late in the day."[50]

140. Asked if it would have been useful to have had the formal advice of the Attorney General during the period after resolution 1441 when the Armed Forces were preparing for military action, Mr Blair replied:

"No. I think what was important for him to do was to explain to us what his concerns were … Peter was quite rightly saying to us, 'These are my concerns. This is why I don't think 1441 in itself is enough'.

"… [W]e had begun military preparations even before we got the … 1441 resolution. We had to do that otherwise we would never have been in a position to take military action. But let me make it absolutely clear, if Peter in the end had said, 'This cannot be justified lawfully', we would have been unable to take action."[51]

141. Asked if he had any observations on the process by which Lord Goldsmith's advice had been obtained, Lord Turnbull, Cabinet Secretary between September 2002 and September 2005, said: "I can see that it would have been better if this had been done earlier, but the list of things for which that is true runs to many pages."[52]

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[48] Public hearing, 27 January 2010, page 102.
[49] Public hearing, 27 January 2010, page 232.
[50] Public hearing, 26 January 2010, pages 24-25.
[51] Public hearing, 29 January 2010, page 150.
[52] Public hearing, 25 January 2011, page 25.

Lord Goldsmith's meeting with No.10 officials, 19 December 2002

142. In a meeting held at his request with No.10 officials on 19 December, Lord Goldsmith was again told that he was not at that stage being asked for advice; and that the UK was pushing for a second resolution.

143. Lord Goldsmith was also told that, when he was asked for advice, it would be helpful if he were to discuss a draft with Mr Blair.

144. As requested by Lord Goldsmith, Ms Adams set up a meeting with Mr Powell.[53]

145. The meeting took place on 19 December.

146. A minute produced by Mr David Brummell, the Legal Secretary to the Law Officers from August 2000 to November 2004, stated that Sir David Manning and Baroness Sally Morgan, the No.10 Director of Political and Government Relations, were also present, as well as Mr Powell, and that the meeting's purpose was to provide Lord Goldsmith "with an update on developments and likely timings for any future action, rather than for the AG to provide specific legal advice".[54]

147. Mr Brummell recorded that Mr Powell had sketched out three "possible scenarios":

- "Saddam Hussein does something very stupid and the weapons inspectors find some WMD, which leads to a UN … resolution finding material breach and authorising the use of force."
- "The inspectors catch out Saddam Hussein in some way but the response of members of the Security Council is such that there is no second resolution."
- "… [T]he US become frustrated with the UN process and decide to take military action regardless, i.e. without UN support."

148. Mr Brummell wrote that Mr Powell had commented:

- "if the US and UK were to decide that military action was justified, the British Cabinet would be unanimous in their support";
- "There would be no question of the UK supporting military action" in the third scenario; and "it was unlikely that the US would proceed" in the "absence of UK support"; and
- military action could start as early as mid-February.

149. Mr Brummell reported that Sir David Manning had confirmed that the UK was pushing for a second resolution and he thought there was a "reasonably good prospect (i.e. a 50:50 or so chance)" of success. Iraq had also made the "mistake of alienating Russia" by cancelling an oil contract which "would change the political weather".

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[53] Minute Adams to Attorney General, 11 December 2002, 'Iraq: Interpretation of Resolution 1441'.
[54] Minute Brummell, 19 December 2002, 'Iraq: Note of Meeting at No. 10 Downing Street – 4.00 pm, 19 December 2002'.

150. Sir David had also confirmed that the "basic assumption" was that Dr Blix would report any evidence of breaches to the Security Council and:

> "The SC would then debate whether the reported breaches were serious or trivial. It would then be for the Security Council, in the light of that debate, to decide what action should be taken. It was noted that this would suggest that it was expected that the SC would have to express its view."

151. Mr Brummell recorded that Lord Goldsmith had agreed that the adoption of resolution 1441:

> "… which represented a 'complex compromise' had been a considerable achievement. He thought that a key question arose in relation to the interpretation of OP4 … What could the phrase 'for assessment' mean if it did not mean an assessment as to whether the breach was sufficiently material to justify resort to use of force?"

152. Mr Brummell also recorded that there would be "a full Cabinet discussion on Iraq some time in the middle of January, i.e. before the Security Council met at the end of January". It had been agreed that:

- Lord Goldsmith would be invited to attend Cabinet "for this purpose";
- it would be useful for him to speak to Sir Jeremy Greenstock "to get a fuller picture of the history of the negotiation of resolution 1441";
- Lord Goldsmith "was not being called on to give advice at this stage. But he would be giving further consideration to all these issues"; and
- it "might be helpful" if Lord Goldsmith "were to discuss a legal advice paper in draft with the Prime Minister".

153. There is no No.10 record of the meeting.

154. Lord Goldsmith told the Inquiry that he was concerned about what was meant by the expression "for assessment" in OP 4, which seemed "to be an essential issue".[55]

155. Lord Goldsmith said:

> "I wanted to understand principally what was meant by 'for assessment', and I also wanted to know what were the – what the answers to a number of other textual points that I raised as giving rise to questions about what was meant by 1441."[56]

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[55] Public hearing, 27 January 2010, page 65.
[56] Public hearing, 27 January 2010, pages 65-66.

156. Asked if this request could have been channelled through Ms Adams to the Foreign Office Legal Advisers, Lord Goldsmith explained:

> "There are a number of ways it could have been done, and I'm not sure that the Foreign Office would have been able to deal ultimately with the US side, but it could have been."[57]

157. Lord Goldsmith said:

> "I wasn't expecting to discuss it with Jonathan Powell. That wasn't the point. I did want to discuss that with the Prime Minister, with the Foreign Secretary, who had been very closely involved in the negotiations, and this was a channel."[58]

158. Lord Goldsmith told the Inquiry that he wanted to have "from the client, you know, 'What do you say in relation to certain of these arguments?'"[59]

159. Lord Goldsmith told the Inquiry that he viewed Mr Blair as "ultimately" the client for his advice.[60]

160. Asked whether the client was, at that stage, "expressing a view on how soon" the advice would be required, Lord Goldsmith told the Inquiry:

> "I don't recall. Certainly there wasn't … any request at that stage for final advice, but given what I said about needing to understand certain further matters … it obviously wasn't going to be then and there."[61]

161. Asked whether the client was concerned that he should not "come in too soon" with his advice, Lord Goldsmith told the Inquiry that that question would need to be put to Mr Blair; and that Mr Powell and his very close advisers knew what Mr Blair's mind was.[62]

162. Asked what indications he had been given about the timing of his replies, Lord Goldsmith stated:

> "I don't recall …
>
> "All I was saying was I wasn't actually in a position to provide my advice at that stage – because I hadn't completed my researches and my enquiries – and it was agreed that I would provide a draft advice which would be something that would then enable me to raise questions which were causing me concern, so I could understand what the response to them was."[63]

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[57] Public hearing, 27 January 2010, page 65.
[58] Public hearing, 27 January 2010, page 66.
[59] Public hearing, 27 January 2010, page 67.
[60] Public hearing, 27 January 2010, page 68.
[61] Public hearing, 27 January 2010, page 68.
[62] Public hearing, 27 January 2010, page 68.
[63] Public hearing, 27 January 2010, page 69.

163. Lord Turnbull told the Inquiry that he, Admiral Sir Michael Boyce, Chief of the Defence Staff (CDS), the diplomatic service and others were all clients for Lord Goldsmith's advice.[64] The characterisation of Mr Blair as the client was not "a very good description of the importance of this advice".

164. In his written statement, Lord Goldsmith cited his telephone call with Mr Powell on 11 November and the meeting on 19 December as occasions when he had been "discouraged from providing" his advice.[65]

165. Asked if he was aware that Lord Goldsmith felt he was being discouraged, Mr Blair told the Inquiry:

> "I think it was more that we knew obviously when we came to the point of decision we were going to need formal advice. We knew also this was a very tricky and difficult question. It was important actually that he gave this advice. I think the only concern, and I am speaking from memory here; generating bits of paper the entire time on it, but, I mean, it was obviously important that he was involved."[66]

Lord Goldsmith's provisional view

Lord Goldsmith's draft advice of 14 January 2003

166. As agreed with Mr Powell on 19 December 2002, Lord Goldsmith handed his draft advice to Mr Blair on 14 January 2003.

167. The draft advice stated that a further decision by the Security Council would be required to revive the authorisation to use force contained in resolution 678 (1990) although that decision did not need to be in the form of a further resolution.

168. Lord Goldsmith saw no grounds for self-defence or humanitarian intervention providing the legal basis for military action in Iraq.

169. Lord Goldsmith's draft advice did not explicitly address the possibility, identified by the Law Officers in 1997, of other "exceptional circumstances" arising if the international community "as a whole" had accepted that Iraq had repudiated the cease-fire, but the Security Council was "unable to act".

170. The advice did, however, address both the precedent of Kosovo and the question of whether a veto exercised by a Permanent Member of the Security Council might be deemed to be unreasonable, stating that the Kosovo precedent did not apply in the prevailing circumstances of Iraq; and that there was no "room for arguing that a condition of reasonableness [could] be implied as a precondition for the exercise of a veto".

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[64] Public hearing, 25 January 2011, page 28.
[65] Statement, 4 January 2011, paragraph 4.2.
[66] Public hearing, 21 January 2011, page 59.

171. Ms Adams informed Lord Goldsmith on 10 January that a meeting with Mr Blair had been arranged, at No.10's request, for noon on 14 January. There would be a full Cabinet discussion on 16 January and arrangements were being made for Lord Goldsmith to attend.

172. Ms Adams told the Inquiry she had prepared a submission analysing the arguments as she saw them and including her own view, which was essentially the same as that of Mr Wood. Lord Goldsmith then made comments on it which she adopted to produce a draft advice.[67]

173. Lord Goldsmith's draft advice stated that it was "clear that resolution 1441" contained "no express authorisation by the Security Council for the use of force".[68]

174. The revival argument had been relied on by the UK in the past but it would:

> "… not be defensible if the Council has made it clear either that action short of the use of force should be taken to ensure compliance with the cease-fire or that it intends to decide subsequently what action is required …"[69]

175. Lord Goldsmith wrote that OP1 contained a finding that Iraq was in material breach of its obligations, but it was accepted that the effect of the "firebreak" in OP 2 was that resolution 1441 did not immediately revive the authorisation to use force in resolution 678. In his view:

> "The key question in relation to the interpretation of resolution 1441 is whether the terms of [operative] paragraph 12 … indicate that the Council has reserved to itself the power to decide on what further action is required to enforce the cease-fire in the event of a further material breach by Iraq.
>
> "… to answer this question, it is necessary to analyse the terms of resolution 1441 as a whole …"

176. In his analysis, Lord Goldsmith made the following observations:

- The references to resolution 678 (1990) and resolution 687 (1991) in preambular paragraphs 4, 5 and 10 of the resolution suggested "that the Council had the revival argument in mind" when it adopted the resolution.
- The reference to "material breach" in OP1 signified "a finding by the Council of a sufficiently serious breach of the cease-fire conditions to revive the authorisation in resolution 678".
- The "final opportunity" in OP2 implied that the Council had "determined that compliance with resolution 1441" was Iraq's "last chance before the cease-fire resolution will be enforced".

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[67] Public hearing, 30 June 2010, pages 20-22.
[68] Minute Adams to Attorney General, 10 January 2003, 'Iraq: Resolution 1441'.
[69] Minute [Draft] [Goldsmith to Prime Minister], 14 January 2003, 'Iraq: Interpretation of Resolution 1441'.

- The first part of OP4, that false statements or omissions in the Iraqi declaration and failure to comply with and co-operate fully in the implementation of resolution 1441 would "constitute a further material breach", suggested that the Council had "determined that any failure by Iraq to comply with or co-operate in the implementation of the resolution will be a material breach".
- The later reference in OP4 to a requirement to report that breach "to the Council for assessment under paragraphs 11 and 12" raised the "key question" as to whether that was "merely a procedural requirement for a Council discussion (the stated US/UK position)" or whether it indicated "the need for a determination of some sort … that force was now justified".
- It appeared "to be accepted that only serious cases of non-compliance would constitute a material breach, on the basis that it would be difficult to justify the use of force in relation to a very minor infringement of the terms of the resolution".
- Mr Straw had told Parliament on 25 November that a material breach would need "as a whole to add up to something deliberate and more significant: something that shows Iraq's intention not to comply".
- If that was the case, "then any Iraqi misconduct must be assessed to determine whether it is sufficiently serious as to constitute a material breach".
- The question then was "who is to make that assessment".
- In the event of a reported breach, OP12 stated that the Council would "consider the situation and the need for compliance with all relevant resolutions in order to secure international peace and security".
- Proposals to amend OP12 "which would have made clear that a further decision was required were rejected".
- "The previous practice of the Council and statements made during the negotiation" of resolution 1441 demonstrated that the phrase "serious consequences" in OP13 was "accepted as indicating the use of force".

177. In the light of that examination, Lord Goldsmith identified two critical questions:

"(a) whether it would be legitimate to rely on the revival argument; and

(b) what are the conditions for revival."

178. Lord Goldsmith wrote:

- He considered "in relation to OP1" that "a finding of 'material breach'" constituted a "determination of a sufficiently serious breach of the terms of the cease-fire resolution [resolution 687] to revive the authorisation to use for[ce] in resolution 678".
- If OP4 had stopped after the words "breach of Iraq's obligations", there "would have been a good argument that the Security Council was authorising the use

of force in advance if there was a failure by Iraq to comply and co-operate fully with the implementation of the resolution".

179. Considering the words "for assessment under paragraphs 11 and 12", which had been added at the end of OP4, Lord Goldsmith observed that they "must mean something". He wrote that it was "hard not to read these words as indicating that it is for the Council [to] assess if an Iraqi breach is sufficiently significant in light of all the circumstances".

180. Lord Goldsmith explained that "three principal factors" had led him to that conclusion:

- The words "for assessment" implied the "need for a substantive assessment". The view that OP12 required "merely a Council discussion … would reduce the Council's role to a procedural formality, so that even if the majority of the Council's members expressed themselves opposed to the use of force this would have no effect".
- It was "accepted that" OP4 did "not mean that every Iraqi breach would trigger the use of force, so someone must assess whether or not the breach is 'material'". It was "more consistent with the underlying basis of the revival argument" to interpret OP4 as meaning that it was "for the Council to carry out that assessment".
- He did not find the "contrary arguments concerning the meaning of 'for assessment' sufficiently convincing".

181. While Lord Goldsmith described the fact that French and Russian attempts to "make it plain" that a further breach would "only be 'material' when assessed as such by the Council" had not been accepted as the "strongest" point in favour of the view that a determination by the Council was not required, he cautioned:

> "But what matters principally in interpreting a resolution is what the text actually says, not the negotiation which preceded its adoption."

182. Lord Goldsmith added that he did "not find much difference" between the French proposals and the final text of the resolution.

183. Addressing the Explanations of Vote (EOVs) provided when resolution 1441 was adopted on 8 November 2002, Lord Goldsmith wrote that they "did not assist greatly in determining the correct interpretation of the text of OPs 4 and 12".

184. Lord Goldsmith concluded:

> "… my opinion is that resolution 1441 does not revive the authorisation to use of [sic] force contained in resolution 678 in the absence of a further decision of the Security Council. The difference between this view of the resolution and the approach which argues that no further decision is required is narrow, but key.

"The further decision need not be in the form of a further resolution. It is possible that following a discussion under OP12 of the resolution, the Council could make clear by other means, e.g. a Presidential statement, that it believes force is now justified to enforce the cease-fire."

185. Addressing the principle of proportionality, Lord Goldsmith emphasised that:

"Any force used pursuant to the authorisation in resolution 678:

- must have as its objective the enforcement of the terms of the cease-fire contained in resolution 687 (1990) [sic] and subsequent relevant resolutions;
- be limited to what is necessary to achieve that objective; and
- must be proportionate to that objective, i.e. securing compliance with Iraq's disarmament objectives.

"That is not to say that action may not be taken to remove Saddam Hussein from power if it can be shown that such action is necessary to secure the disarmament of Iraq and that it is a proportionate response to that objective. But regime change cannot be the objective of military action. This should be borne in mind in making public statements about any campaign."

186. As he had promised following the meeting on 22 October, when Mr Blair had asked about the consequences of a perverse or unreasonable veto "of a second resolution intended to authorise the use of force", Lord Goldsmith also addressed other legal bases for military action.

187. In her minute of 14 October 2002, Ms Adams had drawn Lord Goldsmith's attention to the Law Officers' advice to Mr Blair in 1997 which identified the possibility that there could be:

"… exceptional circumstances in which although the Council had not made a determination of material breach it was evident to and generally accepted by the international community as a whole that Iraq had in effect repudiated the cease-fire and that a resort to military force to deal with the consequences of Iraq's conduct was the only way to ensure compliance with the cease-fire conditions."[70]

188. Ms Adams added:

"I understand this passage was included in the advice to cover the sort of situation where the Council was unable to act. But of course the counter view would be that if the Council has rejected a resolution authorising the use of force, then under the scheme of the Charter, it cannot be said that force is legally justified."

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[70] Minute Adams to Attorney General, 14 October 2002, 'Iraq: Meeting with David Manning, 14 October'.

189. In the "lines to take" provided for Lord Goldsmith's meeting with Mr Blair, Ms Adams wrote:

> "It is impossible to give a firm view on this now. We should certainly not plan on being able to rely on such a justification. There does not seem to [be] wide support for military action among the wider international community at present."[71]

190. In his draft advice of 14 January 2003, Lord Goldsmith wrote that:

> "In ruling out the use of force without a further decision of the Council, I am not saying that other circumstances may not arise in which the use of force may be justified on other legal grounds, eg if the conditions for self-defence or humanitarian intervention were met. However, at present, I have seen nothing to suggest there would be a legal justification on either of these bases."[72]

191. In relation to the "Kosovo Option", Lord Goldsmith wrote that the UK had been "able to take action … because there was an alternative legal base which could be relied on which did not depend on Council authorisation, namely intervention to avert an overwhelming humanitarian catastrophe".

192. Lord Goldsmith did not, however, address whether any other "exceptional circumstances" could arise which might provide the basis for action against Iraq.

193. Lord Goldsmith also addressed the question of whether, in the event that, "following a flagrant violation by Iraq", one of the five Permanent Members (P5) of the Council "perversely or unreasonably vetoed [a] further Council decision intended to authorise the use of force", the Coalition would be justified in acting without Security Council authorisation.

194. Lord Goldsmith wrote that the scheme of the UN Charter clearly envisaged "the possibility of a P5 veto" and did "not provide that such vetoes may only be exercised on 'reasonable grounds'". In those circumstances, he did not believe that there was:

> "… room for arguing that a condition of reasonableness can be implied as a precondition for the lawful exercise of a veto. Thus, if one of the P5 were to veto a further Council decision pursuant to OPs 4 and 12 of resolution 1441, there would be no Council authorisation for military action."

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[71] Minute Adams to Attorney General, 22 October 2002, 'Iraq: Meeting with the Prime Minister, 22 October' attaching 'Lines to Take'.
[72] Minute [Draft] [Goldsmith to Prime Minister], 14 January 2003, 'Iraq: Interpretation of Resolution 1441'.

195. Lord Goldsmith told the Inquiry that he had handed the draft paper to Mr Blair and there was some discussion, but he did not think there had been a long discussion:

> "The one thing I do recall was that he [Mr Blair] said … 'I do understand that your advice is your advice'. In other words, the Prime Minister made it clear he accepted that it was for me to reach a judgement and that he had to accept that."[73]

196. No.10 did not seek Lord Goldsmith's further views about the legal basis for the use of force until the end of February, and he did not discuss the issues again with Mr Blair until 11 March.

No.10's reaction to Lord Goldsmith's advice

197. Mr Powell proposed that Sir Jeremy Greenstock should be asked to suggest alternatives to Lord Goldsmith.

198. Mr Blair's response to Mr Powell indicated that he himself was not confident that resolution 1441, of itself, provided a legal basis for the use of force. Mr Blair's response suggested a readiness to seek any ground on which Lord Goldsmith would be able to conclude that there was a legal basis for military action.

199. Given the consistent and unambiguous advice of the FCO Legal Advisers from March 2002 onwards and Lord Goldsmith's advice from 30 July 2002, that self-defence could not provide a basis for military action in Iraq, the Inquiry has seen nothing to support Mr Blair's idea that a self-defence argument might be "revived".

200. Lord Goldsmith's draft advice stated that:

> "It was proposed before Christmas that it would be worthwhile to discuss the negotiation of the resolution and particularly the genesis of the words 'for assessment' with Sir Jeremy Greenstock. It is not clear if and when he will be able to come to London for such a meeting."[74]

201. Mr Powell sent an undated note to Mr Blair advising: "We should get Jeremy Greenstock over to suggest alternatives to him."[75]

202. Mr Blair replied to Mr Powell:

> "We need to explore, especially (a) whether we c[oul]d revive the self-defence etc arguments or (b) whether the UNSCR [sic] c[oul]d have a discussion, no resolution authorising force but nonetheless the terms of the discussion and/or decision, make it plain there is a breach."[76]

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[73] Public hearing, 27 January 2010, page 72.
[74] Minute [Draft] [Goldsmith to Prime Minister], 14 January 2003, 'Iraq: Interpretation of Resolution 1441'.
[75] Note [handwritten] Powell to PM, [undated and untitled].
[76] Note [handwritten] [Blair to Powell], [undated and untitled].

203. Asked whether his response to Mr Powell's manuscript note on Lord Goldsmith's draft advice of 14 January was mostly about Lord Goldsmith understanding the negotiating history, or whether he was keen to find an alternative that might persuade Lord Goldsmith that there was a basis for military action, Mr Blair told the Inquiry that he thought it was "both".[77]

204. Mr Blair added that he thought Lord Goldsmith himself had suggested meeting Sir Jeremy:

> "So in a sense he had already raised that issue … I think I was simply casting about … I was saying 'Have a look at this point. Have a look at that', but the key thing was indeed that he was to speak to Jeremy."

205. Mr Brummell's record of Lord Goldsmith's meeting with No.10 officials on 19 December records only that it would be "useful" for Lord Goldsmith to "speak to Sir Jeremy Greenstock, to get a fuller picture of the history of the negotiation of resolution 1441".[78]

206. Despite Lord Goldsmith's draft advice, Mr Blair continued to say in public that he would not rule out military action if a further resolution in response to an Iraqi breach was vetoed.

207. He did so in his statement to Parliament on 15 January and when he gave evidence to the Liaison Committee on 21 January about taking action in the event of an "unreasonable veto".

208. These statements were at odds with the draft advice he had received and discussed with Lord Goldsmith.

209. During Prime Minister's Questions on 15 January, Mr Blair was asked a series of questions by the Leader of the Opposition, Mr Iain Duncan Smith.[79]

210. Asked whether the Government's position was that a second resolution was preferable or, as Ms Clare Short, the Development Secretary, had said, essential. Mr Blair replied:

> "… we want a UN resolution. I have set out continually, not least in the House on 18 December [2002], that in circumstances where there was a breach we went back to the UN and the spirit of the UN resolution was broken because an unreasonable veto was put down, we would not rule out action. That is the same position that everybody has expressed, and I think it is the right position. However … it is not merely preferable to have a second resolution. I believe that we will get one."

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[77] Public hearing, 21 January 2011, page 63.
[78] Minute Brummell, 19 December 2002, 'Iraq – Note of meeting at No.10 Downing Street, 19 December 2002'.
[79] House of Commons, *Official Report*, 15 January 2003, columns 677-678.

211. Mr Blair emphasised that the UN route had been chosen "very deliberately" because it was "important" that Saddam Hussein was "disarmed with the support of the international community". He hoped that the House would unite around the position that if the UN resolution was breached, "action must follow, because the UN mandate has to be upheld". The Government's position was that a "second UN resolution" was "preferable", but it had:

> "… also said that there are circumstances in which a UN resolution is not necessary, because it is necessary to be able to say in circumstances where an unreasonable veto is put down that we would still act."[80]

212. In his evidence to the Liaison Committee on 21 January, Mr Blair was asked about the impact of taking action without a second resolution.[81]

213. In his responses, Mr Blair emphasised a second resolution would be highly desirable, but argued that action should not be "unreasonably blocked".

- It would be "easier in every respect" if there was a second resolution, but there could not be "a situation where there is a material breach recognised by everybody and yet action is unreasonably blocked". Without that "qualification", the discussion in the Security Council was "not likely to be as productive as it should be".
- It would be "highly desirable" to have a second resolution.
- It would be "more difficult" to act without one, but if the inspectors said that they could not do their job properly or they made a finding that there were weapons of mass destruction, it would "be wrong" in the face of a veto "if we said 'Right, well there is nothing we can do, he can carry on and develop these weapons.' … We must not give a signal to Saddam that there is a way out of this … [It] is best done with the maximum international support but it will not be done at all if Saddam thinks there is any weakness …" That "would be disastrous".

214. Lord Goldsmith was asked by the Inquiry about the timing and substance of his advice to Mr Blair on the impact of a veto.[82]

215. Lord Goldsmith wrote:

> "… I do not think that there was any doubt about my view. I had been clear at the meeting with the Prime Minister on 22 October 2002, and I provided a written record of my view in David Brummell's letter of 23 October 2002. Although I said I would consider the issue further, the sense that I conveyed was that I would look at the issue again to see if anything changed my mind. To that end, I did have a discussion

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[80] House of Commons, *Official Report*, 15 January 2003, column 678.
[81] Minutes 21 January 2003, Liaison Committee (House of Commons), [Minutes of Evidence], Q&A 25, 27-28, 52, 54.
[82] Statement, 17 January 2011, paragraphs 4.1-4.7.

with John Grainger [FCO Legal Counsellor] and Michael Wood on 5 November 2002 and asked for further information … but after this further consideration my view remained the same. If I had reached a different view, I am sure that I would have made this known, but I didn't. I decided therefore to wrap the issue up … in my draft advice of 14 January 2003."

216. Lord Goldsmith's meeting with Mr Blair on 22 October 2002 is described in Section 3.5.

217. Asked whether that advice was draft or definitive, Lord Goldsmith wrote: "In one sense the whole of the advice of 14 January 2003 was draft", but he "was clear" that, in relation to the exercise of a veto, "that must have been understood by the Prime Minister".

218. Asked whether that was clear to Mr Blair, Lord Goldsmith wrote:

"I believe so."

219. Asked whether Mr Blair's words that it was "necessary to be able to say in circumstances where an unreasonable veto is put down that we would still act", and Mr Blair's later comments[83] during a *BBC Newsnight* interview on 6 February, were compatible with his advice, Lord Goldsmith replied: "No."

220. Asked if he was aware of Mr Blair's statements at the time, and, if so, what he thought of them, and what action he had taken, Lord Goldsmith replied:

"I became aware at some stage of the statements the Prime Minister made, though I cannot recall precisely when. I was uncomfortable about them, and I believe that I discussed my concerns with Jack Straw and my own staff, though I can find no record of a formal note of any such conversations. I understood entirely the need to make public statements which left Saddam Hussein in no doubt about our firmness of purpose. It was more likely that he would co-operate if he thought that there was a real likelihood of conflict. My concern was that we should not box ourselves in by the public statements that were made, and create a situation which might then have to be unravelled."[84]

221. The Inquiry asked Mr Blair:

- whether he considered that what he said on 15 January and 6 February was compatible with Lord Goldsmith's advice;
- whether he had received any other legal advice on the issue;
- whether his view that action could be taken was derived from the use of force without a UNSCR in relation to Kosovo; and

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[83] "If the inspectors do report that they can't do their work properly because Iraq is not co-operating there's no doubt … that is a breach of the resolution. In those circumstances there should be a further resolution. If, however … a country unreasonably in those circumstances put down a veto then I would consider action outside of that."; Statement, 17 January 2011, paragraphs 4.5-4.6.
[84] Statement, 17 January 2011, paragraph 4.7.

- given that the need to prevent an overwhelming humanitarian catastrophe would not provide the basis for action in Iraq, the legal basis on which he thought the UK would act.[85]

222. In his statement for the Inquiry, Mr Blair did not address the substance of Lord Goldsmith's advice that, in the event of a veto, there would be no Security Council authorisation for the use of force.[86] He wrote:

> "I never believed that action in Iraq could be on the same legal basis as Kosovo … So I never raised Kosovo as a direct precedent. However in Kosovo, we had had to accept we could not get a UN resolution even though we wanted one because Russia had made it clear it would wield a political veto. So we, not the UNSC, made the judgement that the humanitarian catastrophe was overwhelming.
>
> "… [I]f it were clear and accepted by a UNSC member that there was a breach of [resolution] 1441, but nonetheless they still vetoed, surely that must have some relevance as to whether a breach had occurred, and thus to revival of resolution 678 authorising force … I was not suggesting that we, subjectively and without more, could say: this is unreasonable, but that a veto in circumstances where [a] breach was accepted, surely could not override the consequences of such a breach set out in 1441 ie they could not make a bad faith assessment."

223. Mr Blair added:

> "I was aware … of Peter Goldsmith's advice on 14 January … but … I was also aware that he had not yet had the opportunity to speak to Sir Jeremy Greenstock or to the US counterparty.
>
> "I had not yet got to the stage of a formal request for advice and neither had he got to the point of formally giving it. So I was continuing to hold to the position that another resolution was not necessary. I knew that the language of 1441 had represented a political compromise. But I also knew it had to have a meaning and that meaning, in circumstances where lack of clarity was the outcome of a political negotiation, must depend on what was understood by the parties to the negotiation.
>
> "I knew that the US had been crystal clear and explicit throughout. This was the cardinal importance of not just including the phrase 'final opportunity' which to me meant 'last chance'; but also the designation in advance of a failure to comply fully and unconditionally, as a 'material breach' – words with a plain and legally defined meaning.
>
> "Peter's view at that time was, because of the word 'assessment' in OP4 of 1441, there should be a further decision. But I was aware that … had been precisely and openly rejected by the US and UK when negotiating the text. That is why

[85] Inquiry request for a witness statement, 13 December 2010, Q7, page 4.
[86] Statement, 14 January 2011, pages 9-10.

his provisional advice was always going to be influenced by what was said and meant during the course of the negotiation of 1441. So I asked that he speak to Sir Jeremy Greenstock and later to the US."

224. Asked if he had understood that his answer in Parliament was inconsistent with the legal advice he had been given, Mr Blair told the Inquiry:

> "I was making basically a political point. However I accept entirely that there was an inconsistency between what he was saying and what I was saying … but I was saying it not … as a lawyer, but politically."[87]

225. Asked if he could really distinguish between making a political point and a legal point when presenting a legal interpretation to the House of Commons, Mr Blair told the Inquiry:

> "I understand that … I was trying to hold that line … I was less making a legal declaration … because I could not do that, but a political point, if there was a breach we had to be able to act … throughout this period of time … we were going for this second resolution. It was always going to be difficult to get it, but we thought we might …"[88]

226. Mr Blair added:

> "I tried to choose my words carefully all the way through. In the two quotes you have, I chose them less carefully …"[89]

227. Mr Blair made similar points justifying the position he had taken in his discussion with President Bush on 31 January and his interview on the *BBC Newsnight* programme on 6 February.

Cabinet, 16 January 2003

228. As promised by Mr Blair on 19 December, Cabinet discussed Iraq on 16 January 2003.

229. Mr Blair told Cabinet that the strategy remained to pursue the UN course. The inspectors needed time to achieve results. If Iraq was not complying with the demands of the Security Council, a second resolution would be agreed.

230. Mr Straw stated that the UK should not rule out the possibility of military action without a second resolution. Mr Blair repeated that statement in his concluding remarks.

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[87] Public hearing, 21 January 2011, page 71.
[88] Public hearing, 21 January 2011, page 74.
[89] Public hearing, 21 January 2011, page 75.

231. Mr Blair's decision to ask for Lord Goldsmith's draft advice and his invitation to Lord Goldsmith to attend Cabinet suggest that he intended the advice to inform discussion in Cabinet on 16 January.

232. But Mr Blair did not reveal that he had received Lord Goldsmith's draft advice which indicated that a further determination by the Security Council that Iraq was in material breach of its obligations would be required to authorise the revival of the authority to take military action in resolution 678.

233. As the Attorney General, Lord Goldsmith was the Government's Legal Adviser not just the Legal Adviser to Mr Blair.

234. There is no evidence that Mr Straw was aware of Lord Goldsmith's draft advice before Cabinet on 16 January, although he was aware of Lord Goldsmith's position.

235. There is no evidence that Lord Goldsmith had communicated his concerns to Mr Hoon or to any other member of Cabinet.

236. Mr Blair's decision not to invite Lord Goldsmith to speak meant that Cabinet Ministers, including those whose responsibilities were directly engaged, were not informed of the doubts expressed in Lord Goldsmith's draft advice about the legal basis of the UK's policy.

237. It may not have been appropriate for Lord Goldsmith to challenge the assertions made by Mr Blair and Mr Straw, which repeated their previous public statements, during Cabinet.

238. Notwithstanding the draft nature of his advice, it would have been advisable for Lord Goldsmith to have told Mr Straw and Mr Hoon of his concerns.

239. Lord Goldsmith could also have expressed his concerns subsequently in private. Other than his conversations with Mr Straw in early February, there is no evidence that he did so.

240. Ms Adams' brief for Lord Goldsmith for Cabinet on 16 January stated:

> "In the light of our discussion yesterday, if asked for your views on the interpretation of resolution 1441, you might say that:
>
> - "you have not given advice";
> - "you are waiting for further briefing from the FCO before finalising your views (alluding to the proposed Greenstock discussion)";
> - "it is therefore premature to express a view"; and

- "in any event, interpretation of resolution [1441] may be influenced by subsequent Council discussion following further Iraqi non-compliance".[90]

241. Lord Goldsmith's manuscript comments indicated that he had reservations about the first bullet point in Ms Adams' proposed "lines to take".[91]

242. At Cabinet on 16 January, Mr Blair said that:

> "… he wanted to make the United Nations route work. The inspectors were doing their job inside Iraq and he was optimistic that they would discover weapons of mass destruction and their associated programmes which had been concealed. They needed time to achieve results, including from better co-ordinated intelligence. If Iraq was not complying with the demands of the United Nations, he believed the … Security Council would pass a second resolution."[92]

243. Mr Blair told his colleagues that evidence from the inspectors would make a veto of a second resolution by other Permanent Members of the Security Council "less likely":

> "Meanwhile, British and American forces were being built up in the Gulf. If it came to conflict, it would be important for success to be achieved quickly. The [military] build up was having an effect on the Iraqi regime, with internal support dwindling for President Saddam Hussein … The strategy remained to pursue the United Nations course."

244. Mr Blair concluded by telling Cabinet that he would be meeting President Bush at the end of the month to discuss Iraq, after Dr Blix's report to the Security Council on 27 January.

245. Mr Straw said:

> "… he was aware of anxieties about the possibility of having to diverge from the United Nations path. There was a good prospect of achieving a second resolution. Many had been doubtful about achieving the first resolution; in the event, the … Security Council vote had been unanimous. While sticking with the United Nations route we should not rule out the possibility of military action without a second resolution. Voting decisions in the Security Council could be driven by domestic politics, not the demands of the international situation."

246. Mr Straw added that:

> "In his recent contacts with the Muslim and Arab world, all could see the benefit of Saddam Hussein's demise. He had utterly rejected the notion that we were hostile

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[90] Minute Adams to Attorney General, 15 January 2003, 'Cabinet Meeting, Thursday 16 January: Iraq'.
[91] Manuscript comment Goldsmith on Minute Adams to Attorney General, 15 January 2003, 'Cabinet Meeting, Thursday 16 January: Iraq'.
[92] Cabinet Conclusions, 16 January 2003.

to Islam … Saddam Hussein had attacked his own people and his neighbours – all of whom were Muslims."

247. Summing up the discussion, Mr Blair said:

"… the strategy based on the United Nations route was clear, although the uncertainties loomed large and there was a natural reluctance to go to war. It was to be expected that the public would want the inspectors to find the evidence before military action was taken. Pursuing the United Nations route was the right policy, but we should not rule out the possibility of military action without a second resolution. The priorities for the immediate future were:

- improved communications, which would set out the Government's strategy and be promoted by the whole Cabinet;
- preparatory work on planning the aftermath of any military action and the role of the United Nations in that, which should in turn be conveyed to the Iraqi people so that they had a vision of a better life in prospect; and
- contingency work on the unintended consequences which could arise from the Iraqi use of weapons of mass destruction, environmental catastrophe or internecine strife within Iraq."

Lord Goldsmith's meeting with Sir Jeremy Greenstock, 23 January 2003

248. Ms Adams sent Sir Jeremy Greenstock a copy of Lord Goldsmith's draft advice, stating that it indicated the view he had "provisionally formed regarding the interpretation of the resolution"; and that:

"The Attorney would welcome your comments on the view he has reached. In particular, he would be interested to know if you feel that there are any significant arguments which he has overlooked which would point to a different conclusion. The note has been passed by the Attorney to No.10, but has not been circulated more widely. I have been asked to stress that the note should not be copied further."[93]

249. In preparation for a meeting between Sir Jeremy and Mr Blair on 23 January to discuss negotiation of a second resolution and related issues, Mr Rycroft told Mr Blair that Sir Jeremy would explore Mr Blair's "ideas" with Lord Goldsmith later that day.[94]

250. There is no mention of the issues to be discussed with Lord Goldsmith in the No.10 record of the meeting with Sir Jeremy.[95]

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[93] Letter Adams to Greenstock, 21 January 2003, 'Meeting with the Attorney General, 23 January'.
[94] Minute Rycroft to Prime Minister, 22 January 2003, 'Iraq: Meeting with Jeremy Greenstock'.
[95] Minute Rycroft to Manning, 23 January 2003, 'Iraq: Prime Minister's Meeting with Jeremy Greenstock'.

251. Sir Jeremy Greenstock wrote to Sir David Manning on 24 January with his perspective on the discussion with Lord Goldsmith.[96]

252. Sir Jeremy recorded that the "central issue" debated was whether the wording of OP4 "meant that the Council had something substantive to do in the second stage (viz determining that a breach was material and deciding on consequent action) before action could be taken on the further material breach; or whether further discussion/ consideration in the Council … sufficed".

253. Sir Jeremy said he had told Lord Goldsmith that:

- the negotiations had "settled the wording of OPs 11-13 before a draft OP4 was ever proposed";
- in that "tussle", the "French/Russians/ Chinese lost (their … EOVs were indicative in this respect) an explicit requirement for a new decision by the Council";
- France "wanted 'further material breach, when assessed', and accepted with difficulty the final wording. This suggested they saw the difference between the two";
- the US had come to the UN "to give the Security Council a further opportunity to be the channel for action"; and
- the "intention of the sponsors was that the fact of a further material breach would be established in a report from the inspectors".

254. Sir Jeremy had argued that Lord Goldsmith's draft advice "took insufficient account of the alternative routes to OP12 … The fact that OP4 was a late addition was an indication that the route through OPs 1, 2, 11, 12 and 13 had separate validity." There was "no question in the co-sponsors' minds of … conceding that the Council had to assess what was a breach".

255. Sir Jeremy's view was that "the natural interpretation of 'assessment' … was that the Council would assess the options for the next steps … after a material breach had occurred".

256. Lord Goldsmith's position had been to argue "the opposite case, that the late addition of 'assessment' … must add something significant".

257. Sir Jeremy identified "an intermediate interpretation, whereby the fact of the material breach particularly if reported by the inspectors as directed in OP11, automatically brought the final opportunity to an end". Sir Jeremy suggested that "interpretation was … given weight by the absence of clear wording in OP12 on the need for a further decision. And it had a close precedent in the US/UK action on 16 December 1998 …"

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[96] Letter Greenstock to Manning, 24 January 2003, [untitled].

258. Sir David Manning submitted the letter to Mr Blair, commenting: "To be aware that Jeremy G[reenstock] is in debate with the AG."[97]

259. A copy of Sir Jeremy's letter was sent only to Lord Goldsmith's office.

260. In a minute to Lord Goldsmith on 24 January, Ms Adams addressed the points made by Sir Jeremy on the textual arguments; the history of the negotiations; the precedent provided by resolution 1205 (1998); and references that had been made by Sir Jeremy to a paper submitted by Professor Christopher Greenwood Q.C., Professor of International Law, LSE, to the Foreign Affairs Committee (FAC) in October 2002.[98]

261. Ms Adams concluded:

> "Overall, although I don't believe that the arguments can all be taken without challenge, I certainly think they strengthen the case for the second view and make the balance of view as to which is the better of the two alternative interpretations rather closer."

262. Ms Adams suggested that Lord Goldsmith "might want to consider" whether he "would like to put these arguments to Michael Wood". Although that would "probably mean disclosing to him your provisional view of the resolution and perhaps even the draft advice".

263. Ms Adams commented to Lord Goldsmith that Sir Jeremy's letter to Sir David Manning "helpfully sets out his view of the arguments, although I don't think there are any points which are not covered in my minute of 24 January".[99]

264. Lord Goldsmith's undated minute to Ms Adams, inviting her to draft a note setting out his views, suggested that he did not share Sir Jeremy's view that the wording of OP4 was the "central issue".[100]

265. Lord Goldsmith wrote that Sir Jeremy's main argument had been that there was "no need to focus on the words 'for assessment' in OP4 because there is a trigger in OP1 suspended by OP2 but which suspension will be lifted if Iraq 'fails to take the final opportunity'".

266. Lord Goldsmith wrote that he did "not consider that this argument can in fact work to create a form of automaticity if the final opportunity is not taken". He focused on the fact that OPs 4 and 11 both led to OP12 and the need for the Security Council to meet "to consider the situation … and the need for full compliance with all the relevant

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[97] Manuscript comment Manning to PM, 25 January 2003, on Letter Greenstock to Manning, 24 January 2003, [untitled].
[98] Minute Adams to Attorney General, 24 January 2003, 'Iraq: Resolution 1441: Sir Jeremy Greenstock's points'.
[99] Manuscript comment Adams to AG, 27 January 2003, on Letter Greenstock to Manning, 24 January 2003, [untitled].
[100] Minute Attorney General to Adams, [24 January 2003], [untitled].

Security Council resolutions in order to secure international peace and security"; and that the resolution had to be read as a whole. In his view, that meant the Council had to "consider what is needed in order to secure international peace and security and, in particular, whether full compliance is necessary". OP12 required "a determination by the Security Council of what is now required".

267. Lord Goldsmith also addressed Sir Jeremy's argument that resolution 1205 (1998) provided a precedent. Lord Goldsmith wrote that the point was not that the resolution validated the revival argument; he did not regard the fact that there was "strong evidence of disagreement of other States with the proposition" as "a matter of concern". The question was "not whether such an argument exists but what are the conditions which attach to its existence".

Mr Blair's interview on *BBC Breakfast with Frost*, 26 January 2003

268. In an interview on 26 January, Mr Blair stated explicitly that failure to co-operate with the inspectors would be a material breach of resolution 1441.

269. In an extended interview on *BBC TV*'s *Breakfast with Frost* on 26 January, Mr Blair set out in detail his position on Iraq.[101]

270. Pressed as to whether non-compliance rather than evidence of weapons of mass destruction justified "a war", Mr Blair replied that he "profoundly" disagreed with the idea that a refusal to co-operate was of a "lesser order":

> "… if he fails to co-operate in being honest and he is pursuing a programme of concealment, that is every bit as much a breach as finding, for example, a missile or chemical agent."

271. Asked whether a second resolution was needed, required or preferred, Mr Blair replied:

> "Of course we want a second resolution and there is only one set of circumstances in which I've said that we would move without one … all this stuff that … we're indifferent … is nonsense. We're very focused on getting a UN resolution.
>
> "… [Y]ou damage the UN if the UN inspectors say he's not co-operating, he's in breach, and the world does nothing about it. But I don't believe that will happen …"

Options for a second resolution

272. Intensive discussions on a second resolution took place at the end of January.

273. Ms Wilmshurst wrote to Ms Adams on 27 January with draft texts for two options for a second resolution, one expressly authorising the use of force, the other containing

[101] *BBC News*, 26 January 2003, *Prime Minister prepares for war.*

implicit authority.[102] Ms Wilmshurst wrote that no decisions had been taken on the drafts and no discussions had begun with the US, but the FCO would welcome any comments Lord Goldsmith might wish to make on the options.

274. Ms Adams replied that, having regard to the terms of resolution 1441 and the previous practice of the Council, Lord Goldsmith considered that "where the Security Council determines that Iraq had committed a sufficiently serious breach of the conditions of the cease-fire imposed by resolution 687 (1991)" to revive the authorisation in resolution 678(1990), an implicit resolution would be sufficient to revive the authorisation to use force in resolution 678.[103]

275. The "critical element" was that "there has been a finding, in whatever form, by the Security Council itself", and that "A Presidential Statement would also be sufficient".

276. Ms Adams wrote that Lord Goldsmith did not at that stage intend to offer any detailed drafting comments on the proposed text, "given that it is likely that they will change in discussions with the US".

277. In relation to the possibility of issuing an "ultimatum", Lord Goldsmith's view was that "would need to be expressed in very clear terms so there is no room for doubt whether or not Iraq had met the Council's demands. Otherwise there is a risk of opening up a debate about whether there is a need for a further determination by the Council that Iraq had failed to comply with the new ultimatum."

278. Ms Adams recorded that Lord Goldsmith wished to make clear that a second resolution authorising the use of force "would not give an unlimited right to use force against Iraq". Lord Goldsmith considered that any use of force would have to be directed towards the objective of securing compliance with the disarmament obligations, which the Security Council had already determined in resolution 687(1991) and subsequent relevant resolutions were "necessary requirements for restoring international peace and security in the area". The use of force would, moreover, have to be limited to what was "necessary to enforce those obligations, and be a proportionate response to Iraq's breach".

279. Ms Adams explicitly stated that Lord Goldsmith's comments were "made without prejudice to the separate question … of whether a second resolution is legally required". He had also asked to be "kept closely informed of developments" and wished "to have the opportunity to comment on any draft which is to be tabled for discussion with other members of the Council".

280. Mr Grainger wrote to Mr Macleod, to convey the substance of the advice in Ms Adams' letter.[104]

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[102] Letter Wilmshurst to Adams, 27 January 2003, 'Iraq: Second Resolution'.
[103] Letter Adams to Wilmshurst, 30 January 2003, 'Iraq: Second Resolution'.
[104] Letter Grainger to Macleod, 31 January 2003, 'Iraq: Second Resolution'.

Lord Goldsmith's advice, 30 January 2003

281. Ms Adams had written to Sir David Manning on 28 January, recording that Lord Goldsmith had found Sir Jeremy Greenstock's letter of 24 January "a useful record of Sir Jeremy's arguments on which the Attorney is reflecting"; but that Lord Goldsmith:

> "… would like to make clear, in order to avoid any doubt about his position, that the purpose of the meeting was to allow the Attorney to hear the best arguments which could be made in support of the view that resolution 1441 can be interpreted as authorising the use of force, under certain conditions, without a further Council decision. The Attorney was therefore principally in listening mode …"[105]

282. Ms Adams wrote that there was "one point on which Lord Goldsmith would find it helpful to have further information". Sir Jeremy's arguments had relied "heavily on the negotiating history … and the fact that other delegations sought, but failed to obtain, certain language in OPs 4 and 12". Lord Goldsmith wanted to know "if possible, to what extent other members of the Council were aware of these bilateral discussions and therefore the significance of the language". Lord Goldsmith also wished to take up Sir Jeremy's suggestion to meet US counterparts, including to "hear their views on what is necessary in practice to trigger the authorisation to use force".

283. Ms Adams concluded that Lord Goldsmith was conscious that Mr Blair was due to meet President Bush later that week. The letter stated:

> "The Prime Minister is aware of the Attorney's provisional view of the interpretation of the resolution. However, if the Attorney is to consider the arguments of his US counterparts before reaching a definitive view, he will not be in a position to finalise his advice this week. The Attorney would therefore like to know whether you see any difficulty with this and whether the Prime Minister would wish to have the Attorney's considered advice before he departs for the US."

284. Sir David Manning wrote on Ms Adams' letter that someone should respond to Lord Goldsmith's question about advice for Mr Blair in his absence.[106]

285. Baroness Morgan commented: "not necessary before w/end".[107]

286. Mr Rycroft recorded: "I replied by phone as Sally said."[108]

287. A copy of Ms Adams' letter was sent to Sir Jeremy Greenstock, who responded to Lord Goldsmith's question on 29 January.[109]

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[105] Letter Adams to Manning, 28 January 2003, 'Iraq'.
[106] Manuscript comment Manning on Letter Adams to Manning, 28 January 2003, 'Iraq'.
[107] Manuscript comment Morgan on Letter Adams to Manning, 28 January 2003, 'Iraq'.
[108] Manuscript comment Rycroft on Letter Adams to Manning, 28 January 2003, 'Iraq'.
[109] Letter Greenstock to Manning, 29 January 2003, [untitled].

288. The points made by Sir Jeremy included:

- the early drafts of what became resolution 1441 "were discussed among members of the P5, bilaterally, and in extensive and frequent conversations at Ministerial level";
- a text was not finally "agreed by" all members of the P5 until 7 November; and
- he had "convened meetings with the non-Permanent Members during the drafting process to make sure they were aware of developments. The significance of the proposals for what became OP 4, 11 and 12 were fully discussed on these occasions."

289. Despite being told that advice was not needed for Mr Blair's meeting with President Bush on 31 January, Lord Goldsmith wrote on 30 January to emphasise that his view remained that resolution 1441 did not authorise the use of military force without a further determination by the Security Council.

290. That was the third time Lord Goldsmith had felt it necessary to put his advice to Mr Blair in writing without having been asked to do so; and on this occasion he had been explicitly informed that it was not needed.

291. Lord Goldsmith had made only a "provisional" interpretation of resolution 1441, but his position was firmly and clearly expressed.

292. It was also consistent with the advice given by Mr Wood to Mr Straw.

293. Despite the message that his advice was not needed before the meeting with President Bush, Lord Goldsmith decided to write to Mr Blair on 30 January, stating:

> "I thought you might wish to know where I stand on the question of whether a further decision of the Security Council is legally required in order to authorise the use of force against Iraq."[110]

294. Lord Goldsmith informed Mr Blair that the meeting with Sir Jeremy Greenstock had been "extremely useful", and that "it was in fact the first time that the arguments in support of the case that there is no need for a further Council decision had been put to me in detail". He had "considered carefully" the "important points" Sir Jeremy had made. Lord Goldsmith wrote that he was "preparing a more detailed note of advice" which would set out his "conclusions in relation to those arguments".

295. Lord Goldsmith added that he had "indicated to Sir David Manning" that he "would welcome the opportunity, if arrangements can be made in time, to hear the views of my US counterparts on the interpretation of resolution 1441". He was "not convinced" that it would "make any difference to my view", but he remained "ready to hear any arguments".

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[110] Minute Goldsmith to Prime Minister, 30 January 2003, 'Iraq'.

296. Lord Goldsmith concluded:

> "… notwithstanding the additional arguments put to me since our last discussion, I remain of the view that the correct legal interpretation of resolution 1441 is that it does not authorise the use of military force without a further determination by the Security Council, pursuant to paragraph 12 of the resolution, that Iraq has failed to take the final opportunity granted by the Council. I recognise that arguments can be made to support the view that paragraph 12 of the resolution merely requires a Council discussion rather than a further decision. But having considered the arguments on both sides, my view remains that a further decision is required."

297. Sir David Manning commented: "Clear advice from Attorney on need for further resolution."[111]

298. Mr Rycroft wrote: "I specifically said that we did not need further advice this week."[112]

299. The underlining of Lord Goldsmith's concluding paragraph quoted above is Mr Blair's and he wrote alongside the paragraph: "I just don't understand this."[113]

300. Asked by the Inquiry why he had written to Mr Blair at that point, Lord Goldsmith told the Inquiry:

> "I discovered that Mr Blair was going to see President Bush again at the end of January and there was concern again about views being expressed that I had now been persuaded by Sir Jeremy, so I did send a short minute to the Prime Minister to make sure that he didn't think that was the case. I hadn't been asked for it, but I sent it."[114]

301. Asked to explain what it was he did not understand about Lord Goldsmith's advice, Mr Blair wrote:

> "When I received the advice on 30 January – which again was provisional – I did not understand how he could reach the conclusion that a further decision was required, when expressly we had refused such language in 1441."[115]

302. Although Mr Blair commented that he did not understand Lord Goldsmith's conclusion, it was consistent with the views Lord Goldsmith had set out in his meeting with Mr Blair on 22 October 2002, and subsequently in his conversations with Mr Powell on 11 November and 19 December and in his draft advice given to Mr Blair and discussed with him on 14 January 2003.

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[111] Manuscript comment Manning on Minute Goldsmith to Prime Minister, 30 January 2003, 'Iraq'.
[112] Manuscript comment Rycroft on Minute Goldsmith to Prime Minister, 30 January 2003, 'Iraq'.
[113] Manuscript comment Blair on Minute Goldsmith to Prime Minister, 30 January 2003, 'Iraq'.
[114] Public hearing, 27 January 2010, page 90.
[115] Statement, 14 January 2011, page 10.

303. The issue that Lord Goldsmith was addressing in his advice to Mr Blair was not what the UK's objective had been in negotiating resolution 1441 but its legal effect in the circumstances of early 2003.

304. Mr Blair referred again to this manuscript comment in his oral evidence when recalling the No.10 meeting which had taken place on 17 October 2002, "which we then minuted out, including to Peter"; and his meeting with Lord Goldsmith on 22 October 2002.

305. Mr Blair said:

> "… we had agreed on 17 October that there were clear objectives for the resolution and those objectives were, I think we actually say this very plainly, the ultimatum goes into 1441. If he breaches the ultimatum action follows. So this was the instruction given. I mean, I can't remember exactly what I said after the 22 October, but I should imagine I said "Well, you had better make sure it does meet our objectives …"[116]

306. Mr Blair added:

> "… the thing that was problematic for me throughout, and it is why I wrote … 'I just don't understand this' is that the whole point about our instructions to our negotiators was, 'Make sure that this resolution is sufficient because we can't guarantee we are going to go back into a further iteration of this or a second resolution'."

307. Mr Blair's meeting on 17 October and the meeting between Lord Goldsmith and Mr Blair on 22 October are described in Section 3.5.

US agreement to pursue a second resolution

308. In the meeting on 31 January, President Bush agreed to support a second resolution to help Mr Blair.

309. A briefing paper prepared by the FCO Middle East Department on 30 January described the objectives for Mr Blair's meeting with President Bush as:

> "to convince President Bush that:
>
> - our strategy, though working, needs more time;
> - the military campaign will be very shocking in many parts of the world, especially in its opening phase (five times the bombing of the Gulf war);
> - a second UN Security Council resolution (i) would greatly strengthen the US's position, (ii) is politically essential for the UK, and almost certainly legally essential as well;

[116] Public hearing, 21 January 2011, pages 55-56.

- we should support Saudi ideas for disarmament and regime change with UN blessing; and
- the US needs to pay much more attention, quickly, to planning on 'day after' issues; and that the UN needs to be central to it."[117]

310. On the legal position, a background note stated:

> "There are concerns that a second resolution authorising the use of force is needed before force may lawfully be employed against Iraq to enforce the WMD obligations in the UNSCRs. If a draft resolution fails because of a veto (or indeed because it does not receive nine positive votes), the fact that the veto is judged 'unreasonable' is immaterial from a legal point of view."

311. In the meeting on 31 January, Mr Blair confirmed that he was:

> "… solidly with the President and ready do whatever it took to disarm Saddam."[118]

312. Mr Blair said he firmly believed that it was essential that we tackle the threats posed by WMD and terrorism. He wanted a second resolution if we could possibly get one because it would make it much easier politically to deal with Saddam Hussein. He believed that a second resolution was in reach. A second resolution was an insurance policy against the unexpected.

313. Mr Blair set out his position that the key argument in support of a second resolution must rest on the requirement in 1441 that Saddam Hussein must co-operate with the inspectors. Dr Blix had already said on 27 January that this was not happening; he needed to repeat that message when he reported to the Security Council in mid-February and at the end of February/early March. That would help to build the case for a second resolution.

314. Mr Blair added that there were various uncertainties:

- Saddam Hussein might claim at the eleventh hour to have had a change of heart; and
- we could not be sure that Dr Blix's second and third reports would be as helpful as his first.

315. Mr Blair was, therefore, flexible about the timing of the second resolution. The key was to ensure that we secured it. We had taken the UN route in the expectation that the UN would deal with the Iraq problem, not provide an alibi for avoiding the tough decisions. The resolution was clear that this was Saddam Hussein's final opportunity. We had been very patient. Now we should be saying that the crisis must be resolved in weeks, not months. The international community had to confront the challenges of WMD and terrorism now.

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[117] Paper FCO [MED], 30 January 2003, 'Prime Minister's visit to Camp David, 31 January: Iraq'.
[118] Letter Manning to McDonald, 31 January 2003, 'Prime Minister's Conversation with President Bush on 31 January'.

316. Mr Blair argued that the second resolution:

> "… was not code for delay or hesitation. It was a clear statement that Saddam was not co-operating and that the international community was determined to do whatever it took to disarm him. We needed to put the debate in a wider context. The international community had to confront the challenges of WMD and terrorism now, whether in Iraq or North Korea, otherwise the risks would only increase."

Public statements by Mr Blair, February 2003

317. In early February, Mr Blair made public statements implying that the UK could take part in military action if a second resolution was vetoed.

318. In the House of Commons on 5 February, Mr Chris Mullin (Labour) told Mr Blair that he:

> "… could not support an attack on Iraq unless it was specifically endorsed by a second resolution of the United Nations Security Council."[119]

319. Mr Blair responded:

> "I have set out my position … on many occasions. Surely, the position has to be this: if there is a breach of the original United Nations resolution 1441, a second resolution should issue.
>
> "That was the anticipated outcome. What resolution 1441 says is that the inspectors go into Iraq, and if they notify the facts that amount to a material breach, a second resolution should issue. That is why I believe that if the inspectors continue to say, as they are now, that Iraq is not co-operating, there will be a second resolution. The only circumstances in which I have left room for us to manoeuvre are those in which it is clear that the inspectors are finding that Iraq is not co-operating, so it is clear that Iraq is in material breach, but for some reason someone puts down what I would describe as an unreasonable and capricious use of the veto.
>
> "I do not believe that that will happen and I hope that it will not, but I do not think that it is right to restrict our freedom of manoeuvre in those circumstances because otherwise, the original spirit and letter of resolution 1441 would itself be breached. I believe and hope that we will resolve this issue through the United Nations."[120]

320. Mr Blair gave an extended interview about Iraq and public services on *BBC TV's Newsnight* on 6 February.[121]

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[119] House of Commons, *Official Report*, 5 February 2003, column 270.
[120] House of Commons, *Official Report*, 5 February 2003, column 270.
[121] *BBC News*, 6 February 2003, *Transcript of Blair's Iraq Interview.*

321. During the interview Mr Jeremy Paxman challenged Mr Blair on a number of issues, including whether Mr Blair would "give an undertaking" that he would "seek another UN resolution specifically authorising the use of force".

322. Explaining his position on a second resolution, Mr Blair stated that "the only circumstances in which we would agree to use force" would be with a further resolution, "except for one caveat". That was:

> "If the inspectors do report that they can't do their work properly because Iraq is not co-operating, there's no doubt that under the terms of the existing United Nations resolution that that's a breach of the resolution. In those circumstances there should be a further resolution.
>
> "… If a country unreasonably in those circumstances put down a veto then I would consider action outside of that."

323. Pressed whether he considered he was "absolutely free to defy the express will of the Security Council", Mr Blair responded that he could not "just do it with America", there would have to be "a majority in the Security Council", and:

> "… the issue of a veto doesn't even arise unless you get a majority in the Security Council. Secondly, the choice … is … If the will of the UN is the thing that is most important and I agree that it is, if there is a breach of resolution 1441 … and we do nothing then we have flouted the will of the UN."

324. Asked if he was saying that there was already an authorisation for war, Mr Blair responded:

> "No, what I am saying is … In the resolution [1441] … we said that Iraq … had … a final opportunity to comply.
>
> "The duty of compliance was defined as full co-operation with the UN inspectors. The resolution … say[s] 'any failure to co-operate fully is a breach of this resolution and serious consequences i.e. action, would follow' … [W]e then also put in that resolution that there will be a further discussion in the Security Council. But the clear understanding was that if the inspectors say that Iraq is not complying and there is a breach … then we have to act.
>
> "… [I]f someone … says … I accept there's a breach … but I'm issuing a veto, I think that would be unreasonable … I don't think that's what will happen. I think that … if the inspectors do end up in a situation where they're saying there is not compliance by Iraq, then I think a second resolution will issue."

325. Asked whether he agreed it was "important to get France, Russia and Germany on board", Mr Blair replied, "Yes … That's what I am trying to get."

326. Asked if he would "give an undertaking that he wouldn't go to war without their agreement", Mr Blair replied:

> "… supposing in circumstances where there plainly was [a] breach … and everyone else wished to take action, one of them put down a veto. In those circumstances it would be unreasonable.
>
> "Then I think it [not to act] would be wrong because otherwise you couldn't uphold the UN. Because you would have passed your resolution and then you'd have failed to act on it."

327. Asked whether it was for the UK to judge what was "unreasonable", Mr Blair envisaged that would be in circumstances where the inspectors, not the UK, had reported to the Council that they could not do their job.

328. Asked if the US and UK went ahead without a UN resolution would any other country listen to the UN in the future, Mr Blair replied that there was "only one set of circumstances" in which that would happen. Resolution 1441 "effectively" said that if the inspectors said they could not do their job, a second resolution would issue: "If someone then … vetoes wrongly, what do we do?"

329. In his evidence to the Inquiry Mr Blair explained the position he had adopted in his meeting with President Bush and subsequent public statements. He drew the Inquiry's attention to the political implications of acknowledging publicly the legal advice he had been given while there was still an unresolved debate within the UK Government.

330. Mr Blair also emphasised that he had specifically said that action would be taken only in circumstances where the inspectors had reported that they could no longer do their job.

331. Mr Blair told the Inquiry that the main objective of the meeting on 31 January was to convince President Bush that it was necessary to get a second resolution.[122] That "was obviously going to make life a lot easier politically in every respect". Mr Blair added: "we took the view that that was not necessary, but, obviously, politically, it would have been far easier".

332. Asked why he had not told President Bush that he had been advised that a further determination of the Security Council would be necessary to authorise the use of force, Mr Blair wrote in his witness statement:

> "In speaking to President Bush on 31 January 2003 I was not going to go into this continuing legal debate, internal to the UK Government. I repeated my strong commitment, given publicly and privately to do what it took to disarm Saddam."[123]

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[122] Public hearing, 29 January 2010, pages 95-96.
[123] Statement, 14 January 2011, page 10.

333. Mr Blair subsequently told the Inquiry that, in the context of trying to sustain an international coalition:

> "My desire was to keep the maximum pressure on Saddam because I hoped we could get a second resolution with an ultimatum because that meant we could avoid the conflict altogether, or then have a clear consensus for removing Saddam. So I was having to carry on whilst this internal legal debate was continuing and try to hope we could overcome it."[124]

334. Asked if he had felt constrained in making a commitment to President Bush by the advice Lord Goldsmith was continuing to give him, Mr Blair told the Inquiry:

> "No. I was going to take the view, and I did right throughout that period, there might come a point at which I had to say to the President of the United States, to all the other allies, 'I can't be with you.' I might have said that on legal grounds if Peter's advice had not, having seen what the Americans told him about the negotiating process, come down on the other side. I might have had to do that politically. I was in a very, very difficult situation politically. It was by no means certain that we would get this thing through the House of Commons.
>
> "… I was going to continue giving absolute and firm commitment until the point at which definitively I couldn't …"[125]

335. Mr Blair added he had taken that position:

> "… because had I raised any doubt at that time, if I had suddenly said 'Well, I can't be sure we have got the right legal basis'. If I started to say that to President Bush, if I had said that publicly, when I was being pressed the whole time 'Do you need a second resolution, is it essential …?' … but I wasn't going to be in a position where I stepped back until I knew I had to, because I believed that if I started to articulate this, in a sense saying 'Look, I can't be sure', the effect of that both on the Americans, on the coalition and most importantly on Saddam, would have been dramatic."

336. Mr Blair acknowledged that holding that line was uncomfortable, "especially in the light of what Peter [Goldsmith] had said".

337. Mr Blair told the Inquiry that President Bush:

> "… knew perfectly well that we needed a second resolution. We had been saying that to him throughout … [W]e had not had the final advice yet …
>
> "… I was not going to … start putting the problem before the President … until I was in a position where I knew definitely that I had to."[126]

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[124] Public hearing, 21 January 2011, page 65.
[125] Public hearing, 21 January 2011, pages 67-68.
[126] Public hearing, 21 January 2011, pages 68-69.

338. Mr Blair added:

> "If I had started raising legal issues at that point with the President, I think it would have started to make him concerned as to whether we were really going to be there or not and what was really going to happen.
>
> "Now I would have had to have done that because in the end whatever I thought about the legal position, the person whose thoughts mattered most and definitively were Peter's, but I wasn't going to do that until I was sure about it."[127]

339. Subsequently, Mr Blair added that it had been "very, very difficult". He was answering questions in the House of Commons and giving interviews and:

> "… having to hold the political line in circumstances where there was this unresolved … debate within the UK Government …
>
> "If I had … in January and February said anything that indicated there was a breach in the British position … it would have been a political catastrophe for us."[128]

340. Mr Blair told the Inquiry that these difficulties explained why he had wanted to get Lord Goldsmith "together with the Americans and resolve this once and for all".[129]

A disagreement between Mr Straw and Mr Wood

341. Mr Straw had visited Washington on 23 January and had repeated the political arguments for trying to get a second resolution.

342. In a meeting on 23 January, Mr Straw and Mr Colin Powell, US Secretary of State, discussed the inspectors' reports due to be presented to the Security Council on 27 January, the need to "shift the burden of proof to Iraq", and the need to ensure that there were no differences between the US and UK.[130]

343. In his subsequent meeting with Vice President Dick Cheney, Mr Straw said that "the key question was how to navigate the shoals between where we were today and a possible decision to take military action".[131] The UK would be "fine" if there was a second resolution; and that it would be "ok if we tried and failed (a la Kosovo). But we would need bullet-proof jackets if we did not even try". In response to Vice President Cheney's question whether it would be better to try and fail than not to try at all, Mr Straw said the former.

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[127] Public hearing, 21 January 2011, pages 69-70.
[128] Public hearing, 21 January 2011, pages 70-71.
[129] Public hearing, 21 January 2011, page 73.
[130] Telegram 91 Washington to FCO London, 23 January 2003, 'Iraq: Foreign Secretary's Lunch with US Secretary of State'.
[131] Telegram 93 Washington to FCO London, 23 January 2003, 'Foreign Secretary's Meeting with Vice President of the United States, 23 January'.

344. Mr Wood had warned Mr Straw on 24 January that "without a further decision by the Council, and absent extraordinary circumstances", the UK would not be able lawfully to use force against Iraq.

345. Mr Wood wrote to Mr Straw on 22 and 24 January about the terms of the discussions on a second resolution.

346. Commenting on advice to Mr Straw for his visit to Washington, Mr Wood wrote:

> "The Foreign Secretary will know that the legal advice is that a second resolution authorising the use of force is needed before any force may lawfully be employed against Iraq to enforce the WMD obligations in the SCRs. If a draft resolution fails because of a veto (or indeed because it does not receive nine positive votes), the fact that the veto (or failure to vote in favour) is 'unreasonable' is neither here nor there from a legal point of view. Further, who is to judge what is 'unreasonable'?"[132]

347. In his second minute, Mr Wood expressed concern about Mr Straw's reported remarks to Vice President Cheney.[133]

348. Mr Wood wrote that Kosovo was "no precedent": the legal basis was the need to avert an overwhelming humanitarian catastrophe; no draft resolution had been put to the Security Council; and no draft had been vetoed. He hoped there was:

> "… no doubt in anyone's mind that without a further decision of the Council, and absent extraordinary circumstances (of which at present there is no sign), the United Kingdom cannot lawfully use force against Iraq to ensure compliance with its SCR WMD obligations. To use force without Security Council authority would amount to the crime of aggression."

349. Mr Straw told Mr Wood he did not accept that view and that there was a strong case for a different view.

350. Mr Straw discussed the advice with Mr Wood on 28 January.[134]

351. Mr Straw wrote to Mr Wood the following day: "I note your advice, but I do not accept it."[135]

352. Quoting his experiences as Home Secretary, Mr Straw stated that, "even on apparently open and shut issues", he had been advised: "there could be a different view, honestly and reasonably held. And so it turned out to be time and again."

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[132] Minute Wood to PS [FCO], 22 January 2003, 'Iraq: Legal Position'.
[133] Minute Wood to PS [FCO], 24 January 2003, 'Iraq: Legal Basis for Use of Force'.
[134] Manuscript comment McDonald to Wood, 28 January 2003, on Minute Wood to PS [FCO], 24 January 2002, 'Iraq: Legal Basis for Use of Force'.
[135] Minute Straw to Wood, 29 January 2003, 'Iraq: Legal Basis for Use of Force'.

353. Mr Straw concluded:

> "I am as committed as anyone to international law and its obligations, but it is an uncertain field. There is no international court for resolving such questions in the manner of a domestic court. Moreover, in this case, the issue is an arguable one … I hope (for political reasons) we can get a second resolution. But there is a strong case to be made that UNSCR 678, and everything which has happened since (assuming Iraq continues not to comply), provides a sufficient basis in international law to justify military action."

354. Mr Straw sent copies of his letter to Lord Goldsmith and to Sir David Manning as well as to senior officials in the FCO.

355. Lord Goldsmith reminded Mr Straw of the duties of Legal Advisers and that the principal mechanism for resolving an issue when a Minister challenged the legal advice he or she had received was to seek an opinion from the Law Officers.

356. Lord Goldsmith wrote to Mr Straw on 3 February stating that he was not commenting "on the substance of the legal advice in relation to Iraq", which he would "deal with separately", but on the points Mr Straw had made in his letter to Mr Wood of 29 January about the role of Government Legal Advisers. They had already discussed that issue, but Lord Goldsmith thought it right to record his views.

357. Lord Goldsmith wrote:

> "It is important for the Government that its lawyers give advice which they honestly consider to be correct … they should give the advice they believe in, not the advice which they think others want to hear. To do otherwise would undermine their function … in giving independent objective and impartial advice. This is not to say … that lawyers should not be positive and constructive in helping the Government achieve its policy objectives through lawful means and be open-minded in considering other points of view.
>
> "But if a Government legal adviser genuinely believes that a course of action would be unlawful, then it is his or her right and duty to say so. I support this right regardless of whether I agree with the substance of the advice which has been given. Where a Minister challenges the legal advice he or she has received, there are established mechanisms to deal with this. The principal such mechanism is to seek an opinion from the Law Officers."[136]

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[136] Minute Goldsmith to Foreign Secretary, 3 February 2003, [untitled].

358. Mr Straw responded on 20 February to Lord Goldsmith's letter of 3 February, acknowledging that the substantive issue – Iraq – was being dealt with separately, and stating:

> "For the record, I want to make it completely clear that I fully respect the integrity of Michael Wood and his colleague legal advisers. I believe that officials always offer their best advice. At the same time Ministers must be able to raise legitimate questions about the advice they receive. As far as the implementation of Iraq UNSCRs is concerned, this is an uncertain area of law. The US, Netherlands and Australian Government legal advisers all, I understand, take the view that SCR 1441 provides legal sanction for military operations. The full range of views ought to be reflected in the advice offered by our Legal Advisers."[137]

359. Mr Straw, Lord Goldsmith and Sir Michael Wood all conceded that this correspondence was unusual.

360. Sir Michael Wood told the Inquiry why he had felt it necessary to send his note of 24 January:

> "It is something I didn't normally have to do, but I did it quite frequently during this period. It was because of the statement that he was recorded as saying to the [US] Vice President [about Kosovo]. That was so completely wrong, from a legal point of view, that I felt it was important to draw that to his attention … [W]e had a bilateral meeting at which he took the view that I was being very dogmatic and that international law was pretty vague and that he wasn't used to people taking such a firm position."[138]

361. Sir Michael emphasised that the meeting had been very amicable and that although it was quite unusual to receive a minute like the one from Mr Straw, he had not taken it amiss.

362. Ms Wilmshurst told the Inquiry that Sir Michael's view that 1441 did not authorise the use of force and that a second resolution was required was shared by all the FCO Legal Advisers dealing with the matter.[139]

363. Lord Goldsmith told the Inquiry:

> "I was unhappy when I saw that [Mr Straw's minute of 29 January], not because I thought it followed that Sir Michael was right and Mr Straw was wrong about the legal issue … but I didn't like, to be honest, the sort of tone of what appeared to be a rebuke to a senior legal adviser for expressing his or her view. I have always

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[137] Minute Straw to Attorney General, 20 February 2003, [untitled].
[138] Public hearing, 26 January 2010, pages 30-32.
[139] Public hearing, 26 January 2010, pages 5-6.

taken the view in Government – indeed I told Government lawyers – that they should express their views, however unwelcome they might be."[140]

364. Mr Straw submitted a 'Supplementary Memorandum' addressing this exchange before his hearing on 8 February 2010.[141]

365. Mr Straw wrote that following a "private meeting in mid-January" with Vice President Cheney:

> "… the usual rather cryptic summary of my conversation was issued in a confidential FCO telegram … Reading this Sir Michael sent me his minute of 24 January which, with my response, has been the subject of considerable interest by the Inquiry, and publicly.
>
> "Far from ignoring this advice, as has been suggested publicly, I read Sir Michael's minute with great care, and gave it the serious attention it deserved. So much so that I thought I owed him a formal and personal written response, rather than simply having a conversation with him."

366. Mr Straw told the Inquiry that he had "never sent a minute like that before or since".[142]

367. Mr Straw also acknowledged that Lord Goldsmith's letter of 3 February was "very unusual".[143] In his view, it had been sent because Lord Goldsmith thought Mr Straw was "questioning the right of legal advisers to offer me advice". Mr Straw had told Lord Goldsmith that he was not, and had subsequently put that in writing.

368. Mr Straw explained that his comment to Vice President Cheney about Kosovo was about military action in the absence of a Security Council resolution.

369. Mr Straw's minute did not address the substance of Mr Wood's advice on the Kosovo issue.

370. Mr Straw told the Inquiry that Kosovo itself was not a precedent and he fully accepted the legal basis was different.[144] It was relevant "only to this extent, that … there was an effort made to gain Security Council agreement and that failed, but the military action went ahead".

371. In his 'Supplementary Memorandum', Mr Straw wrote that he had reached the view that he needed to respond to Mr Wood in writing because he had been "struck by the categorical nature of the advice … and its contrast with the very balanced and

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[140] Public hearing, 27 January 2010, page 94.
[141] Statement, February 2010, 'Supplementary Memorandum by the Rt Hon Jack Straw MP'.
[142] Public hearing, 8 February 2010, page 19.
[143] Public hearing, 8 February 2010, page 24.
[144] Public hearing, 8 February 2010, pages 21-22.

detailed advice the same Legal Adviser had proffered to the Attorney General".[145] It was "incorrect to claim that there was 'no doubt' about the position" because two views had been set out in Mr Wood's letter of instructions to Lord Goldsmith on 9 December 2002 and the issue "was at the heart of the debate on lawfulness". That, "In turn and in part … depended on the 'negotiating history'", of the resolution.

372. Mr Straw subsequently told the Inquiry that, if Mr Wood had thought there was "no doubt", that was what he should have written in the instructions to Lord Goldsmith of 9 December.[146] The purposes of that document and Mr Wood's minute of 24 January "were the same, to offer legal advice and … the legal advice he had offered … was contradictory". In Mr Straw's view he was "entitled to raise that".

373. The evidence set out in this Report demonstrates that Mr Wood fully understood that Lord Goldsmith's response to the letter of instruction of 9 December 2002 would provide the determinative view on the points at issue and he was not seeking to usurp that position.

374. Mr Wood had referred to the need to seek Lord Goldsmith's advice on several previous occasions and it should not have been necessary to reiterate the point in every minute to Mr Straw.

375. Until Lord Goldsmith had reached his definitive view, FCO Legal Advisers had a duty to draw the attention of Ministers to potential legal risks; and Lord Goldsmith's minute of 3 February confirmed that duty.

376. Mr Wood's advice to Mr Straw was fully consistent with views previously expressed by Lord Goldsmith.

377. Lord Goldsmith's response, insisting on the duty of Government lawyers to provide frank, honest and, if necessary, unwelcome legal advice without fear of rebuke from Ministers, was timely and justified.

378. In his 'Supplementary Memorandum', Mr Straw wrote that the:

> "… decision was one for the Attorney General alone – a fact to which no reference was made nor qualification offered in the Legal Adviser's minute to me …"[147]

379. Mr Straw added:

> "It would surely be a novel, and fundamentally flawed, constitutional doctrine that a Minister was bound to accept any advice offered … by a Departmental Legal Adviser as determinative of an issue, if there were reasonable grounds for taking a contrary view. Such a doctrine would wholly undermine the principles of personal Ministerial responsibility and give inappropriate power to a Department's Legal Advisers."

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[145] Statement, February 2010, 'Supplementary Memorandum by the Rt Hon Jack Straw MP'.
[146] Public hearing, 8 February 2010, page 16.
[147] Statement, February 2010, 'Supplementary Memorandum by the Rt Hon Jack Straw MP'.

380. In the subsequent hearing, Mr Straw told the Inquiry he had responded to Mr Wood because:

> "… where I disagreed with him was that he had the right over and above the Attorney General to say what was or was not unlawful … it is a most extraordinary constitutional doctrine that, in the absence of a decision by the Attorney General about what was or was not lawful, that a Departmental Legal Adviser is able to say what is or is not unlawful."[148]

381. Mr Straw added:

> "But in the absence of a decision by the Attorney General … there has to be doubt. That was what I thought was strange, and, as I say, he is fully entitled to send me the note. I never challenged his right to do that, and if I may say so, there is some suggestion in the notes that I ignored the advice. I never ignore advice. I gave it the most careful attention."[149]

382. Sir Franklin Berman, Sir Michael Wood's predecessor as the FCO Legal Adviser, wrote:

> "I have to confess (once again) to some astonishment at seeing a former Foreign Secretary implying in recent evidence to the Inquiry that he was not bound by legal advice given to him at the highest level, but was entitled to weigh it off against other legal views as the basis for policy formulation. If Ministers begin to think that they can shop around until they discover the most convenient legal view, without regard to its authority, that is a recipe for chaos."[150]

383. As Lord Goldsmith remarked in his letter of 3 February, the remedy in case of dispute was to ask for his opinion, but he did not at that stage have Mr Blair's agreement to share his draft views.

384. Mr Straw's evidence makes clear his concern that Lord Goldsmith should not at that stage take a definitive view without fully considering the alternative interpretation advocated by Mr Straw and set out in his letter of 6 February 2003.

385. The balance of the evidence set out later in this Section suggests that neither Mr Straw nor Mr Wood had, by 29 January, seen Lord Goldsmith's draft advice of 14 January.

386. In his 'Supplementary Memorandum' Mr Straw pointed out "the huge difference between the normal run of the mill legal advice on usual issues and legal advice on whether it was legal for the United Kingdom to take military action".[151] That was "why, on all sides, this issue was so sensitive".

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[148] Public hearing, 8 February 2010, page 11.
[149] Public hearing, 8 February 2010, page 14.
[150] Statement, 7 March 2011, paragraph 8.
[151] Statement, February 2010, 'Supplementary Memorandum by the Rt Hon Jack Straw MP'.

387. Mr Straw added that he "had an intense appreciation" of the negotiating history of resolution 1441 and "an acute understanding" of what France, Russia and China had said in their EOVs and the subsequent Ministerial meetings of the Security Council and "crucially – what they had not said". That needed to be "weighed in the balance before a decision".

388. Mr Straw wrote:

> "Once the Attorney General had uttered on this question, that would have been the end of the matter; as on any other similar legal question. It would be wholly improper of any Minister to challenge, or not accept, such an Attorney General decision, whatever it was. But we were not at that stage."

389. The Inquiry asked a number of witnesses to comment on Mr Straw's assertion that international law was an uncertain field and there was no international court to decide matters.

390. Mr Straw emphasised that it meant the responsibility rested on Lord Goldsmith's shoulders.

391. Addressing that point, Sir Michael Wood told the Inquiry:

> "… he is somehow implying that one can therefore be more flexible, and that I think is probably the opposite of the case … because there is no court, the Legal Adviser and those taking decisions based on legal advice have to be all the more scrupulous in adhering to the law … It is one thing for a lawyer to say, 'Well, there is an argument here. Have a go. A court, a judge, will decide in the end'. It is quite different in the international system where that's usually not the case. You have a duty to the law, a duty to the system. You are setting precedents by the very fact of saying and doing things."[152]

392. Ms Wilmshurst took a similar view: "I think that, simply because there are no courts, it ought to make one more cautious about trying to keep within the law, not less."[153]

393. On the question of whether international law was an uncertain field, Lord Goldsmith stated:

> "I didn't really agree with what he was saying about that. There obviously are areas of international law which are uncertain, but this particular issue, at the end of the day, was: what does this resolution mean?"[154]

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[152] Public hearing, 26 January 2010, pages 33-34.
[153] Public hearing, 26 January 2010, page 9.
[154] Public hearing, 27 January 2010, page 94.

394. In his 'Supplementary Memorandum', Mr Straw wrote:

> "In this area of international law, recourse to the courts is not available. This means that international law must be inherently less certain, and that, given the seriousness of the issues, great care has to be taken in coming to a view. But the absence of an external tribunal means that a view has in the end to be taken by the Attorney General, on whose shoulders rests a great weight of responsibility."[155]

395. Asked whether there was a responsibility to be "all the more scrupulous in adhering to the law" in circumstances where there was no court with jurisdiction to rule on the use of force in Iraq, Mr Straw replied:

> "Yes, of course. You have to be extremely scrupulous because it is a decision which is made internally without external determination … but that's a very separate point from saying that … the correct view is on one side rather than the other. The correct view was the correct view."[156]

Mr Straw's letter to Lord Goldsmith, 6 February 2003

396. In a letter of 6 February, Mr Straw took issue with a number of the provisional conclusions in Lord Goldsmith's draft advice of 14 January.

397. Mr Straw attached great importance to concessions made by France, Russia and China (which he described as a defeat for them).

398. But Mr Straw dismissed concessions made by the UK and the US as a trade-off which merely offered other members of the Security Council "some procedural comfort".

399. That considerably understated the importance of the concessions by all members of the P5 to create sufficient ambiguity about the meaning of the resolution to command consensus in the Security Council.

400. The UK had explicitly recognised during the negotiation of resolution 1441 that the inclusion of a provision for the Security Council to "consider" a report would create the opportunity for France and others to argue that a further decision would be required to determine whether Iraq was in material breach of resolution 1441.

401. In his letter Mr Straw did not refer to Lord Goldsmith's minute to Mr Blair of 30 January.

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[155] Statement, February 2010, 'Supplementary Memorandum by the Rt Hon Jack Straw MP'.
[156] Public hearing, 8 February 2010, pages 26-27.

402. A minute from Ms Adams to Lord Goldsmith, in preparation for a meeting with Mr Straw on 3 February, makes clear that Lord Goldsmith planned to give Mr Straw a copy of his draft advice of 14 January and his minute to Mr Blair of 30 January.[157]

403. Ms Adams also wrote:

> "David [Brummell] has not yet been able to get hold of Jonathan Powell, despite several attempts. We do not therefore know whether No.10 is content for you to pass your draft advice to the Foreign Secretary."

404. There is no record of the meeting on 3 February. There was no copy of Lord Goldsmith's minute to Mr Blair of 30 January in the papers provided by the FCO to the Inquiry or anything to indicate that Mr Straw received a copy.

405. Mr Straw's Private Office sent Mr Brummell, "as promised", the draft of a letter from Mr Straw to Lord Goldsmith on 4 February.[158] The letter was also sent to Sir Christopher Meyer, British Ambassador to the US, Sir David Manning and Mr Powell.

406. In his letter of 6 February, which was unchanged from the draft, Mr Straw wrote that he had been asked by Lord Goldsmith in the last week of January if he had seen Lord Goldsmith's draft "opinion" on Iraq.[159]

407. Mr Straw had seen Lord Goldsmith's draft advice, but he:

> "… had not had a chance to study it in detail. This I have now done. I would be very grateful if you would carefully consider my comments below before coming to a final conclusion and I would appreciate a conversation with you as well. As you will be aware I was immersed in the line-by-line negotiations of the resolution, much of which was conducted capital to capital with P5 Foreign Ministers."

408. Mr Straw continued:

> "It goes without saying that a unanimous and express Security Council authorisation would be the safest basis for the use of force against Iraq. But I have doubts about the negotiability of this in current circumstances. We are likely to have to go for something less. You will know the UK attaches high priority to achieving a second resolution for domestic policy reasons and to ensure wide international support for any military action. This was the case the Prime Minister was making in Washington [on 31 January]. We are working hard to achieve it."

409. Referring to his minute to Mr Wood of 29 January, Mr Straw stated that he "had been very forcefully struck by a paradox in the culture of Government lawyers, which is that the less certain the law is, the more certain in their views they become".

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[157] Minute Adams to Attorney General, 3 February 2003, 'Iraq: Key Papers'.
[158] Letter Sinclair to Brummell, 4 February 2003, 'Iraq: Second Resolution'.
[159] Letter Straw to Goldsmith, 6 February 2003, 'Iraq: Second Resolution'.

410. Mr Straw wrote:

> "Jeremy Greenstock has given you the negotiating history of OP4 and of how the words 'for assessment' were included. It is crucial to emphasise, as Jeremy spelt out, that the overwhelming issue between US/UK and the French/Russians/Chinese (F/R/C) was whether a second resolution was required to authorise any use of force or not. As Jeremy told you the F/R/C lost on this, and they knew they had lost. To achieve this, however, we had to show that the discussions on the first resolution would not be the end of the matter. So the trade-off … for the F/R/C defeat on the substantive issue of a second resolution was some procedural comfort – provided in OPs 4, 11 and 12. If there were a further material breach this would be "reported to the Council for assessment in accordance with paragraphs 11 and 12 below …"

411. Addressing Lord Goldsmith's view that he did not "find much difference" between the French text and the final wording of OP4, Mr Straw stated that there was "all the difference in the world". The French text[160] "would have given the Security Council … the exclusive right to determine whether there had been an OP4 further material breach". The US and UK had resisted that.

412. Mr Straw also challenged Lord Goldsmith's view that the Council "must" assess whether a breach was material. That was "to ignore both the negotiating history and the wording. We were deliberate in not specifying who would determine that there had been a material breach."

413. Addressing the meaning of the term "for assessment", Mr Straw wrote that OP4 itself offered "meaning by the following words 'in accordance with paragraphs 11 and 12 below'." OP12 provided that the Council would "consider the situation", which Mr Straw argued stopped short of "decide". Assessment was not, as Lord Goldsmith had characterised it, "a procedural 'formality'". That would be "to parody what we had in mind; but certainly a process in which the outcome was quite deliberately at large". The resolution had given the F/R/C:

> "… further discussions and time, further reports – and an ability to influence events, in return for no automatic second resolution being necessary. And in return – a major US concession – the US/UK agreed not to rely on 1441 as an authorisation for the use of force immediately after its adoption (so called automaticity)."

414. Mr Straw concluded:

> "Putting all this together, I think the better interpretation of the scheme laid out in 1441 is that (i) the fact of the material breach, (ii) (possibly) a further UNMOVIC report and (iii) 'consideration' in the Council together revive 678. At the very least, this interpretation, which coincides with our firm policy intention and that of our

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[160] On 2 November, France proposed the words "shall constitute a further material breach of Iraq's obligations when assessed by the Security Council". See Section 3.5.

co-sponsors, deserves to be given the same weight as a view which in effect hands the F/R/C the very legal prize they failed to achieve in the negotiation of 1441."

415. Mr Straw told the Inquiry that he had "spent some time drafting" his letter to Lord Goldsmith, and that:

> "Obviously I'm pretty certain that Sir Jeremy Greenstock would have seen the draft and his legal adviser Iain Macleod, certainly Peter Ricketts … But … I then put it together from the negotiating history …"[161]

Further advice on a second resolution

416. Lord Goldsmith was asked on 4 February for urgent advice on a second resolution determining that Iraq had failed to take the final opportunity offered in resolution 1441.

417. Following a number of bilateral contacts about the nature of the second resolution, Mr Grainger wrote to Ms Adams on 4 February warning that the indications were that some key Security Council members, "such as France", might not be persuaded that the Council should adopt even an "implicit" resolution that mentioned material breach. Mr Grainger sought Lord Goldsmith's views "as soon as possible" on the elements of a second resolution necessary to make clear that Iraq had failed to take the final opportunity provided in resolution 1441 and that serious consequences would follow.[162]

418. After rehearsing the key provisions of OPs 1, 2, 4, 11, 12 and 13, Mr Grainger wrote:

> "… the relationship between these various paragraphs is a matter of some complexity. It is however clear that the serious consequences which the Council has repeatedly warned Iraq it will face as a result of its continued violations of its obligations … are to occur in the context of paragraph 12 – that is following consideration of the situation by the Council in accordance with that paragraph. The consideration … can take place only when a report – either of a material breach under paragraph 4, or of the interference or failure to comply mentioned in paragraph 11 – has been made.
>
> "In our view once Council consideration has taken place, a specific reference to material breach is not required in any decision by the Council: what is necessary is that the Council should conclude that the serious consequences for Iraq referred to in paragraph 13 are triggered. If the Council has considered a report under paragraph 4, the finding of material breach will be implicit. If … the Council has considered a report under paragraph 11, it will be clear that the new enhanced inspections regime has not worked and therefore the material breach finding in paragraph 1 is still operative."

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[161] Public hearing, 8 February 2010, page 30.
[162] Letter Grainger to Adams, 4 February 2003, 'Iraq: Second Resolution'.

419. Ms Adams responded on 6 February that Lord Goldsmith had agreed that:

> "Provided the new resolution is linked back sufficiently to resolution 1441 so that it is clear that the Council has concluded that Iraq has failed to take the final opportunity granted by resolution 1441, it should be possible to rely on the finding of material breach in that resolution in order to revive the use of force in resolution 678."[163]

420. Addressing draft text suggested by Mr Grainger, Ms Adams also recorded that Lord Goldsmith:

> "… has some doubts about the generality of the wording 'Iraq has still not complied' because not every incident of non-compliance will constitute a further material breach under OP4 of resolution 1441 (see for example statements by the Foreign Secretary to Parliament[164]). Moreover, the Attorney recalls that Blix has indicated that only serious cases of non-compliance would be reported to the Council under OP11."

421. Ms Adams suggested that a better minimalist version for a resolution would be one which:

> "… stated simply that the Council has concluded that Iraq has failed to take the final opportunity offered by resolution 1441. This would indicate that the finding of material breach in OP1 of resolution 1441 is no longer suspended, thus reviving the authorisation to use force in resolution 678. In this case there would be no need for an operative paragraph on 'serious consequences' because this would follow from the terms of resolution 1441."[165]

Lord Goldsmith's visit to Washington, 10 February 2003

422. Lord Goldsmith's discussions in Washington on 10 February confirmed that the US position was that Iraq was in material breach of resolution 1441 and the conditions for the cease-fire were, therefore, no longer in place.

423. The US maintained that the Security Council had already considered that fact as required by OP12.

424. The US Administration attached importance to helping the UK find a way to join them in action against Iraq.

425. As discussed with No.10, Lord Goldsmith travelled to Washington, accompanied by Ms Adams, to meet leading US lawyers involved in the negotiation of resolution 1441 on 10 February 2003.

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[163] Letter Adams to Grainger, 6 February 2003, 'Iraq: Second Resolution'.
[164] House of Commons, *Official Report*, 25 November 2002, column 51.
[165] Letter Adams to Grainger, 6 February 2003, 'Iraq: Second Resolution'.

426. Lord Goldsmith met Mr John Bellinger III (the NSC Legal Adviser), Judge Alberto Gonzales (Counsel to the President), Dr Rice, Mr William Taft IV (Legal Adviser at the State Department), Mr Marc Grossman (Under Secretary of State for Political Affairs) and Mr William Haynes II (General Counsel at the DoD).[166]

427. Ms Adams' record of the discussions set out the questions which had been addressed and the US responses, including:

- Resolution 1441 contained two determinations of material breach (in OPs 1 and 4) and the US view was that the conditions of OP4 had already been met. There was, therefore, a Security Council determination of material breach by Iraq, meaning that the conditions for the cease-fire were no longer in place.
- The use of the term "material breach" had been avoided in 1998. Its use in resolution 1441 strengthened the argument that the Council intended to revive resolution 678.
- The use of the term "co-operate fully" had been retained in the resolution in order to ensure that any instances of non-co-operation would be material. In the US view, "any" Iraqi non-compliance was sufficient to constitute a material breach.
- The US recognised the UK's concerns about de minimis breaches (eg an hour's delay in getting access to a site), but considered that the situation was "well past" that point.
- The inspectors were "reporters not assessors".
- The US would not have accepted a resolution implying that a further decision was required.
- OP12 was not a "purely procedural requirement". The members of the Council were "under a good faith obligation to participate in the further consideration of the matter within the meaning of OP12".
- The US had satisfied that requirement by the actions they had already taken, for example Secretary Powell's report to the Council on 5 February.[167]

428. Mr Brenton commented that there had been "no problem lining up a good range of senior interlocutors" for Lord Goldsmith to meet, "underlining how important the Administration consider it to help the UK to be in a position to join them in action against Iraq".[168]

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[166] Letter Brenton to Goldsmith, 11 February 2003, 'Visit to Washington, January [sic] 10; Iraq'.
[167] Letter Adams to McDonald, 14 February 2003, 'Attorney General's Visit to Washington, 10 January [sic]: Iraq' attaching Minute Adams to Attorney General, 14 February 2003, 'US Responses to Questions on Resolution 1441'.
[168] Letter Brenton to Goldsmith, 11 February 2003, 'Visit to Washington, January [sic] 10; Iraq'.

429. Mr Brenton subsequently reported on 6 March that the US "had also gained the impression that we need the resolution for legal reasons: I explained the real situation".[169]

430. Asked by the Inquiry what he had understood "the real situation" to be, Mr Brenton said that Lord Goldsmith had not told him anything, but he had sat in on Lord Goldsmith's conversations with the US Attorney General and "got the impression from him [Lord Goldsmith] that there was a legal case for our involvement, even if we didn't get the second resolution".[170]

431. Ms Adams produced a revised draft for Lord Goldsmith on 12 February, which for the first time concluded:

> "… having regard to the arguments of our co-sponsors which I heard in Washington, I am prepared to accept that a reasonable case can be made that resolution 1441 revives the authorisation to use force in resolution 678."[171]

Agreement on a second resolution

432. Following discussion between Mr Blair and President Bush on 19 February, the UK agreed a "light draft resolution" with the US.

433. Lord Goldsmith subsequently advised that draft would be "sufficient" to authorise the use of force if it was all that would be negotiable.

434. Lord Goldsmith did not, however, accept the underpinning legal analysis offered by Sir Jeremy Greenstock.

435. Reflecting the seriousness of his concerns about the implications of recent developments, Mr Blair sent President Bush a Note on 19 February about the need for a second resolution (see Section 3.7).

436. Mr Blair proposed focusing on the absence of full co-operation and a "simple" resolution stating that Iraq had failed to take the final opportunity, with a side statement defining tough tests of co-operation and a vote on 14 March to provide a deadline for action.

437. Sir Jeremy gave Ambassador John Negroponte, US Permanent Representative to the UN, a revised "light draft resolution" on 19 February which:

- noted [draft preambular paragraph (PP) 5] that Iraq had "submitted a declaration … containing false statements and omissions and has failed to comply with and co-operate fully in the implementation of that resolution [1441]"; and

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[169] Telegram 294 Washington to FCO London, 6 March 2003, 'Iraq: UN Endgame'.
[170] Private hearing, 17 January 2011, pages 25-26.
[171] Note [draft] Adams, 12 February 2003, 'Iraq: Interpretation of 1441'.

- decided [draft OP1] that Iraq had "failed to take the final opportunity afforded to it in resolution 1441 (2002)".[172]

438. Sir Jeremy reported that he had told Ambassador Negroponte that the draft "was thin on anything with which Council members could argue and would be less frightening to the middle ground". It did not refer to "serious consequences" and that "instead of relying on OP4 of 1441", the draft resolution "relied on OP1 of 1441, re-establishing the material breach suspended in OP2".[173]

439. Sir Jeremy added that issuing the draft would signal the intent to move to a final debate, which they should seek to focus "not on individual elements of co-operation but on the failure by Iraq to voluntarily disarm" and avoid being "thrown off course by individual benchmarks or judgement by Blix". It should be accompanied by a "powerful statement about what 1441 had asked for" which had "been twisted into partial, procedural, and grudging co-operation from Iraq"; and that "substantive, active and voluntary co-operation was not happening".

440. In response to a question from the US about whether the "central premise", that the final opportunity was "now over", would be disputed, Sir Jeremy said that:

> "… was where we would have to define our terms carefully: voluntary disarmament was not happening."

441. Ms Adams wrote to Mr Grainger on 20 February. She thanked him for drawing her attention to the telegrams from Sir Jeremy Greenstock.[174] She pointed out that Lord Goldsmith did "not agree with the legal analysis" in Sir Jeremy Greenstock's first telegram. Lord Goldsmith considered:

> "… that OP4 of resolution 1441 is highly relevant to determining whether or not Iraq has taken the final opportunity granted by OP2 … Moreover, PP5 of the draft text uses language drawn from OP4 to establish the fact that Iraq has failed to comply … the Attorney does not consider that it is accurate to say that the draft text relies on OP1 … rather than OP4."

442. On the draft text, Ms Adams wrote that Lord Goldsmith considered:

> "… it would be preferable for any resolution to indicate as clearly as possible that the resolution is intended to authorise the use of force. The clearer the resolution, the easier it will be to defend legally the reliance on the 'revival argument', which … is … controversial. A resolution which included the terms 'material breach' and 'serious consequences' … would therefore be desirable … However, the Attorney has previously advised that it is not essential in legal terms for a second resolution

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[172] Telegram 288 UKMIS New York to FCO London, 20 February 2003, 'Iraq: 19 February: Draft Resolution'.
[173] Telegram 287 UKMIS New York to FCO London, 20 February 2003, 'Iraq: 19 February'.
[174] Letter Adams to Grainger, 20 February 2003, 'Iraq: Second resolution'.

to include this language. Therefore, if a resolution in the form contained … [in the advice from UKMIS New York] is all that is likely to be negotiable, he considers it would be sufficient …"

A second resolution is tabled

443. Sir Jeremy Greenstock remained concerned about the lack of support in the Security Council and the implications, including the legal implications, of putting the resolution to a vote and failing to get it adopted.

444. A draft of a second resolution was tabled by the UK, US and Spain on 24 February. The draft operative paragraphs stated simply that the Security Council:

- "Decides that Iraq has failed to take the final opportunity afforded to it by resolution 1441."
- "Decides to remain seized of the matter."[175]

445. France, Russia and Germany responded by tabling a memorandum which proposed strengthening inspections and bringing forward the work programme specified in resolution 1284 (1999) and accelerating its timetable.[176]

446. Canada also circulated ideas for a process based on key tasks identified by UNMOVIC.[177]

447. Sir Jeremy Greenstock advised that in circumstances where there were fewer than nine positive votes but everyone else abstained, the resolution would not be adopted and it would have no legal effect.[178] He found it:

> "… hard to see how we could draw much legal comfort from such an outcome; but an authoritative determination would be a matter for the Law Officers. (Kosovo was different: in that case a Russian draft condemning the NATO action as illegal was heavily defeated, leaving open the claim that the action was lawful … (or at least was so regarded by the majority of the Council).
>
> "Furthermore, in the current climate … the political mandate to be drawn from a draft which failed to achieve nine positive votes seems to me likely to be (at best) weak … The stark reality would remain that the US and UK had tried and failed to persuade the Council to endorse the use of force against Iraq. And the French

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[175] Telegram 302 UKMIS New York to FCO London, 25 February 2003, 'Iraq: Tabling of US/UK/Spanish Draft Resolution: Draft Resolution'.
[176] UN Security Council, 23 February 2003, 'Letter dated 24 February 2003 from the Permanent Representatives of France, Germany and the Russian Federation to the United Nations addressed to the President of the Security Council' (S/2003/214).
[177] Letter Wright to Colleagues, 24 February 2003, [untitled] attaching 'Non-paper: Ideas on Bridging the Divide'.
[178] Letter Greenstock to Manning, 25 February 2003, [untitled].

(and the Russians and Chinese) would no doubt be sitting comfortably among the abstainers …

"My feeling … is that our interests are better served by not putting a draft to a vote unless we were sure that it had sufficient votes to be adopted … But we should revisit this issue later – a lot still had to be played out in the Council."

448. Mr Blair told Cabinet on 27 February that he would continue to push for a further Security Council resolution.

449. Mr Alastair Campbell, Mr Blair's Director of Communications between May 1997 and August 2003, wrote in his diaries that Mr Blair had had a meeting with Mr Prescott, the Deputy Prime Minister, and Mr Straw, "at which we went over the distinct possibility of no second resolution because the majority was not there for it". Mr Blair "knew that meant real problems, but he remained determined on this, and convinced it was the right course".[179]

450. Mr Blair told Cabinet that he would continue to push for a further Security Council resolution.[180] He described the debate in the UK and Parliament as "open":

"Feelings were running high and the concerns expressed were genuine. But decisions had to be made. The central arguments remained the threat posed by weapons of mass destruction in the hands of Iraq; the brutal nature of the Iraqi regime; and the importance of maintaining the authority of the UN in the international order. Failure to achieve a further Security Council resolution would reinforce the hand of the unilateralists in the American Administration."

A "reasonable case"

Lord Goldsmith's meeting with No.10 officials, 27 February 2003

451. When Lord Goldsmith met No.10 officials on 27 February he advised that the safest legal course would be to secure a further Security Council resolution.

452. Lord Goldsmith told them, however, that he had reached the view that a "reasonable case" could be made that resolution 1441 was capable of reviving the authorisation to use force in resolution 678 (1990) without a further resolution, if there were strong factual grounds for concluding that Iraq had failed to take the final opportunity offered by resolution 1441.

453. Lord Goldsmith advised that, to avoid undermining the case for reliance on resolution 1441, it would be important to avoid giving any impression that the UK believed a second resolution was legally required.

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[179] Campbell A & Hagerty B. *The Alastair Campbell Diaries. Volume 4. The Burden of Power: Countdown to Iraq.* Hutchinson, 2012.
[180] Cabinet Conclusions, 27 February 2003.

454. Mr Powell confirmed that No.10 did not wish the Attorney General's advice to "become public".

455. Lord Goldsmith did not inform Mr Straw or Mr Hoon of his change of view.

456. As their responsibilities were directly engaged, they should have been told of Lord Goldsmith's change of position.

457. At the request of No.10, Lord Goldsmith met Mr Powell, Baroness Morgan and Sir David Manning on 27 February.[181]

458. Ms Adams advised Lord Goldsmith that the purpose of the meeting was to "discuss the French veto", which she interpreted as meaning "the scope for action in the absence of a second resolution".

459. Ms Adams provided a speaking note for Lord Goldsmith, setting out the legal arguments in detail, including:

- the discussions with Mr Straw, Sir Jeremy Greenstock and the US Administration "were valuable" and had given Lord Goldsmith "background information on the negotiating history" which he had "not previously had";
- the US discussions were "particularly useful" as they gave "a clearer insight into the important US/French bilateral discussions over the terms of OP12 of resolution 1441";
- that was "relevant to the interpretation of the resolution";
- while the revival argument was "controversial", Lord Goldsmith had "already made clear" that he agreed with the advice of his predecessors that it provided "a valid legal basis for the use of force provided that the conditions for revival" were "satisfied";
- the "arguments in support of the revival argument" were "stronger following adoption of resolution 1441";
- "elements" of resolution 1441 indicated that the Security Council "intended to revive the authorisation in [resolution] 678";
- but the Council "clearly … did not intend 678 to revive immediately";
- the procedure set out in OPs 4,11 and 12 "for determining whether or not Iraq has taken the final opportunity" were "somewhat ambiguous";
- it was "clear" that if Iraq did not comply there would be "a further Council discussion" but it was "not clear what happens next";
- it was "arguable" that OPs 4 and 12 indicated that "a further Council decision" was "required";
- Lord Goldsmith had been "impressed" by the "strength and sincerity" of the US view that they had "conceded a Council discussion and no more";

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[181] Minute Adams to Attorney General, 26 February 2003, 'Iraq: Meeting at No.10, 27 February'.

- the difficulty of relying on the assertions of US officials that the French knew and accepted what they were voting for when there was little "hard evidence beyond a couple of telegrams recording admissions by French negotiators that they knew the US would not accept a resolution which required a further Council decision";
- "the possibility remains that the French and others accepted OP12 because in their view it gave them a sufficient basis on which to argue that a second resolution was required (even if that was not made expressly clear)"; and
- the statements made on adoption of the resolution indicated that "there were differing views within the Council as to the legal effect of the resolution".[182]

460. Lord Goldsmith was advised to state that he remained "of the view that the safest legal course would be to secure a further Security Council resolution" which, as he had advised the FCO, need not explicitly authorise the use of force as long as it made clear that the Council had "concluded that Iraq has not taken its final opportunity".

461. Ms Adams advised that he should further state:

> "Nevertheless, having regard to the further information on the negotiating history which I have been given and to the arguments of the US administration which I heard in Washington, I am prepared to accept – and I am choosing my words carefully here – that a reasonable case can be made that resolution 1441 is capable of reviving the authorisation in 678 without a further resolution if there are strong factual grounds for concluding that Iraq has failed to take the final opportunity. In other words we would need to demonstrate hard evidence of non-compliance and non-co-operation."

462. Lord Goldsmith was also advised:

- that a court "might well conclude" that OPs 4 and 12 did "require a further Council decision", but that "the counter view can reasonably be maintained";
- that the analysis applied "whether a second resolution fails to be adopted because of a lack of votes or because it is vetoed. I do not see any difference between the two cases"; and
- it was "important that in the course of negotiations on the second resolution we do not give the impression that we believe it is legally required. That would undermine our case for reliance on resolution 1441".

463. There is no No.10 record of the 27 February meeting.

464. In his record of a telephone call from Lord Goldsmith reporting the meeting, Mr Brummell wrote that Lord Goldsmith "confirmed that he had deployed in full" the lines prepared by Ms Adams, with the exception of the reference to the fact that "on a number

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[182] Minute Adams to Attorney General, 27 February 2003, 'Iraq: Lines to Take for No 10 Meeting'.

of previous occasions" the Government had engaged in military action on a legal basis that was no more than "reasonably arguable".[183]

465. Mr Brummell also wrote:

> "Jonathan Powell said that he understood the Attorney's advice in summary to mean that by far the safest way forward is to obtain a second resolution, but that, if we are unable to obtain one, it might be arguable that we do not need one, although we could not be confident that a court would agree with this.
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> "The No.10 representatives confirmed that the US and UK Governments were continuing with their intensive efforts to secure the passage of a second resolution, if at all possible.
>
> "Jonathan Powell confirmed that No.10 did not wish the Attorney's advice to become public."

466. Mr Powell told the Inquiry that he did not really remember the meeting.[184]

467. Lord Goldsmith told the Inquiry that he did not know why he had not informed No.10 that there was a reasonable case before 27 February. He said:

> "After I came back from the United States … I had taken the view there was a reasonable case. A draft was produced which reflected that. I don't know why it took me until 27 February, but that may have been the first time there was a meeting. I met with Jonathan Powell, Sir David Manning and Baroness Morgan and told them that I had been very much assisted in my considerations by Jeremy Greenstock, the Americans – I may have mentioned Jack Straw as well, and I was able to tell them that it was my view that there was a reasonable case."[185]

468. Lord Goldsmith added:

> "Obviously, I had prepared what I was going to say. Then – so I told them – and I had given them, therefore, as I saw it, and as I believe they saw it … the green light, if you will, that it was lawful to take military action, should there not be a second resolution and should it be politically decided that that was the right course to take."

469. Lord Goldsmith identified three main influences on his thinking which contributed to the change in his position by the end of February that a reasonable case could be made that resolution 1441 authorised the use of force without the requirement for a further resolution:

- the meeting with Sir Jeremy Greenstock on 23 January;

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[183] Minute Brummell, 27 February 2003, 'Iraq: Attorney General's Meeting at No. 10 on 27th February 2003'.
[184] Public hearing, 18 January 2010, page 104.
[185] Public hearing, 27 January 2010, pages 130-131.

- the views of Mr Straw as expressed in his letter of 6 February 2003; and
- meetings in the US on 10 February.

470. Lord Goldsmith described the purpose of his meeting with Sir Jeremy as:

> "… to get first-hand from our principal negotiator at the United Nations his observations on the negotiating history and on the text which had been agreed and his understanding of what it meant, particularly to get his comments on the textual arguments we had raised.
>
> " … It doesn't mean I follow it, but it is helpful to me … because if you understand what somebody is trying to achieve, you can then often look at the document with that in mind, and then the words which are used become clearer to you."[186]

471. Lord Goldsmith also told the Inquiry that Sir Jeremy:

> "… was very clear in saying the French, Russians lost and they knew they had lost … and his argument was – that's why the resolution is worded the way that it is.
>
> …
>
> "… It was a compromise, but compromise in this sense: that the United States had conceded a Council discussion but no more."[187]

472. Lord Goldsmith told the Inquiry:

> "Sir Jeremy had made some good points and he had made some headway with me, but, frankly there was still work for me to do and he hadn't got me there, if you like, yet."[188]

473. Mr Straw told the Inquiry that his letter of 6 February to Lord Goldsmith, was "really the sum" of what he had said.[189]

474. Following his meetings in the US on 10 February, Lord Goldsmith was impressed by the fact that, in negotiating 1441, the US had a single red line which was not to lose the freedom of action to use force that they believed they had before 1441, and their certainty that they had not done so.

475. Asked to explain how the US belief that it had preserved its "red line" had influenced his considerations, Lord Goldsmith told the Inquiry that all his US interlocutors had spoken with one voice on the issue of the interpretation of 1441:

> "The discussion involved some detailed textual questions … On one point they were absolutely speaking with one voice, which is they were very clear that what mattered

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[186] Public hearing, 27 January 2010, pages 75-76.
[187] Public hearing, 27 January 2010, page 77.
[188] Public hearing, 27 January 2010, page 89.
[189] Public hearing, 8 February 2010, page 30.

to them, what mattered to President Bush, is whether they would … concede a veto … that the red line was that they shouldn't do that, and they were confident that they had not …

"… [T]he red line was 'We believe' they were saying 'that we have a right to go without this resolution. We have been persuaded to come to the United Nations' … 'but the one thing that mustn't happen is that by going down this route, we then find we lose the freedom of action we think we now have' and if the resolution had said there must be a further decision by the Security Council, that's what it would have done, and the United States would have been tied into that.

"They were all very, very clear that was the most important point to them and that they hadn't conceded that, and they were very clear that the French understood that, that they said that they had discussed this with other members of the Security Council as well and they all understood that was the position."[190]

476. Lord Goldsmith stated:

"It was frankly, quite hard to believe, given what I had been told about the one red line that President Bush had, that all these experienced lawyers and negotiators in the United States could actually have stumbled into doing the one thing that they had been told mustn't happen … a red line means a red line. It was the only one, I was told, that mattered. They didn't mind what else went into the resolution, so long as it did not provide a veto, and if it required a decision then one of the Security Council members, perhaps the French, could then have vetoed action by the United States, which, up to that point, they believed they could take in any event."[191]

477. Asked whether his US interlocutors had been able to provide him with any evidence that France had acknowledged the US position, Lord Goldsmith replied:

"I wish they had presented me with more. That was one of the difficulties, and I make reference to this, that, at the end of the day we were sort of dependent upon their view in relation to that … I looked very carefully at all the negotiating telegrams and I had seen that there were some acknowledgements of that, acknowledgements that the French understood the United States' position, at least, in telegrams that I had seen, and I was told of occasions when this had been clearly stated to the French."[192]

478. Correspondence between Ms Adams and the British Embassy Washington recorded that Lord Goldsmith had asked the US lawyers if they had any evidence that the French had acknowledged that no second resolution was needed, and the US lawyers had offered to check. The subsequent reply was that, although they had

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[190] Public hearing, 27 January 2010, pages 110-111.
[191] Public hearing, 27 January 2010, pages 127-128.
[192] Public hearing, 27 January 2010, page 112.

made their position abundantly clear to the French, the US lawyers had been unable to find a statement from the French acknowledging that a second resolution would not be needed.[193]

479. Asked if he should also have sought the views of the French, Lord Goldsmith replied:

> "No I couldn't do that. I plainly could not have done that … because, there we were, plainly by this stage, in a major diplomatic stand-off between the United States and France … you couldn't have had the British Attorney General being seen to go to the French to ask them 'What do you think?' The message that that would have given Saddam Hussein about the degree of our commitment would have been huge."[194]

480. Others had a different view.

481. Mr Straw told the Inquiry that if Lord Goldsmith "had asked to talk to the French, of course, we would have facilitated that … I have no recollection of that ever being raised with me at all".[195]

482. Asked about Lord Goldsmith's evidence that he could not speak to French officials about the interpretation of resolution 1441, Sir John Holmes, British Ambassador to France from 2002 to 2007, replied:

> "I don't see why he couldn't have done, or at least somebody else ask the question on his behalf. But I think what is true is that the French were, again, very wary about ever saying what their own legal position was. They took a very strong political position about no automaticity … but they were very careful, I don't remember them ever actually saying what their own legal position was."[196]

483. Asked whether the legal position would have mattered as much to the French as it did to us, Sir John responded: "No because the automatic assumption increasingly was that they weren't going to be part of it."[197]

Mr Straw's evidence to the Foreign Affairs Committee, 4 March 2003

484. Mr Straw told the Foreign Affairs Committee on 4 March that it was "a matter of fact" that Iraq had been in material breach "for some weeks" and resolution 1441 provided sufficient legal authority to justify military action against Iraq if it was "in further material breach".

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[193] Letter Brenton to Adams, 13 February 2003, 'Attorney General's Visit to Washington'.
[194] Public hearing, 27 January 2010, page 115.
[195] Public hearing, 8 February 2010, page 31.
[196] Public hearing, 29 June 2010, page 32.
[197] Public hearing, 29 June 2010, page 32.

485. Mr Straw also stated that a majority of members of the Security Council had been opposed to the suggestion that resolution 1441 should state explicitly that military action could be taken only if there were a second resolution.

486. In his evidence to the FAC on 4 March, Mr Straw was asked a series of questions by Mr Donald Anderson, the Chairman of the Committee, about the legality of military action without a second resolution.[198]

487. Asked about Mr Blair's "escape clause" and that the Government "would not feel bound to await" a second resolution "or to abide by it if it were to be vetoed unreasonably", Mr Straw replied:

> "The reason why we have drawn a parallel with Kosovo is … it was not possible to get a direct Security Council resolution and instead the Government and those that participated in the action had to fall back on previous … resolutions and general international law … to justify the action that was taken … We are satisfied that we have sufficient legal authority in 1441 back to the originating resolution 660 [1990] … to justify military action against Iraq if they are in further material breach."

488. Mr Straw added that that was "clearly laid down and it was anticipated when we put 1441 together". The Government would "much prefer" military action, if that proved necessary, "to be backed by a second resolution", but it had had to reserve its options if such a second resolution did not prove possible. That was what Mr Blair had "spelt out".

489. Asked if the Government should proceed without the express authority of the UN, Mr Straw replied:

> "We believe there is express authority … There was a … a very intensive debate – about whether … 1441 should say explicitly … that military action to enforce this resolution could only be taken if there were a second resolution. That … was not acceptable to a majority of members of the Security Council, it was never put before the … Council. Instead … what the Council has to do … is to consider the situation …"

490. Mr Straw told Sir Patrick Cormack (Conservative) that Iraq had "been in material breach as a matter of fact for some weeks now because they were told they had to co-operate immediately, unconditionally and actively". He added:

> "… we are anxious to gain a political consensus, if that can be achieved … which recognises the state of Iraq's flagrant violation of its obligations. As far as … the British Government is concerned, that is a matter of fact; the facts speak for themselves."[199]

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[198] Minutes, 4 March 2003, Foreign Affairs Committee (House of Commons), [Evidence Session], Q 147-151.
[199] Minutes, 4 March 2003, Foreign Affairs Committee (House of Commons), [Evidence Session], Q 154.

491. Asked by Mr Andrew Mackinley (Labour) how there was going to be "proper conscious decision-making" about whether Iraq was complying, Mr Straw replied:

> "… we make our judgement on the basis of the best evidence. I have to say it was on the basis of the best evidence that the international community made its judgement on 8 November. They had hundreds of pages of reports …"[200]

Sir Jeremy Greenstock's advice on "end game options", 4 March 2003

492. In his advice "on the end game options", Sir Jeremy Greenstock stated that there was little chance of bridging the gap with the French – "senior politicians were dug in too deep"; and that a French veto appeared "more of a danger than failure to get nine votes".[201]

493. Sir Jeremy identified the options as:

- "stay firm … and go with the US military campaign in the second half of March with the best arguments we can muster if a second resolution … is unobtainable, we fall back on 1441 and regret that the UN was not up to it …";
- "make some small concessions that might just be enough to get, e.g. Chile and Mexico on board". The "most obvious step" might be "ultimatum language" making military action the default if the Council did not agree that Iraq had come into compliance with resolution 1441;
- "try something on benchmarks, probably building on Blix's cluster document". That "would be better done outside the draft resolution" to "avoid diluting 1441 (and avoid placing too much weight on Blix's shoulders)"; and
- "putting forward a second resolution not authorising force", although it was clear that Sir Jeremy envisaged there would be an "eventual use of force".

494. Sir Jeremy commented: "In the end, it may be best just to forge ahead on present lines."

495. Mr Ricketts told Mr Straw that he and Sir David Manning had discussed Sir Jeremy's advice and believed that the "best package" might comprise:

- adding a deadline to the draft resolution requiring "a bit more time". A US suggestion "that Iraq should have 'unconditionally disarmed' in ten days" would be "seen as unreasonable";
- a small number of carefully chosen benchmarks "set out separately from the resolution, ideally by the Chileans and Mexicans … We could then use the clusters document to illustrate how little compliance there had been across the board"; and

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[200] Minutes, 4 March 2003, Foreign Affairs Committee (House of Commons), [Evidence Session], Q 166.
[201] Telegram 339 UKMIS New York to FCO London, 4 March 2003, 'Personal Iraq: End Game Options'.

- the US to make clear that it "accepted a significant UN role in post-conflict Iraq".[202]

496. Mr Grainger sent a copy of Mr Ricketts' advice to Mr Straw to Ms Adams, setting out the ultimatum language under consideration which he thought "would be entirely consistent with the advice previously given by the Attorney", including the need for any ultimatum to be expressed in very clear terms so that there was no room for doubt about whether Iraq had met the Council's demands.[203]

Mr Blair's conversation with President Bush, 5 March 2003

497. In the light of the failure to secure support for the draft resolution of 24 February , Mr Blair proposed a revised strategy to President Bush on 5 March.

498. Despite Lord Goldsmith's previous advice that, if a further resolution was vetoed, there would be no Council authorisation for military action, Mr Blair told President Bush that, if nine votes could be secured, military action in the face of a veto would be "politically and legally … acceptable".

499. Mr Blair spoke to President Bush on 5 March proposing further amendment to the draft resolution to give members of the Security Council a reason to support the US/UK approaches.[204]

500. Mr Blair said that an ultimatum should include a deadline of 10 days from the date of the resolution for the Security Council to decide that: "Unless … Iraq is complying by [no date specified], then Iraq is in material breach."

501. Mr Blair stated that if there were nine votes but a French veto, he thought that "politically and legally" UK participation in military action would be acceptable. "But if we did not get nine votes, such participation might be legal", but he would face major obstacles. It would be "touch and go".

Advice on the effect of a "veto"

502. In response to a request from Mr Straw about "whether it was possible for a Permanent Member of the Security Council to vote against a resolution while making it clear that this negative vote shall not be regarded as a 'veto'", Mr Wood advised that the "short answer is 'no'".[205]

503. Lord Goldsmith's draft advice of 14 January stated explicitly that the exercise of a veto in relation to a further Security Council decision would mean "no Council authorisation for military action".[206]

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[202] Minute Ricketts to PS [FCO], 4 March 2003, 'Iraq: UN Tactics'.
[203] Letter Grainger to Adams, 4 March 2003, 'Iraq: Second Resolution'.
[204] Letter Rycroft to McDonald, 'Iraq: Prime Minister's Conversation with Bush, 5 March'.
[205] Minute Wood to Private Secretary [FCO], 7 March 2003, 'Iraq: Security Council Voting'.
[206] Minute [Goldsmith to Prime Minister], 14 January 2003, 'Iraq: Interpretation of Resolution 1441'.

504. Ms Adams described the purpose of the meeting between Lord Goldsmith and No.10 officials on 27 February as to "discuss the French veto", and her advice dismissed the concept of an "unreasonable" veto. The advice and Lord Goldsmith's subsequent account to Mr Brummell of the discussion did not address the question of the legality of action in the face of a veto.

505. Sir Kevin Tebbit, MOD Permanent Under Secretary, raised the absence of an agreed legal basis for military action with Sir Andrew Turnbull on 5 March.

506. Sir Kevin Tebbit wrote to Sir Andrew Turnbull on 5 March stating:

> "I am sure you have this in hand already, but in case it might help, I should like to offer you my thoughts on the procedure for handling the legal basis for any offensive operations … in Iraq – a subject touching on my responsibilities since it is the CDS [Chief of the Defence Staff] who will need to be assured that he will be acting on the basis of a lawful instruction from the Prime Minister and the Defence Secretary.
>
> "It is not possible to be certain about the precise circumstances in which this would arise because we cannot be sure about the UN scenario involved … Clearly full UN cover is devoutly to be desired – and not just for the military operation itself …
>
> "My purpose in writing, however, is not to argue the legal merits of the case … but to flag up … that the call to action from President Bush could come at quite short notice and that we need to be prepared to handle the legalities so we can deliver …
>
> "In these circumstances, I suggest that the Prime Minister should be prepared to convene a special meeting of the inner 'war' Cabinet (Defence and Foreign Secretaries certainly, Chancellor, DPM [Deputy Prime Minister], Home Secretary possibly, Attorney General, crucially) at which CDS effectively receives his legal and constitutional authorisation. We have already given the Attorney General information and MOD briefings on objectives and rationale, and I understand that John Scarlett [Chairman of the Joint Intelligence Committee (JIC)] is conducting further briefing on the basis of the intelligence material.
>
> "While it is not possible to predict the timing of the event precisely … [it] could conceivably be as early as 10 March … in the event, albeit unlikely, that the Americans lost hope in the UN and move fast. Michael Jay may have a better fix on this, but I guess the more likely timing would be for Security Council action around the weekend of 15/16 March, and therefore for a meeting after that."[207]

507. Copies of the letter were sent to Sir Michael Jay and Sir David Manning.

508. Sir Michael commented that both Adml Boyce and General Sir Mike Jackson, Chief of the General Staff, had told him that they would need "explicit legal

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[207] Letter Tebbit to Turnbull, 5 March 2003, [untitled].

authorisation". Sir Kevin's proposal "would be one way of achieving this: though the timetable looks a bit leisurely".[208]

509. Sir David Manning advised Mr Blair, through Mr Powell, that he should have an early meeting to discuss the issues.[209]

510. Mr Blair agreed.[210]

Cabinet, 6 March 2003

511. At Cabinet on 6 March, Mr Blair concluded that it was for the Security Council to determine whether Iraq was co-operating fully.

512. Summing up the discussion at Cabinet on 6 March, Mr Blair said it was "the responsibility of the Chief Inspectors to present the truth about Saddam Hussein's co-operation with the United Nations, so that the Security Council could discharge its responsibilities in making the necessary political decisions". The UK was "lobbying hard in favour of the draft Security Council resolution". It was the duty of Saddam Hussein to co-operate fully, "and it was for the Security Council to determine whether that had been the case".[211]

513. A revised resolution was tabled in the Security Council on 7 March (See the Box below).

514. Mr Straw asked, on behalf of the UK, US and Spain as co-sponsors, for a revised draft of the second resolution to be circulated.[212]

UK/US/Spanish draft resolution, 7 March 2003

The draft resolution recalled the provisions of previous Security Council resolutions on Iraq and noted that:

- The Council had "repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations"; and
- Iraq had "submitted a declaration … containing false statements and omissions and has failed to comply with, and co-operate fully in the implementation of, that resolution".

The draft stated that the Council:

- "Mindful of its primary responsibility under the Charter … for the maintenance of international peace and stability;

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[208] Manuscript comment Jay to Ricketts, 5 March 2003, on Letter Tebbit to Turnbull, 5 March 2003, [untitled].
[209] Manuscript comment Manning to Powell and Prime Minister, 6 March 2003, on Letter Tebbit to Turnbull, 5 March 2003, [untitled].
[210] Manuscript comment Prime Minister to Manning, on Letter Tebbit to Turnbull, 5 March 2003, [untitled].
[211] Cabinet Conclusions, 6 March 2003.
[212] Telegram 378 UKMIS New York to FCO London, 7 March 2003, 'Iraq: Draft Resolution'.

- Recognising the threat Iraq's non-compliance with Council resolutions and proliferation of weapons of mass destruction and long-range missiles poses to international peace and security;
- Determined to secure full compliance with its decisions and to restore international peace and security in the area;
- Acting under Chapter VII …;
- Reaffirms the need for full implementation of resolution 1441 (2002);
- Calls on Iraq immediately to take the decisions necessary in the interests of its people and the region;
- "Decides that Iraq will have failed to take the final opportunity afforded by resolution 1441 (2002) unless, on or before 17 March 2003, the Council concludes that Iraq has demonstrated full, unconditional, immediate and active co-operation in accordance with its disarmament obligations under resolution 1441 (2002) and previous relevant resolutions, and is yielding possession to UNMOVIC and the IAEA of all weapons, weapon delivery and support systems and structures, prohibited by resolution 687 (1991) and all subsequent resolutions, and all information regarding prior destruction of such items; and
- "Decides to remain seized of the matter."

Lord Goldsmith's advice, 7 March 2003

515. Lord Goldsmith submitted formal advice to Mr Blair on 7 March, in which he noted that he had been asked for advice on the legality of military action against Iraq without another resolution of the Security Council, further to resolution 1441.[213]

516. Lord Goldsmith identified three possible bases for the use of military force. He explained that neither self-defence nor the use of force to avert overwhelming humanitarian catastrophe applied in this case.

517. As regards the third basis, he wrote that force may be used:

> "… where this is authorised by the UN Security Council acting under Chapter VII of the UN Charter. The key question is whether resolution 1441 has the effect of providing such authorisation …"

518. He wrote:

> "As you are aware, the argument that resolution 1441 itself provides the authorisation to use force depends on the revival of the express authorisation to use force given in 1990 by Security Council Resolution 678."

[213] Minute Goldsmith to Prime Minister, 7 March 2003, 'Iraq: Resolution 1441'.

519. Lord Goldsmith posed and answered two questions. First, he considered whether the revival argument was a sound legal basis in principle. Second, he considered the question of whether resolution 1441 had the effect of reviving the authority to use military force in resolution 678 (1990).

The revival argument – a sound basis "in principle"

520. Lord Goldsmith set out the basic principles of the revival argument and described how, in January 1993 (following UN Presidential Statements condemning particular failures by Iraq to observe the terms of the cease-fire resolution) and again in December 1998 (for Operation Desert Fox), following a series of Security Council resolutions, notably 1205 (1998), the use of force had relied on the revival argument.

521. He wrote:

> "Law Officers have advised in the past that, provided the conditions are made out, the revival argument does provide a sufficient justification in international law for the use of force against Iraq."

522. Having referred to the opinion, expressed in August 1992, by then UN Legal Counsel, Carl-August Fleischauer, as supportive of the UK view, Lord Goldsmith continued:

> "However, the UK has consistently taken the view (as did the Fleischauer opinion) that as the cease-fire conditions were set by the Security Council in resolution 687, it is for the Council to assess whether any such breach of those obligations has occurred.
>
> "The US have a rather different view: they maintain that the fact of whether Iraq is in breach is a matter of objective fact which may therefore be assessed by individual Member States. I am not aware of any other state which supports this view. This is an issue of critical importance when considering the effect of resolution 1441."

523. Lord Goldsmith concluded:

> "The revival argument is controversial. It is not widely accepted among academic commentators. However, I agree with my predecessors' advice on this issue. Further, I believe that the arguments in support of the revival argument are stronger following adoption of resolution 1441."

524. Lord Goldsmith explained that this was because of the terms of the resolution and the negotiations which led to its adoption. He noted that PPs 4, 5 and 10 of the resolution recalled "the authorisation to use force in resolution 678 and that resolution 687 imposed obligations on Iraq as a necessary condition of the cease-fire"; that OP 1 provided that Iraq had been and remained in material breach of relevant resolutions including resolution 687; and that OP13 recalled that Iraq had been "warned repeatedly" that "serious consequences" would "result from continued violations of its obligations".

525. Lord Goldsmith noted:

> "… Previous practice of the Council and statements made by Council members during the negotiation of resolution 1441 demonstrate that the phrase 'material breach' signifies a finding by the Council of a sufficiently serious breach of the cease-fire conditions to revive the authorisation in resolution 678 and that 'serious consequences' is accepted as indicating the use of force."

526. Lord Goldsmith wrote:

> " … I disagree, therefore, with those commentators and lawyers who assert that nothing less than an explicit authorisation to use force in a Security Council resolution will be sufficient."

The revival argument – the effect of resolution 1441 (2002)

527. Having accepted the validity of the revival argument Lord Goldsmith addressed the question of whether resolution 1441 was sufficient to revive the authorisation in resolution 678 without an assessment by the Security Council that the basis of the cease-fire established in resolution 687 had been destroyed.

528. Lord Goldsmith wrote:

> "In order for the authorisation to use force in resolution 678 to be revived, there needs to be a determination by the Security Council that there is a violation of the conditions of the cease-fire and that the Security Council considers it sufficiently serious to destroy the basis of the cease-fire. Revival will not, however, take place, notwithstanding a finding of violation, if the Security Council has made clear either that action short of the use of force should be taken to ensure compliance with the terms of the cease-fire, or that it intends to decide subsequently what action is required to ensure compliance."

529. He continued:

> "Notwithstanding the determination of material breach in OP1 of resolution 1441, it is clear that the Council did not intend that the authorisation in resolution 678 should revive immediately following the adoption of resolution 1441, since OP2 of the resolution affords Iraq a 'final opportunity' to comply with its disarmament obligations under previous resolutions by co-operating with the enhanced inspection regime described in OPs 3 and 5-9. But OP2 also states that the Council has determined that compliance with resolution 1441 is Iraq's last chance before the cease-fire resolution will be enforced."

530. On that basis, Lord Goldsmith expressed the view that:

> "OP2 has the effect therefore of suspending the legal consequences of the OP1 determination of material breach which would otherwise have triggered the revival

of the authorisation in resolution 678. The narrow but key question is: on the true interpretation of resolution 1441, what has the Security Council decided will be the consequences of Iraq's failure to comply with the enhanced regime."

531. Lord Goldsmith told the Inquiry:

"… without a firebreak, they [members of the Security Council] understood from past practice, from what happened in 1998 after resolution 1205, that the United States and the United Kingdom, and perhaps other states, would have then taken that as saying 'We now have the authority of the United Nations to move today'."[214]

532. Lord Goldsmith identified OPs 4, 11 and 12 as the provisions relevant to the question of whether or not Iraq had taken the final opportunity:

"It is clear from the text of the resolution, and is apparent from the negotiating history, that if Iraq fails to comply, there will be a further Security Council discussion. The text is, however, ambiguous and unclear on what happens next."

533. On that question, Lord Goldsmith identified and summarised the "two competing arguments":

- "that provided there is a Council discussion, if it does not reach a conclusion, there remains an authorisation to use force"; or
- "that nothing short of a further Council decision will be a legitimate basis for the use of force".

The first line of argument

534. The first line of argument maintained that, provided there was a Council discussion, whether conclusive or not, there remained an authorisation to use force.

535. It relied on the following steps:

- Iraq had been found to be in material breach of relevant resolutions including resolutions 678 and 687. Its violations were therefore, in principle, sufficient to revive the authorisation to use force in resolution 678.
- Iraq had been given a final opportunity to comply and had been warned that it would face serious consequences if it did not do so.
- OP4 of resolution 1441 had the effect of determining in advance that any false statements by Iraq in its declaration and failure by Iraq at any time to comply with and co-operate fully in the implementation of the resolution would constitute a further material breach and would thus revive the authority which had been suspended without any further determination by the Security Council.

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[214] Public hearing, 27 January 2010, page 84.

- It was necessary, however, for the Security Council to meet "to consider the situation.
- As the resolution had not specified that the Security Council should "decide" what action should be taken, such a meeting would provide an opportunity for further action by the Security Council, but it was not essential that it reach a decision. Once the procedural requirement was satisfied, the authority to take military action in resolution 678 was, once again, fully revived.

The second line of argument

536. The second line of argument focused, by contrast, on the words in OP4 ("and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below") and on the requirement in OP12 for the Security Council to "consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security". According to the second line of argument, these provisions implied a return to the Security Council for a decision.

537. Lord Goldsmith wrote that one view in support of the second line of argument was that the wording of OP4 "indicated the need for an assessment by the Security Council of how serious any Iraqi breaches [were] and whether any Iraqi breaches [were] sufficiently serious to destroy the basis of the cease-fire". He pointed out that this had been the position taken by Mr Straw when he told Parliament on 25 November that "material breach means something significant; some behaviour or pattern of behaviour where any single action appears relatively minor but the action as a whole adds up to something more deliberate and significant: something that shows Iraq's intention not to comply". If that was so, the question was by whom such an assessment was to be carried out. Lord Goldsmith noted that, according to the UK view of the revival argument, it could only be the Security Council.

538. Lord Goldsmith set out the counter position as:

> "If OP4 means what it says: the words 'co-operate fully' were included specifically to ensure that any instances of non-co-operation would amount to material breach. This is the US analysis of OP4 and is undoubtedly more consistent with the view that no further decision of the Council is necessary to authorise force, because it can be argued that the Council has determined in advance that any failure will be a material breach."

539. Lord Goldsmith advised that the critical issue was, nonetheless, what was to happen when a report came to the Security Council under OP4 or OP11. "In other words", he wrote, "what does OP12 require".

The significance of OP12

540. Lord Goldsmith noted that the language of OP12 was a compromise and was unclear. But it did provide that there should be a meeting of the Council "to consider the situation and the need for compliance in order to secure international peace and security".

541. Thus, Lord Goldsmith observed, the Security Council was provided with an opportunity to take a further decision expressly authorising the use of force or, "conceivably, to decide that other enforcement measures should be used". If it did not do so, however, he stated that the "clear US view" was that "the determination" of material breach in OPs 1 and 4 would remain valid, thus authorising the use of force without a further decision.

542. Lord Goldsmith wrote that his view was:

> "… that different considerations apply in different circumstances. The OP12 discussion might make clear that the Council view is that military action is appropriate but that no further decision is required because of the terms of resolution 1441. In such a case, there would be good grounds for relying on the existing resolution as the legal basis for any subsequent military action. The more difficult scenario is if the views of Council members are divided and a further resolution is not adopted either because it fails to attract 9 votes or because it is vetoed."

543. Lord Goldsmith rehearsed the arguments for and against the view that, in those circumstances, no further decision of the Security Council was needed to authorise the use of force.

544. He identified the principal argument in favour of this interpretation to be that the word "consider" had been chosen deliberately and that French and Russian proposals to amend this provision so that the Security Council should be required to "decide" what was to happen had not been accepted.

545. Lord Goldsmith wrote that he had been impressed by the strength and sincerity of the views of the US Administration on this point. At the same time, "the difficulty" was that the UK was "reliant" on US "assertions" that France and others:

> "… knew and accepted that they were voting for a further discussion and no more. We have very little evidence of this beyond a couple of telegrams recording admissions by French negotiators that they knew the US would not accept a resolution which required a Council decision. The possibility remains that the French and others accepted OP12 because in their view it gave them a sufficient basis on which to argue that a second resolution was required (even if that was not made expressly clear)."

546. Lord Goldsmith added:

> "A further difficulty is that, if the matter ever came before a court, it is very uncertain to what extent the court would accept evidence of the negotiating history to support a particular interpretation of the resolution, given that most of the negotiations were conducted in private and there are no agreed or official records."

547. Lord Goldsmith identified three arguments in support of the view that a further decision was needed:

- The word "assessment" in OP4 and the language of OP12 indicated that the Council would be assessing the seriousness of any Iraqi breach.
- There was special significance in the words "in order to secure international peace and security" reflecting the responsibility of the Security Council under Article 39 of the UN Charter and it could be argued that the Council was to exercise a determinative role on the issue.
- Any other construction reduced the role of the Security Council to a formality.

548. Lord Goldsmith wrote:

> "Others have jibbed at this categorisation, but I remain of the opinion that this would be the effect in legal terms of the view that no further resolution is required. The Council would be required to meet, and all members of the Council would be under an obligation to participate in the discussion in good faith, but even if an overwhelming majority of the Council were opposed to the use of force, military action could proceed regardless."

549. Lord Goldsmith pointed out that the statements made by Security Council members on the adoption of resolution 1441, which might be referred to in circumstances when the wording of the resolution was not clear, were not conclusive. He wrote:

> "Only the US explicitly stated that it believed that the resolution did not constrain the use of force by States 'to enforce relevant United Nations resolutions and protect world peace and security' regardless of whether there was a further Security Council decision. Conversely, two other Council members, Mexico and Ireland, made clear that in their view a further decision of the Council was required before the use of force would be authorised. Syria also stated that the resolution should not be interpreted, through certain paragraphs, as authorising any State to use force."

Other arguments rejected

550. Lord Goldsmith rejected the argument that it was possible to establish that Iraq had failed to take its final opportunity through the procedures in OPs 11 and 12 without regard to the words "for assessment" in OP4. He accepted that the words "and shall be reported to the Council for assessment in accordance with paragraphs 11 and 12" were

added at a late stage, but noted that it was substituted for other language "which would clearly have had the effect of making any finding of material breach subject to a further Council decision". He wrote:

> "It is clear … that any Iraqi conduct which would be sufficient to trigger a report from the inspectors under OP11 would also amount to a failure to comply with and co-operate fully in the implementation of the resolution and would thus be covered by OP4. In addition, the reference to paragraph 11 in OP4 cannot be ignored. It is not entirely clear what this means, but the most convincing explanation seems to be that it is a recognition that an OP11 inspectors' report would also constitute a report of a further material breach within the meaning of OP4 and would thus be assessed by the Council under OP12."

551. Addressing whether the differences between the US and UK objectives had any impact on the interpretation of resolution 1441, Lord Goldsmith wrote:

> "I have considered whether this difference in the underlying legal view means that the effect of the resolution might be different for the US than for the UK, but I have concluded that it does not affect the position. If OP12 of the resolution, properly interpreted, were to mean that a further Council decision was required before force was authorised, this would constrain the US just as much as the UK. It was therefore an essential negotiating point for the US that the resolution should not concede the need for a second resolution. They are convinced that they succeeded."

Lord Goldsmith's conclusions

552. In paragraphs headed "Summary", Lord Goldsmith set out his conclusions.

553. He wrote that the language of resolution 1441:

> "… leaves the position unclear and the statements made on adoption of the resolution suggest that there were differences of view within the Council as to the legal effect of the resolution. Arguments can be made on both sides.
>
> "A key question is whether there is … a need for an assessment of whether Iraq's conduct constitutes a failure to take the final opportunity or has constituted a failure fully to co-operate within the meaning of OP4 such that the basis of the cease-fire is destroyed. If an assessment is needed of that sort, it would be for the Council to make it.
>
> "A narrow textual reading of the resolution suggests that sort of assessment is not needed, because the Council has pre-determined the issue. Public statements, on the other hand, say otherwise."

554. Lord Goldsmith wrote that he remained "of the opinion that the safest legal course would be to secure the adoption of a further resolution to authorise the use of force", and that he had "already advised" that he did "not believe that such a resolution need be

explicit in its terms" if it established that the Council had "concluded" that Iraq had "failed to take the final opportunity offered by resolution 1441".

555. Lord Goldsmith added:

> "Nevertheless, having regard to the information on the negotiating history which I have been given and to the arguments of the US Administration which I heard in Washington, I accept that a reasonable case can be made that resolution 1441 is capable in principle of reviving the authorisation in 678 without a further resolution."

556. Lord Goldsmith added that that would:

> "… only be sustainable if there are strong factual grounds for concluding that Iraq has failed to take the final opportunity. In other words, we would need to be able to demonstrate hard evidence of non-compliance and non-co-operation. Given the structure of the resolution as a whole, the views of UNMOVIC and the IAEA will be highly significant in this respect. In the light of the latest reporting by UNMOVIC, you will need to consider extremely carefully whether the evidence … is sufficiently compelling to justify the conclusion that Iraq has failed to take the final opportunity."

557. Lord Goldsmith wrote:

> "In reaching my conclusions, I have taken account of the fact that on a number of previous occasions, including in relation to Operation Desert Fox in December 1998 and Kosovo in 1999, UK forces have participated in military action on the basis of advice from my predecessors that the legality of the action under international law was no more than reasonably arguable.
>
> "But a 'reasonable case' does not mean that if the matter ever came before a court I would be confident that the court would agree with this view. I judge that, having regard to the arguments on both sides, and considering the resolution as a whole in the light of the statements made on adoption and subsequently, a court might well conclude that OPs 4 and 12 do require a further Council decision in order to revive the authorisation in resolution 678. But equally I consider that the counter view can reasonably be maintained.
>
> "However, it must be recognised that on previous occasions when military action was taken on the basis of a reasonably arguable case, the degree of public and Parliamentary scrutiny of the legal issue was nothing like as great as it is today."

558. Lord Goldsmith's advice of 7 March did not present the "reasonable case" as stronger or "better" than the opposing case.

559. Nevertheless, in making that judgement, Lord Goldsmith took responsibility for a decision that a reasonable case was sufficient to provide the legal basis for the UK Government to take military action in Iraq.

560. Lord Goldsmith told the Inquiry that it was:

> "… very clear that the precedent in the United Kingdom was that a reasonable case was a sufficient lawful basis for taking military action … I checked this at the time, because this is what I had been told by my officials – it was the basis for the action in Kosovo, it was also the basis for the action in 1998 … as a matter of precedent it was standard practice to use the reasonable case basis for deciding on the lawfulness of military action."[215]

561. Lord Goldsmith added that he was saying that it was "the right test to use", and that:

> "… as a matter of precedent it was standard practice to use the reasonable case basis for deciding on the lawfulness of military action."

562. Asked to explain the meaning of the word "reasonable", Lord Goldsmith told the Inquiry:

> "It means a case which not just has some reasoning behind it, put in practical terms, it is a case that you would be content to argue in court, if it came to it, with a reasonable prospect of success. It is not making the judgment whether it is right or wrong …"[216]

563. Asked whether the reference in his 7 March advice to action being taken in Iraq in Operation Desert Fox in 1998 and in Kosovo in 1999 on the basis that the legality of the action was "reasonably arguable" was a "somewhat lesser standard" than others that he might have liked to present, Lord Goldsmith replied that the distinction he was making:

> "… was between the authority based on the assessment that there was a reasonable case that it was lawful, to authority which is based upon having balanced all the arguments and come down on one side or the other, is it, in fact, lawful?"[217]

564. Lord Goldsmith added:

> "I had originally been not that instinctively in favour of this 'reasonable case' approach, but these precedents were helpful, because, although Kosovo was a different legal basis, the point was that the British Government had committed itself to military action on the basis of legal advice that there was a reasonable case. That was the precedent. It had been pressed upon me that that was the precedent in the past.

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[215] Public hearing, 27 January 2010, page 97.
[216] Public hearing, 27 January 2010, pages 97-98.
[217] Public hearing, 27 January 2010, pages 169-170.

> "I can see … that, with hindsight, I was being overly cautious in expressing it in this way, but that was the precedent that had been used and I went along with it. Not 'I went along with it', I followed the same practice."[218]

565. Asked about his advice to Mr Blair that he could not be confident that a court would agree with the view that there was a "reasonable case", Lord Goldsmith replied:

> "I think … I'm explaining what I mean by 'reasonable case', and this is – if you like – the 'yes, but' point. I wanted to … underline to the Prime Minister that I was saying that reasonable case is enough. I'm saying it is a reasonable case. So that is the green light … but I want to underline, 'Please don't misunderstand, a reasonable case doesn't mean of itself that, if this matter were to go to court, you would necessarily win'. 'On the other hand, the counter view can reasonably be maintained'."[219]

566. Ms Adams told the Inquiry that, when she arrived in Lord Goldsmith's office, one of her predecessors had already put together a file of previous Law Officers' advice on the use of force over the last "ten years or so" which "contained all the key advice on the revival argument".[220] In her view, "it was self-evident from this file, that there had been a number of occasions when the Law Officers had … endorsed … military action on the basis of a reasonable case".

567. Addressing Lord Goldsmith's reference to precedent, Ms Adams stated:

> "It wasn't a precedent in the sense of something that had to be followed; it was a precedent in the sense of something which had, as a matter of fact, taken place."[221]

568. Asked if the term "reasonable case" had a meaning in international law, Ms Adams told the Inquiry that it did not, it was:

> "… one which can be reasonably argued. Obviously, it has to have a reasoned basis to it because otherwise it is not going to be reasonable to a court. There has to be a reasonable prospect … of success for this argument, but it doesn't mean to say it is the better legal opinion. That would be my interpretation."[222]

569. The Inquiry has seen the advice from the Law Officers on the use of force described by Ms Adams, in which the formulation "respectable legal argument" is used.

570. Asked whether there was any significant difference between a "reasonable case" and a "respectable legal argument", Lord Goldsmith wrote that he preferred the former, though he treated "respectable case" as amounting to the same test in practice, and "certainly not a higher test".[223]

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[218] Public hearing, 27 January 2010, pages 170-171.
[219] Public hearing, 27 January 2010, pages 173-174.
[220] Public hearing, 30 June 2010, page 43.
[221] Public hearing, 30 June 2010, page 45.
[222] Public hearing, 30 June 2010, page 45.
[223] Statement, 4 January 2011, paragraph 6.1.

571. Asked how his "characterisation of his 7 March advice as a 'green light'" sat with his explanation that a "reasonable case does not mean that if the matter came before a court" he "would be confident that the court would agree", Lord Goldsmith wrote:

> "I was relying on the precedent established in previous cases that a reasonable or respectable case was sufficient. Precedent in the Law Officers' department is commonly followed. However I was careful to explain what I meant by the phrase 'reasonable case' and to highlight in my advice all the difficulties in interpreting the effect of the resolution."[224]

572. Lord Goldsmith added that, after delivering his advice of 7 March, he had:

> "… continued to reflect on the position and on 13 March 2003 concluded that the better view was there was a lawful basis for the use of force without a further resolution."

573. Asked how his "characterisation of his 7 March advice as a 'green light'" sat "with the number of difficulties with the argument that no further Security Council determination" was needed which he had identified but not resolved in that advice, Lord Goldsmith wrote:

> "I was well aware of the contrary arguments and had set them out in detail in my advice. They could not be resolved because the language of the resolution lacked clarity and the statements made on adoption revealed differences of view within the Council on the legal effect of the resolution. The issue for me therefore was to consider whether the argument that the resolution authorised the use of force was of sufficient weight to reach the threshold of certainty that my predecessors had concluded was necessary. I concluded that it was and I knew that therefore I was giving a 'green light'."[225]

574. Asked how his view – that a "reasonable case" was sufficient to decide on the lawfulness of military action – reflected the framework of the UN Charter and the prohibition on the use of force except in self-defence or where clearly authorised by the Security Council in the circumstances set out in Chapter VII of the Charter, Lord Goldsmith wrote:

> "A 'clear' or 'certain' basis for the use of force will always be preferable to a 'reasonable' or 'respectable' one. That is why I argued in my advice of 7 March 2003 that the safest legal course would be to secure the adoption of a further resolution to authorise the use of force … If we had achieved the second resolution that would have provided more certainty – although even then it is still likely to have been in terms relying on the revival of the original 1990/91 authorisation which would not have satisfied all international lawyers. We had however previously engaged

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[224] Statement, 4 January 2011, paragraph 6.3.
[225] Statement, 4 January 2011, paragraph 6.4.

in the use of force on the basis of a reasonable or respectable case that action is authorised by a UNSCR or self defence or humanitarian intervention and my understanding was and is that this is a sufficient basis."[226]

Other matters dealt with in Lord Goldsmith's 7 March advice

575. Lord Goldsmith reiterated the categorical advice, previously expressed in his 14 January draft, that there were no grounds for arguing that "an unreasonable veto" would permit the US and UK to ignore such a veto.

576. Addressing the effect of an "unreasonable" veto, Lord Goldsmith stressed:

> "The analysis set out above applies whether a second resolution fails to be adopted because of a lack of votes or because it is vetoed. As I have said before … there are no grounds for arguing that an 'unreasonable veto' would entitle us to proceed on the basis of a presumed Security Council authorisation. In any event, if the majority of world opinion remains opposed to military action, it is likely to be difficult on the facts to categorise a French veto as 'unreasonable'."

577. Lord Goldsmith stressed the importance of the circumstances at the time a decision was taken.

578. Addressing the importance of circumstances, Lord Goldsmith concluded:

> "The legal analysis may, however, be affected by the course of events over the next week or so, e.g. the discussions on the draft second resolution. If we fail to achieve the adoption of a second resolution, we would need to consider urgently at that stage the strength of our legal case in the light of the circumstances at that time."

579. Lord Goldsmith recognised that there was a possibility of a legal challenge.

580. Lord Goldsmith set out the possible consequences of acting without a further resolution, in particular the ways in which the matter might be brought before a court, some of which he described as "fairly remote possibilities".

581. Lord Goldsmith outlined the potential risks of action before both International and UK Courts, concluding:

> "… it would not be surprising if some attempts were made to get a case of some sort off the ground. We cannot be certain that they would not succeed. The GA route [the General Assembly of the United Nations requesting an advisory opinion on the legality of the military action from the International Court of Justice] may be the most likely …"

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[226] Statement, 4 January 2011, paragraph 6.5.

582. Sir Michael Wood had provided advice on the possibility of legal challenge in October 2002.[227]

583. Lord Goldsmith stressed the importance of the principle of proportionality in the use of force during the campaign.

584. Addressing the principle of proportionality, Lord Goldsmith stressed that the lawfulness of military action depended not only on the existence of a legal basis, but also on the exercise of force during the campaign being proportionate.[228]

585. Lord Goldsmith wrote that any force used pursuant to the authorisation in resolution 678 must have as its objective the enforcement of the terms of the cease-fire contained in resolution 687 and subsequent relevant resolutions; be limited to what is necessary to achieve that objective; and must be a proportionate response to that objective. That was "not to say that action may not be taken to remove Saddam Hussein from power if it can be demonstrated that such action is a necessary and proportionate measure to secure the disarmament of Iraq. But regime change cannot be the objective of military action."

586. Asked if he thought that the matter would be closed by his 7 March advice, Lord Goldsmith told the Inquiry:

> "… at the time, I thought it was, because I thought I had given the green light in February, I was following precedent in giving the green light again, and I thought, therefore, the issue was closed, and therefore, if, politically, the decision was taken wherever it needed to be taken in the United Kingdom, and no doubt the United States, about military action, then that would be it.
>
> "… [R]ecognising that things could change, I said … we would need to … assess the strength of the legal case in the light of circumstances at the time if there were a failure to obtain the second resolution …"[229]

587. Mr Straw, Mr Hoon, Dr John Reid, Minister without Portfolio, and the Chiefs of Staff had all seen Lord Goldsmith's advice of 7 March before the No.10 meeting on 11 March, but it is not clear how and when it reached them.

588. Other Ministers whose responsibilities were directly engaged, including Mr Gordon Brown, the Chancellor of the Exchequer, and Ms Short, the International Development Secretary, and their senior officials, did not see the advice.

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[227] Minute Wood to PS [FCO], 15 October 2002, 'Iraq'.
[228] Minute Goldsmith to Prime Minister, 7 March 2003, 'Iraq: Resolution 1441'.
[229] Public hearing, 27 January 2010, pages 175-176.

Media coverage during the weekend of 8 and 9 March

589. An article in the *Financial Times* on Saturday 8 March referred to an interview with Lord Archer, Solicitor General from 1974 to 1979, that was to be broadcast the following day on *GMTV's Sunday* programme.[230] The article stated that Lord Archer would reject the position "that resolution 1441 provided sufficient legal authority" for military action. It also stated that civil servants were understood to be putting pressure on Sir Andrew Turnbull to show them the Attorney General's advice.

590. On 9 March, an article in the *Sunday Times* warned that there would be "a rebellion" of up to 200 Labour MPs if Mr Blair proceeded to military action without a second UN resolution authorising military action.[231]

591. The article stated:

> "Conservatives urged the Government to say whether Lord Goldsmith, the Attorney General, had given legal approval for military action to be taken under any circumstances."

592. In an interview broadcast in the late evening of 9 March as part of the *BBC Radio 4 Westminster Hour* programme, Ms Short was asked if she would resign if there was no mandate from the UN for war.[232] She said:

> "Absolutely. There's no question about that.
>
> "If there is not UN authority for military action or if there is not UN authority for the reconstruction of the country, I will not uphold a breach of international law or this undermining of the UN and I will resign from the Government."

593. Ms Short's comments were widely reported in the media on 10 March.

Government reaction to Lord Goldsmith's advice of 7 March

Mr Straw's statement, 10 March 2003

594. Mr Straw made a statement to the House of Commons on 10 March 2003.

595. On 10 March, in an oral statement to the House of Commons, Mr Straw reported on his attendance at the ministerial meeting in the Security Council on 7 March (see Sections 3.7 and 3.8).[233]

596. In response to a question from Mr Michael Ancram, Deputy Leader of the Opposition and Shadow Secretary of State for Foreign and Commonwealth Affairs, as

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[230] *Financial Times*, 8 March 2003, *Warning over 'unlawful' war.*
[231] *Sunday Times*, 9 March 2003, *200 Labour MPs revolt over war.*
[232] *The Independent*, 10 March 2003, *Short will quit if Britain goes to war without UN resolution.*
[233] House of Commons, *Official Report*, 10 March 2003, columns 22-24.

to what the Government's position would be in the event that three Permanent Members of the Security Council vetoed a second resolution, Mr Straw replied:

> "We have made it clear throughout that we want a second resolution for political reasons, because a consensus is required, if we can achieve it, for any military action. On the legal basis for that, it should be pointed out that resolution 1441 does not require a second resolution."[234]

597. Asked by Mr Simon Thomas (Plaid Cymru) to remind the House "exactly of which part of resolution 1441 authorises war", Mr Straw said:

> "I am delighted to do so. We start with paragraph 1, which says that the Security Council 'Decides that Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687 … in particular through Iraq's failure to cooperate with United Nations inspectors and the IAEA, and to complete the actions required under paragraph 8 to 13 of resolution 687'.
>
> "We then go to paragraph 4, in which the Security Council 'Decides that false statements or omissions in the declarations submitted by Iraq pursuant to this resolution and failure by Iraq at any time to comply with, and co-operate fully in the implementation of, this resolution shall constitute a further material breach of Iraq's obligations" – Obligations of which it is now in breach. We turn to operative paragraph 13, in which the Security Council 'Recalls, in that context, that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations'."[235]

Mr Blair's meeting with Lord Goldsmith, 11 March 2003

598. Mr Blair discussed the legal basis for the use of military force, and the need to avoid a detailed discussion in Cabinet, in a bilateral meeting with Lord Goldsmith on 11 March.[236]

599. There is no record of that discussion in either the No.10 or Attorney General's papers sent to the Inquiry.

600. In his statement for the Inquiry, Lord Goldsmith confirmed that the meeting had taken place at 0930 but he could not recall the detail of the discussion. He added that it "would have been my first meeting" with Mr Blair since he had submitted his advice of 7 March: "I expect that I would have gone over the main points of my advice with him."[237]

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[234] House of Commons, *Official Report*, 10 March 2003, column 24.
[235] House of Commons, *Official Report*, 10 March 2003, column 34.
[236] Minute Rycroft to Prime Minister, 11 March 2003, 'Iraq Military: 1300 Meeting'.
[237] Statement, 4 January 2011, pages 13-14.

601. Asked about the conclusions of the meeting with Lord Goldsmith, Mr Blair wrote:

> "I did see him briefly, I think, on 11 March 2003 before the meeting with the other Cabinet members. I cannot recall the specific content of the discussion but most likely it would have been about his coming to Cabinet to explain his decision."[238]

602. In the edition of his diaries published in 2012, Mr Campbell wrote that Lord Goldsmith:

> "… had done a long legal opinion and said he did not want TB to present it too positively. He wanted to make it clear he felt there was a reasonable case for war under 1441. There was also a case to be made the other way and a lot would depend on what actually happened. TB also made clear that he did not particularly want Goldsmith to launch a detailed discussion at Cabinet, though it would have to happen at some time, and Ministers would want to cross-examine. With the mood as it was, and with Robin [Cook] and Clare [Short] operating as they were, he knew that if there was any nuance at all, they would be straight out saying the advice was that it was not legal, that the AG was casting doubt on the legal basis for war. Peter Goldsmith was clear that though a lot depended on what happened, he was casting doubt in some circumstances and if Cabinet had to approve the policy of going to war, he had to be able to put the reality to them. Sally [Morgan] said it was for TB to speak to Cabinet, and act on the AG's advice. He would simply say the advice said there was a reasonable case. The detailed discussion would follow.
>
> "… Peter G[oldsmith] told TB he had been thinking of nothing else for three weeks, that he wished he could be clearer in his advice, but in reality it was nuanced."[239]

Mr Blair's meeting, 11 March 2003

603. On 11 March, Ministers discussed legal issues, including holding back for a few days the response to a US request for the use of UK bases.

604. They also discussed the viability of the military plan.

605. Mr Blair held a meeting on 11 March with Mr Prescott, Mr Hoon, Lord Goldsmith and Admiral Boyce. Mr Straw attended part of the meeting.[240] Sir Andrew Turnbull, Mr Powell, Mr Campbell, Baroness Morgan, Sir David Manning and Mr Rycroft were also present.

606. Prior to the meeting, Mr Straw's Private Office wrote to No.10 on 11 March reporting that the US was pressing for a response "as soon as possible" to a letter to Mr Straw delivered by the US Ambassador on 5 March. It had formally requested the UK

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[238] Statement, 14 January 2011, page 11.
[239] Campbell A & Hagerty B. *The Alastair Campbell Diaries. Volume 4. The Burden of Power: Countdown to Iraq.* Hutchinson, 2012.
[240] Letter Rycroft to McDonald, 11 March 2003, 'Iraq: Legal and Military Aspects'.

Government's agreement to the use of RAF Fairford, Diego Garcia and, possibly, other UK bases for military operations against Iraq.[241]

607. In the letter the FCO advised that "under international law, the UK would be responsible for any US action in breach of international law in which the UK knowingly assisted". The draft response was "premised on a decision that UNSCR 1441 and other relevant resolutions" provided "the authority for action".

608. Mr Desmond Bowen, Deputy Head of the Overseas and Defence Secretariat in the Cabinet Office, advised Sir David Manning in a minute that the request was to be discussed at Mr Blair's meeting with Lord Goldsmith, Mr Straw and Mr Hoon on 11 March. He understood that Mr Straw and Mr Hoon had copies of Lord Goldsmith's advice of 7 March.[242]

609. Ms Adams advised Lord Goldsmith that she understood "the principal purpose of the meeting to be to discuss the ad bellum issue".[243]

610. An hour before the meeting took place, MOD Legal Advisers provided questions for Mr Hoon to raise at the meeting, explaining:

> "… some in the FCO – whether having read the AG's letter or not, I don't know – are beginning to believe that the legal base is already OK. It seems to us – and I have discussed this with Martin Hemming – that the position is not yet so clear."[244]

611. The document provided for Mr Hoon stated:

> "Questions for the Attorney General
>
> "If no 2nd resolution is adopted (for whatever reason), and the PM decides that sufficient evidence exists that Iraq has failed to take the final opportunity to comply offered by 1441, is he satisfied that the currently proposed use of force would be lawful under international law?
>
> "Comment: The AG's minute to the PM is equivocal: he says 'a reasonable case can be made' [for the revival argument] but also says that his view is that 'different considerations apply in different circumstances' [meaning the nature of the Security Council discussions under OP12]. He ends his summary thus: 'If we fail to achieve the adoption of a second resolution we would need to consider urgently at that stage the strength of our legal case in the light of circumstances at the time'.

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[241] Letter Sinclair to Rycroft, 11 March 2003, 'US Request to use Diego Garcia and RAF Fairford for Possible Operations Against Iraq'.
[242] Minute Bowen to Manning, 11 March 2003, 'US Use of British Bases'.
[243] Minute Adams to Attorney General, 11 March 2003, 'Iraq: Meeting at No.10, 1PM'.
[244] Email DG OpPol-S to SofS-Private Office-S[MOD], 11 March 2003, 'Urgent for Peter Watkins' attaching Paper 'Questions for the Attorney General'.

"If the answer is yes to the above, can it be assumed that the Attorney will be able to confirm formally at the time that CDS's order to implement the planned operation would be a lawful order (anybody subject to military law commits an offence if he disobeys any lawful command).

"Comment: Notwithstanding the current uncertainties, when it comes to the crunch, CDS will need to be assured that his orders are lawful. As the Attorney points out in his letter, 'on previous occasions when military action was taken on the basis of a reasonably arguable case, the degree of public and Parliamentary scrutiny of the legal issue was nothing like as great as it is today'."

612. A minute from Mr Rycroft to Mr Blair described confirmation of the viability of the overall military plan as the "main purpose of the meeting".[245]

613. The record of the meeting on 11 March stated that Mr Blair had started by addressing the legal basis for military action. He stated that Lord Goldsmith's "advice made it clear that a reasonable case could be made" that resolution 1441 was "capable of reviving" the authorisation of resolution 678 (1990), "although of course a second resolution would be preferable".[246]

614. Other points recorded by Mr Rycroft included:

- Admiral Boyce said he "would need to put a short paragraph in his directive to members of the Armed Forces".
- The paragraph "should be cleared with the Attorney General".
- The UK would send the US a positive reply on its request to use Diego Garcia and RAF Fairford "in a day or two, with the usual conditions attached".
- Mr Hoon and Adm Boyce advised that "once we had given our approval, the US might give very little notice before the start of the campaign".
- Sir Andrew Turnbull asked whether a legal basis for military action was required for civil servants, as well as for members of the Armed Forces.
- Mr Hoon asked whether the Attorney General's legal advice was ever disclosed.
- Mr Blair asked for a quick study into the precedents for that.
- Adm Boyce told the meeting that he was "confident that the battle plan would work".
- Mr Blair stated that "we must concentrate on averting unintended consequences of military action. On targeting, we must minimise the risks to civilians."

615. A letter, formally confirming the UK's agreement to US use of Diego Garcia and RAF Fairford for operations to enforce Iraqi compliance with the obligations on WMD

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[245] Minute Rycroft to Prime Minister, 11 March 2003, 'Iraq Military: 1300 Meeting'.
[246] Letter Rycroft to McDonald, 11 March 2003, 'Iraq: Legal and Military Aspects'.

laid down in resolution 1441 and previous relevant resolutions, was sent to Dr Rice on 18 March.[247]

616. Mr Campbell wrote in his diaries that:

- Mr Hoon had "said he would be happier with a clearer green light from the AG".
- Mr Blair had been "really irritated" when Sir Andrew Turnbull had "said he would need something to put round the Civil Service that what they were engaged in was legal". Mr Blair was "clear we would do nothing that wasn't legal".
- Lord Goldsmith had provided "a version of the arguments he had put to TB, on the one hand, on the other, reasonable case".
- Mr Hoon had advised that the response to the "US request for the use of Diego Garcia and [RAF] Fairford" should be that it was "not … automatic but had to go round the system". Mr Blair had said he "did not want to send a signal that we would not do it".
- Mr Hoon and Mr Straw were telling Mr Blair that the US could act as early as that weekend, and "some of our forces would have to be in before".[248]

Mr Straw's minute to Mr Blair, 11 March 2003

617. Mr Straw advised Mr Blair that the UK and US should not push the second resolution to a vote if it could not secure nine votes and be certain of avoiding any vetoes.

618. Mr Straw suggested the UK should adopt a "strategy" based on the argument that Iraq had failed to take the final opportunity offered by resolution 1441, and that the last three meetings of the Security Council met the requirement for Security Council consideration of reports of non-compliance.

619. Mr Straw wrote to Mr Blair on 11 March setting out his firm conclusion that:

> "If we cannot gain nine votes and be sure of no veto, we should not push our second resolution to a vote. The political and diplomatic consequences for the UK would be significantly worse to have our … resolution defeated (even by just a French veto alone) than if we camp on 1441. [UN Secretary-General] Kofi Annan's comments last evening have strengthened my already strong view on this. Getting Parliamentary approval for UK military action will be difficult if there is no second resolution: but in my view marginally easier by the strategy I propose."[249]

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[247] Letter Manning to Rice, 18 March 2003, [untitled].
[248] Campbell A & Hagerty B. *The Alastair Campbell Diaries. Volume 4. The Burden of Power: Countdown to Iraq.* Hutchinson, 2012.
[249] Minute Straw to Prime Minister, 11 March 2003, 'Iraq: What if We Cannot Win the Second Resolution?'.

620. Mr Straw set out his reasoning in some detail, making clear that it was predicated on a veto only by France. That was "in practice less likely than two or even three vetoes. The points made included:

- The upsides of defying "the" veto had been "well aired". It would "show at least we had a 'moral majority' with us".
- In public comments he and Mr Blair had kept their "options open on what we should do in the event that the resolution does not carry within the terms of the [UN] Charter". That had "been the correct thing to do". "In private we have speculated on what to do if we are likely to get nine votes, but be vetoed" by one or more of the P5.
- Although in earlier discussion he had "warmed to the idea" that it was worth pushing the issue to a vote "if we had nine votes and faced only a French veto", the more he "thought about this, the worse an idea it becomes".
- The intensive debate over Iraq in the last five months had shown how much faith people had in the UN as an institution; and that "far from having the 'moral majority' with us … we will lose the moral high ground if we are seen to defy the very rules and Charter of the UN on which we have lectured others and from which the UK has disproportionately benefitted".
- The "best, least risky way to gain a moral majority" was "by the 'Kosovo route' – essentially what I am recommending. The key to our moral legitimacy then was the matter never went to a vote – but everyone knew the reason for this was that Russia would have vetoed. (Then, we had no resolution to fall back on, just customary international law on humanitarianism; here we can fall back on 1441.)"
- The veto had been included in the UN Charter "for a purpose – to achieve a consensus". The UK could not "sustain an argument (politically, leave aside legally) that a distinction can be made between a 'reasonable' and an 'unreasonable' veto". That was a completely subjective matter.
- The "three recent meetings of the Council more than fulfil the requirement for immediate consideration of reports of non-compliance. So we can say convincingly that the process set out in 1441 is complete. If we push a second resolution to a veto, then the last word on the Security Council record is a formal rejection of a proposal that Iraq has failed to take its final opportunity."

621. Mr Straw advised that it would be "more compelling in Parliament and with public opinion to take our stand on the basis of 1441, and the overwhelming evidence that Iraq has not used the four months since then to co-operate 'immediately, unconditionally and actively'"; and that the UNMOVIC [clusters] document would be "a material help in making that case".

622. Mr Straw advised Mr Blair that he interpreted Mr Annan's "important" statement on 10 March:

> "… essentially as a gypsies' warning not to try and then fail with a second resolution. If the last current act of the Security Council on Iraq is 1441, we can genuinely claim that we have met Kofi's call for unity and for acting within (our interpretation of) the authority of the Security Council."

623. There was no reference in the minute to President Chirac's remarks the previous evening.

624. Mr Straw advised Mr Blair that it would not be possible to decide what the Parliamentary Labour Party (PLP) and the House of Commons would agree until deliberations in the Security Council had concluded. If a second resolution was agreed it would be "fine", but that was "unlikely". He added:

> "I sensed yesterday that sentiment might be shifting our way; but we would need to be very clear of the result before putting down a resolution approving military action. We could not possibly countenance the risk of a defeat …
>
> "But it need not be a disaster for you, the Government, and even more important for our troops, if we cannot take an active part in the initial invasion, provided we get on the front foot with our strategy.
>
> "I am aware of all the difficulties of the UK standing aside from invasion operations, not least given the level of integration of our forces with those of the US. But I understand that the US could if necessary adjust their plan rapidly to cope without us … [W]e could nevertheless offer them a major UK contribution to the overall campaign. In addition to staunch political support, this would include:
>
> - intelligence co-operation;
> - use of Diego Garcia, Fairford and Cyprus, subject to the usual consultation on targeting;
> - as soon as combat operations are over, full UK participation in the military and civilian tasks, including taking responsibility for a sector and for humanitarian and reconstruction work. We could also take the lead in the UN on securing the … resolution to authorise the reconstruction effort and the UN role in it which the US now agree is necessary."

625. Mr Straw concluded:

> "We will obviously need to discuss all this, but I thought it best to put it in your mind as event[s] could move fast. And what I propose is a great deal better than the alternatives. When Bush graciously accepted your offer to be with him all the way, he wanted you alive not dead!"

626. Mr Straw's minute was not sent to Lord Goldsmith or Mr Hoon.

627. Mr Straw's Private Office had separately replied on 11 March to a request from Sir David Manning for advice on the implications of the argument that a French veto would be unreasonable.[250]

628. In the reply, the FCO advised that there was "no recognised concept of an 'unreasonable veto'"; and warned that: "In describing a French veto as 'unreasonable' we would therefore be inviting others to describe any future vetoes as 'unreasonable' too." That could have implications in other areas "such as the Middle East". In addition, "describing the veto as unreasonable would make no difference to the legal position". There was "no implied condition" in the UN Charter that a veto was valid "only" if it was reasonable. There was "already pressure at the UN to abolish veto rights". And pressure could be expected to increase "if the argument that certain vetoes were 'unreasonable' – and could therefore be ignored – gained ground".

629. The UK was "on record as saying that the veto should only be used with restraint and in a manner consistent with the principles of the Charter".

Prime Minister's Questions, 12 March 2003

630. During Prime Minister's Questions on 12 March, Mr Blair stated that the UK would not do anything which did not have a proper legal basis.

631. In PMQs on 12 March Mr Blair focused on efforts to secure a second resolution and the importance for the UN of being seen to act in response to Saddam Hussein's failure to co-operate as required by resolution 1441 and of achieving unity in the international community.[251]

632. Mr Charles Kennedy, Leader of the Liberal Democrats, asked if the Attorney General had advised that a war in Iraq would be legal in the absence of a second resolution authorising force; Mr Richard Shepherd (Conservative) asked why a UN resolution was required; and Mr John Randall (Conservative) asked if Mr Blair would publish the legal advice.

633. In response, the points made by Mr Blair included:

- As he had "said on many occasions … we … would not do anything that did not have a proper legal basis".
- Resolution 1441 provided the legal basis and the second resolution was "highly desirable to demonstrate the will of the international community".
- It was not the convention to publish legal advice but it was "the convention to state clearly that we have a legal base for whatever action we take, and … we must have such a base".

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[250] Letter Owen to Manning, 11 March 2003, 'Iraq: Security Council: Use of vetoes'.
[251] House of Commons, *Official Report*, 12 March 2003, columns 280-290.

634. In response to a question from Mr Kennedy about whether Mr Annan had said that action without a second resolution would breach the UN Charter, Mr Blair stated that Mr Annan had said that it was "important that the UN comes together". Mr Blair added that it was:

> "… complicated to get that agreement … when one nation is saying that whatever the circumstances it will veto a resolution."

635. Mr Kennedy wrote to Mr Blair later that day repeating his request that Mr Blair should publish Lord Goldsmith's advice.[252] A copy of the letter was sent to Lord Goldsmith.

Sir Jeremy Greenstock's discussions in New York, 12 March 2003

636. A UK proposal for a side statement setting out possible tests for Iraq attracted little support amongst Security Council members.

637. Sir Jeremy Greenstock suggested early on the afternoon of 12 March that in the Security Council that day the UK should:

- table a revised draft resolution explaining that the UK was "setting aside the ultimatum concept" in operative paragraph 3 of the draft of 7 March "because it had not attracted Council support";
- distribute a side statement with tests for Saddam Hussein, "explaining that the text was a national position to which the UK wanted as many Council Members as possible to adhere to maintain the pressure on Saddam"; and
- state that the deadline of the 17 March by which it had been proposed that Iraq should demonstrate full, immediate and active co-operation in accordance with resolution 1441 was "being reviewed".[253]

638. Sir Jeremy favoured using the open debate in the Security Council later that day to explain the UK move, adding: "At no point will I signal, in public or in private, that there is any UK fallback from putting this new text to a vote within 24-36 hours."

639. Sir Jeremy reported that he had explained the gist of the plan to Ambassador Negroponte who was briefing Secretary Powell for a conversation with President Bush.

640. Sir Jeremy had spoken to Mr Annan and had explained the UK concept of a side statement and tests which Saddam Hussein could meet "within the tight deadline we would offer (ideally 10 days)" if he "was serious about disarming". Council members "should be able to agree the concept we were offering as a way out of the current impasse".[254]

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[252] Letter Kennedy to Prime Minister, 12 July 2003, [untitled].
[253] Telegram 419 UKMIS New York to FCO London, 12 March 2003, 'Iraq: Second Resolution'.
[254] Telegram 427 UKMIS New York to FCO London, 13 March 2003, 'Iraq: Call on the Secretary-General, 12 March'.

641. Sir Jeremy reported that he had stressed that the UK's objective "was the disarmament of Iraq by peaceful means if possible". The "aim was to keep a united Security Council at the centre of attempts to disarm Iraq", but calls for a "grace period for Iraq" of 45 days or longer were "out of the question". The UK would not amend the draft resolution tabled on 7 March:

> "… until it was clear that the new concept had a chance of succeeding. If the Council was interested, we might be able to move forward in the next day or so; if not, we would be back on the 7 March text and my instructions were to take a vote soon."

642. Sir Jeremy and Mr Annan had also discussed press reporting of Mr Annan's comments (on 10 March), "to the effect that military action without a Council authorisation would violate the UN Charter". Mr Annan said that he had been:

> "… misquoted: he had not been attempting an interpretation of 1441 but merely offering, in answer to a specific question, obvious thoughts about the basic structure of the Charter. Nevertheless the Council was seized of the Iraq problem and working actively on it. It had not yet reached a decision to authorise force; how … could it be right for some Member States to take the right to use force into their own hands?"

643. Sir Jeremy reported that he had "remonstrated that the Council was in paralysis: at least one Permanent Member had threatened to veto 'in any circumstances'. The Council was not shouldering its responsibilities."

644. Asked what the UK would do if it failed to get even nine votes, Sir Jeremy said:

> "… we would have to consider the next steps; but we believed we had a basis for the use of force in existing resolutions (based on the revival of the 678 authorisation by the material breach finding in OP1 of 1441, coupled with Iraq's manifest failure to take the final opportunity offered to it in that resolution) … OP12 … did not in terms require another decision. This was not an accidental oversight: it had been the basis of the compromise that led to the adoption of the resolution."

645. Sir Jeremy reported that he had "urged" Mr Annan "to be cautious about allowing his name to be associated too closely with one legal view of a complicated and difficult issue".

646. At Mr Annan's suggestion, Sir Jeremy subsequently gave the UN Office of Legal Affairs a copy of Professor Greenwood's memorandum to the FAC of October 2002 and Mr Straw's evidence to the FAC on 4 March 2003.

647. Mr Straw's evidence to the FAC is referred to in more detail in Section 3.7.

648. Sir Jeremy reported that Mr Annan had said "several times" that he "understood" what Mr Straw and Mr Blair "were trying to do, and expressed sympathy for the tough situation you found yourselves in". Sir Jeremy reported that Mr José Maria Aznar, the Spanish Prime Minister, was "in a similar predicament". The "US did not

always realise how comments intended by US politicians for US domestic audiences seriously damaged the position of their friends in other countries". In a conversation with President Chirac on 12 March, Mr Annan had "found him 'tough but not closed' to possible compromises".

649. On the same day Mr Straw informed Mr Igor Ivanov, the Russian Foreign Minister, that the UK was about to table a revised resolution, omitting the paragraph from the 7 March draft which contained the deadline of 17 March for Iraq to demonstrate that it had taken the final opportunity offered in resolution 1441 to comply with its obligations.[255]

Mr Blair's conversation with President Bush, 12 March 2003

650. In a telephone call with President Bush on 12 March Mr Blair proposed only that the US and UK should continue to seek a compromise in the UN, while confirming that he knew it would not happen. He would say publicly that France had prevented a resolution.

651. Much of the discussion focused on managing UK politics.

652. Mr Blair recognised that it would not be possible to agree a compromise in the Security Council before 17 March and that the US would not extend the deadline.

653. Mr Blair sought President Bush's help in handling the debate in the House of Commons planned for Tuesday 18 March, where he would face a major challenge to win a vote supporting military action.

654. Mr Blair wanted:

- **to avoid a gap between the end of the negotiating process and the Parliamentary vote in which France or another member of the Security Council might table a resolution that attracted a Council majority; and**
- **US statements on the publication of a Road Map on the Middle East Peace Process and the need for a further resolution on a post-conflict Iraq.**

655. On the afternoon of 12 March Mr Blair and President Bush discussed the latest position and discussions with Chile and Mexico.[256]

656. The conversation and discussions between Mr Straw and Secretary Powell about US concerns about UK diplomatic activity are addressed in more detail in Section 3.8.

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[255] Telegram 46 FCO London to Moscow, 12 March 2003, 'Iraq: Foreign Secretary's Conversation with Russian Foreign Minister, 12 March'.
[256] Letter Rycroft to McDonald, 12 March 2003, 'Iraq: Prime Minister's Telephone Conversation with President Bush, 12 March'.

657. The UK subsequently circulated a draft side statement setting out the six tests to a meeting of Security Council members in New York on the evening of 12 March.[257] The draft omitted an identified date for a deadline and included the addition of a final clause stating:

> "The United Kingdom reserves its position if Iraq fails to take the steps required of it."

658. Sir Jeremy Greenstock commented that the initiative had resulted in:

"
- genuine expressions of warmth from the [undecided 6] for taking them seriously;
- recognition that the UK had made a real effort to find a way through for the Council;
- discomfiture of the negative forces, who sounded plaintive and inflexible in their questioning;
- finally, a bit of time. I can keep this going at least until the weekend."[258]

659. But:

- The UK had not achieved "any kind of breakthrough. The French, Germans and Russians will undoubtedly home in on the preambular section of the draft resolution and on the whiff of ultimatum in the side statement".
- There were "serious questions about the available time", which the US would "not help us to satisfy".

Cabinet, 13 March 2003

660. Mr Blair told Cabinet on 13 March that work continued in the UN to obtain a second resolution and, following the French decision to veto, the outcome remained open.

661. Mr Blair indicated that difficult decisions might be required and promised a further meeting at which Lord Goldsmith would be present.

662. Mr Straw told Cabinet that Iraq continued to be in material breach of resolution 1441 and set out his view of the legal position.

663. Mr Straw told Cabinet that there was "good progress" in gaining support in the Security Council.

664. Mr Blair told Cabinet on 13 March that work continued in the UN to obtain a second resolution. The UK had presented proposals for six "tests", "endorsed by Dr Blix", to judge whether Saddam Hussein had decided to commit himself to disarmament. Satisfying those tests would not mean that disarmament was complete, but that the

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[257] Telegram 429 UKMIS New York to FCO London, 13 March 2003, 'Iraq: UK Side-Statement'.
[258] Telegram 428 UKMIS New York to FCO London, 13 March 2003, 'Iraq: UK Circulates Side-Statement: Part 2'.

first steps had been taken. The non-permanent members of the Security Council were uncomfortable with a situation where, "following the French decision to veto", the Permanent Members were "not shouldering their responsibilities properly". The "outcome in the Security Council remained open". If the United Nations process broke down, difficult decisions would be required and there would be another Cabinet meeting at which the Attorney General would be present.[259]

665. Mr Straw said that, although there were differences between members of the Security Council, "none was saying that Iraq was complying with its international obligations"; and that it "followed that Iraq continued to be in material breach" of those obligations.

666. On the legal basis for military action, Mr Straw said that he "was already on record setting out the position to the Foreign Affairs Committee". Mr Straw rehearsed the negotiating history of the resolution 1441, stating that:

- "the French and Russians had wanted a definition of what would constitute a material breach, but had settled for the facts being presented to the Security Council";
- "they had also wanted a statement that explicit authorisation was required for military action and instead had settled for further consideration by the Security Council …"; and
- failure by Iraq to comply with resolution 1441 "revived the authorisations existing" in resolutions 678 (1990) and 687 (1991).

667. Mr Straw noted that the Government's supporters had "a clear preference" for a second resolution but it "had not been seen as an absolute necessity". There had been "good progress" in New York in "gaining the support of uncertain non-permanent members of the Security Council, including Mexico and Chile".

668. Quoting from her diary, Ms Short wrote that she had asked for "a special Cabinet with the Attorney General present" and this had been agreed. She also reported saying, "if we have UN mandate, possible progress on Palestine/Israel and try with the second resolution process, it would make a big difference". She was "hopeful of progress".[260]

669. Ms Short had been advised by Mr Suma Chakrabarti, the DFID Permanent Secretary, that she should focus her intervention in Cabinet on the need for "a proper decision-making process", which would be "important both in substance and … for the politics". In his view, there were two key points to make:

> "Cabinet needs to discuss now the legal opinion of the Attorney General and how to make it public. This is vital for Ministers, our Armed Services and the Civil Service.

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[259] Cabinet Conclusions, 13 March 2003.
[260] Short C. *An Honourable Deception: New Labour, Iraq and the Misuse of Power*. The Free Press, 2004.

> "As soon as we are clear on the second resolution (whether it fails to get the necessary votes or is not put to a vote), Cabinet should meet again for a discussion on the politics and to put a proposition to Parliament for immediate debate."[261]

670. Mr Campbell wrote in his diaries that Lord Williams of Mostyn, the Leader of the House of Lords, had "said there would be a debate [in Cabinet] on the legality" and Ms Short had said Lord Goldsmith should be present. Mr Blair had "said of course he would".[262]

The continuing public debate

Media reports, 13 March 2003

671. On 13 March, several newspapers commented on the exchanges which had taken place in the House of Commons the previous day.

672. A leading article in *The Guardian* exhorted Mr Blair to "re-engage with Mr Chirac" and stated that he should:

> "… come clean about the legal advice that has been given to the Government by the Attorney General. Either the Attorney has advised that to wage war in defiance of a vetoed UN resolution is acceptable under international law, or he has advised that it is not. The difference is very important and the public has a right to know what has been advised. To say nothing is merely to sow suspicion. In the Commons yesterday, Mr Blair said that Britain was determined to act 'on a proper legal basis'. That has all the sound of a weasel formulation".[263]

673. In the same edition, the political editor referred to the exchanges in Parliament and to a radio interview in which Mr Kenneth Clarke (Conservative) had stated that the advice of the Law Officers had been made available on previous occasions.[264]

674. Articles in the *Financial Times* and *The Times* referred to the questions asked by Mr Kennedy and to the request that Lord Goldsmith's advice should be published.[265]

Parliamentary calls for a statement

675. In Parliament on 13 March, several MPs called for a statement on the Attorney General's advice regarding the legal basis for military action.

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[261] Minute Chakrabarti to Secretary of State [DFID], 12 March 2003, 'Cabinet' 13 March 2003: Iraq'.
[262] Campbell A & Hagerty B. *The Alastair Campbell Diaries. Volume 4. The Burden of Power: Countdown to Iraq.* Hutchinson, 2012.
[263] *The Guardian*, 13 March 2003, *The need to get real: Blair is in denial about Iraq options.*
[264] *The Guardian*, 13 March 2003, *Threat of war: Publish advice on legality of war, opponents urge No.10.*
[265] *Financial Times*, 13 March 2003, *Iraq Crisis Blair Under Pressure; The Times,* 13 March 2003, *Resolute Blair insists that he will stay the course*.

676. MPs raised the issue of the Attorney General's advice later that day when Mr Robin Cook, Leader of the House of Commons, described the business of the House in the week to follow.

677. Mr Eric Forth (Conservative) asked:

> "Given that there is an increasing belief that the Attorney General's advice may well be against military action by this country, certainly if that takes place without United Nations cover, may we please have a statement in the House by the Solicitor General … as to the position with regard to the advice being given to the Prime Minister and the Government by the Attorney General on the legality of military action in Iraq?"[266]

678. Welcoming Conservative support for Mr Kennedy's request for access to the Attorney General's advice, Mr Paul Tyler (Liberal Democrat) stated:

> "… is it not right that the Law Officers are answerable to Parliament, not to the Government of the day. Surely it must be an exceptional circumstance when very important issues of international law are being challenged in the way implied by the Secretary-General of the United Nations? Should there not be a second Security Council resolution, is it not absolutely essential that the Law Officers make a statement prior to any debate in this House?"[267]

679. Several MPs made reference to the authoritative work *Parliamentary Practice* by Erskine May (see Box below).

Erskine May

Thomas Erskine May's *Parliamentary Practice* is an authoritative source of information and guidance on Parliamentary practice and procedure and British constitutional law.

The 22nd edition, current in 2001, contained the following paragraph entitled "Law officer's opinions":

> "The opinions of the law officers of the Crown, being confidential, are not usually laid before Parliament, cited in debate or provided in evidence before a select committee, and their production has frequently been refused; but if a Minister deems it expedient that such opinions should be made known for the information of the House, he is entitled to cite them in the debate."[268]

680. Mr Andrew Mackay (Conservative) asked:

> "… is it not very important indeed that the Prime Minister should let us see this legal advice, ahead of the debate next week?"[269]

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[266] House of Commons, *Official Report*, 13 March 2003, column 430.
[267] House of Commons, *Official Report*, 13 March 2003, column 430.
[268] Erskine May T. *Parliamentary Practice, 22nd Edition*. Butterworths, 1977.
[269] House of Commons, *Official Report*, 13 March 2003, column 437.

681. Referring to the fact there were precedents for the disclosure of the Law Officers' advice, Mrs Alice Mahon (Labour) said: "In these circumstances – these exceptional circumstances – it is absolutely vital that we get that advice."

682. Mr Andrew Mitchell (Conservative) said that the Prime Minister "should bring into the public domain the advice that has been given by the Attorney General".[270]

683. Mr Robert Wareing (Labour) asked:

> "Is it not imperative that we have a statement about the advice given by the Attorney General? Members of Parliament who vote for an aggressive war launched by America and its collaborators and may be culpable and may be committing an offence if the Attorney General's advice were that Britain was going against international law."[271]

684. Further calls for a statement were made during points of order by Mr William Cash, the Shadow Attorney General, Mr John Burnett (Liberal Democrat), Mr Mark Francois (Conservative) and Ms Lynne Jones (Labour).[272]

The legal basis for military action

Lord Goldsmith's change of view, 13 March 2003

685. Lord Goldsmith informed his officials on 13 March that, after further reflection, he had concluded earlier that week that on balance the "better view" was that there was a legal basis for the use of force without a further resolution.

686. Lord Goldsmith reached this view after he had been asked by both Admiral Boyce and Ms Juliet Wheldon, the Treasury Solicitor, to give a clear-cut answer on whether the "reasonable case" was lawful rather than unlawful.

687. This view was the basis on which military action was taken.

688. Mr Martin Hemming had written to Mr Brummell on 12 March stating:

> "It is clear that legal controversy will undoubtedly surround the announcement of any decision by the Government to proceed to military action in the absence of the adoption of a further resolution by the UN Security Council. The CDS is naturally concerned to be assured that his order to commit UK Armed Forces to the conflict in such circumstances would be a lawful order by him. I have informed the CDS that if the Attorney General has advised that he is satisfied that the proposed military action by the UK would be in accordance with national and international law, he [CDS] can properly give his order committing UK forces.

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[270] House of Commons, *Official Report*, 13 March 2003, column 438.
[271] House of Commons, *Official Report*, 13 March 2003, column 440.
[272] House of Commons, *Official Report*, 13 March 2003, columns 444 and 446.

"In view of the rapidly developing situation, I thought that the Attorney would wish to know what I have said on this question."[273]

689. Lord Goldsmith met Mr Brummell and Ms Adams at 1300 on 13 March.[274]

690. In a minute approved by Lord Goldsmith, Mr Brummell wrote that Lord Goldsmith had told him that:

"… he had been giving further careful consideration to his view of the legal basis for the use of force against Iraq … It was clear … that there was a sound basis for the revival argument in principle …

"The question was whether the conditions for the operation of the revival doctrine applied in this case. The Attorney confirmed that, after further reflection, he had come to the clear view that on balance the better view was that the conditions for the operation of the revival argument were met in this case, i.e. there was a lawful basis for the use of force without a further resolution beyond resolution 1441."[275]

691. Addressing the key provisions of resolution 1441, Mr Brummell reported that Lord Goldsmith had stated:

"… the crucial point … was that OP12 did not stipulate that there should be a further decision of the SC before military action was taken, but simply provided for reports of any further breaches by Iraq to be considered by the SC. In the absence of a further decision by the SC, the Attorney General thought that the better view was that resolution 1441 itself revived resolution 678 and provided the legal basis for use of force. (It was, moreover plain that Iraq had failed to take the final opportunity afforded to it and continued to be in material breach: not a single member of the SC considered that Iraq had complied.)"

692. Lord Goldsmith had:

"… fully taken into account the contrary arguments. In coming to his concluded view … he had been greatly assisted by the background material he had seen on the history of the negotiation of resolution 1441 and his discussions with both Sir Jeremy Greenstock and the US lawyers …"

693. Lord Goldsmith's view was:

"It was apparent from this background material that members of the Council were well aware that a finding of material breach by the SC was tantamount to authorising the use of force (through the operation of the revival doctrine). It was for this very reason that the French had been keen to avoid the finding of a material breach

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[273] Letter Hemming to Brummell, 12 March 2003, 'Iraq – Position of the CDS'.
[274] Diary extract Attorney General, 13 March 2003.
[275] Minute Brummell, 13 March 2003, 'Iraq: Legal Basis for Use of Force – Note of Discussion with Attorney General Thursday, 13 March 2003'.

and had argued for the fire-break provision in OP2, so as to prevent automaticité. And in relation to OP12 it was evident that the French, who had pressed hard for a reference to a 'decision' (as a pre-condition to use of force), appreciated that, as the final text provided only for the SC to 'consider' Iraq's further breaches, the way was left open for the operation of the revival argument in the event that the SC did not come to any decision."

694. Lord Goldsmith had:

"… explained that in his minute of 7 March he had wanted to make sure that the Prime Minister was fully aware of the competing arguments. He was clear in his own mind, however, that the better view was that there was a legal basis without a second resolution. He had come to this concluded view earlier in the week."

695. Lord Goldsmith and Mr Brummell agreed that:

- It would be proper for Mr Brummell to confirm to Mr Hemming that the proposed military action would be in accordance with national and international law.
- It would be necessary to prepare a statement setting out the Attorney's view of the legal position which could be deployed at Cabinet and in Parliament the following week.

696. Mr Brummell wrote to Mr Hemming on 14 March to "confirm" that Lord Goldsmith was "satisfied that the proposed military action by the UK would be in accordance with national and international law".[276]

697. Copies of the letter were sent to the Private Offices of Mr Hoon, Admiral Boyce and Sir Kevin Tebbit, as well as to Mr Desmond Bowen (Cabinet Office) and Ms Wheldon.

698. Gen Jackson told the Inquiry that the Chiefs of Staff had seen Lord Goldsmith's advice of 7 March.[277]

699. In his memoir, Gen Jackson wrote that the Chiefs of Staff had discussed the issue of the legal basis for military action and "collectively agreed that we needed to be sure of the ground".[278] Adm Boyce had "on behalf of us all, sought the Attorney General's assurances on the legality of the planned action" and the Chiefs had accepted his advice.

700. Gen Jackson told the Inquiry that a similar assurance had been sought and received in relation to military action in Kosovo in 1999.[279]

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[276] Letter Brummell to Hemming, 14 March 2003, 'Iraq – Position of the CDS'.
[277] Public hearing, 28 July 2010, page 36.
[278] Jackson M. *Soldier: The autobiography of General Sir Mike Jackson,* Bantam Press, 2007.
[279] Public hearing, 28 July 2010, page 38.

701. Lord Goldsmith told the Inquiry that he had reached his "better view" after he had received a letter from the Ministry of Defence stating that Adm Boyce needed "a yes or no answer" on whether military action would be lawful and, as requested by Sir Andrew Turnbull, a visit from Ms Wheldon asking the same question on behalf of the Civil Service.[280]

702. Lord Boyce told the Inquiry:

> "… the propriety and/or the legality of what we were about to do was obviously a concern of mine, not least of it, since, somewhat against my better instincts, we had signed up to the ICC [International Criminal Court]. I always made it perfectly clear to the Prime Minister face-to-face, and, indeed, to the Cabinet, that if we were invited to go into Iraq, we had to have a good legal basis for doing so, which obviously a second resolution would have completely nailed."[281]

703. Lord Boyce added:

> "… that wasn't new, it was something which I had told the Prime Minister that I would need at the end of the day, long before March. This is back in January when we started to commit our forces out there, and, as you say, I received that assurance. This was an important issue, particularly because of the speculation in the press about the legality or otherwise and, as far as I was concerned particularly for my constituency, in other words, soldiers, sailors and airmen and their families had to be told that what they were doing was legal. So it formed the first line of my Operational Directive which I signed on 20 March, and it was important for me just to have a one-liner, because that was what was required, as far as I was concerned, from the Government Law Officer, which, as you say, I received."[282]

704. Lord Goldsmith told the Inquiry:

> "… there were a number of things which happened after 7 March. It was becoming clear, though it hadn't yet become definitive, that the second resolution was going to be very difficult to obtain.
>
> "… But most importantly … I had been presented with a letter which had come from the Ministry of Defence, which reflected the view of CDS, and which was … calling for this clear view, a yes or no answer, as I think he has put it.
>
> "At about the same time, I also received a visit from Juliet Wheldon … the Treasury Solicitor. I understood her to be speaking on behalf of the Civil Service, and, indeed, from what I now know, I suspect, believe, she would at least have been encouraged to do that by the Cabinet Secretary on behalf of the Civil Service.

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[280] Public hearing, 27 January 2010, pages 184-5.
[281] Public hearing, 3 December 2009, page 82.
[282] Public hearing, 3 December 2009, pages 88-89.

"Both of them in a sense were saying the same thing. They were saying, 'We are potentially at risk personally if we participate', or, in the case of the Civil Service, 'assist in war, if it turns out to be unlawful, and therefore, we want to know whether the Attorney's view is yes or no, lawful'.

"That seemed to me to be actually a very reasonable approach for them to take …"[283]

705. Lord Goldsmith told the Inquiry that he:

"… very quickly saw that actually this wasn't satisfactory from their point of view. They deserved more … than my saying there was a reasonable case.

"So, therefore it was important for me to come down clearly on one side of the argument or the other, which is what I proceeded to do."[284]

706. Lord Goldsmith added:

"… until the Civil Service and the … Services said they wanted this clear view, I was working … I take full responsibility for this, but it was with the approval of my office on the basis that saying there was a reasonable case was a green light. It was sufficient for the Government, and if the Cabinet and, as it turns out, the House of Commons, took the view that it was the right thing to do, then we had done enough to explain what the legal basis was and to justify it.

"But when they came with their request, I then saw that actually that wasn't fair on them."

707. Asked how the case had suddenly become stronger, Lord Goldsmith replied:

"It is the decision you make about it. You make a judgment. You say 'I'm asked to advise whether there is a reasonable case', and you examine all the evidence and you say, 'Yes there is a reasonable case'. You don't need to go any further, and in that respect, I can see with hindsight, that I was being overly cautious.

"Then somebody says to you, 'Actually, I don't want to know whether you say there is a reasonable case, I want to know whether or not you consider that it will be lawful.'

"Well, I regard that as a different question and you then have to answer it."[285]

708. Asked why he was able to give the Armed Forces a more certain answer without providing more legal arguments, Lord Goldsmith replied:

"Well, not on the basis of more legal argument, but on the basis of asking a different question. This is, in a sense, why I'm saying 'with hindsight'. I would have liked to

[283] Public hearing, 27 January 2010, pages 183-184.
[284] Public hearing, 27 January 2010, page 171.
[285] Public hearing, 27 January 2010, page 172.

> have known before the following week that what the Armed Services and the Civil Service expect was not what had been the precedent given in the past that they wanted more, they wanted an unequivocal answer. Had I known that, then I would have approached the question differently, and I'm simply saying that I was cautious in not going further than I needed to do on 7 March."[286]

709. Asked whether the difficulties in the Security Council had made it more important to know if there was a sufficient legal basis for military action, Lord Goldsmith replied: "Yes."[287]

710. Asked whether Mr Blair had asked him to come up with a definitive position, Lord Goldsmith told the Inquiry:

> "I don't recall it that way. The way it may have been seen by others or interpreted by others or recollected by others, I don't know, but I don't recall the Prime Minister asking for that, no, definitely not."[288]

711. Asked whether the huge pressure on the Government, including Mr Blair's personal future, had weighed on him, Lord Goldsmith said:

> "The consequences for the Government did not … What did matter to me, of course, was the United Kingdom as a country and the people that we would have been asking to take part in this with a potential personal responsibility, and I did believe it was right to respond to the request from the head of the Armed Services … That weighed with me."[289]

712. Asked whether the possibility of troops who had been deployed to the area being withdrawn as a consequence of his advice weighed upon him Lord Goldsmith said:

> "No. Those sorts of consequences are not what the lawyer has to take into account. What the lawyer has to do is to weigh up the arguments and evidence carefully and reach what he believes is the correct legal view, whatever the consequences may be."[290]

713. The Inquiry asked Mr Blair what discussions he or others under his instruction had with Lord Goldsmith between 7 March, when he had received Lord Goldsmith's formal advice, and 13 March. Mr Blair said:

> "I can't recall any specific discussions that I had. I don't know whether others would have had with him before 13 March, but essentially what happened was this: he gave legal advice, he gave an opinion saying, 'Look, there is this argument against it, there is this argument for it. I think a reasonable case can be made' and obviously

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[286] Public hearing, 27 January 2010, page 173.
[287] Public hearing, 27 January 2010, page 187.
[288] Public hearing, 27 January 2010, page 189.
[289] Public hearing, 27 January 2010, pages 190-191.
[290] Public hearing, 27 January 2010, page 191.

we then had to have a definitive decision, and that decision is: yes, it is lawful to do this or not."[291]

714. Asked if it had been of considerable relief to him when Lord Goldsmith came to the better view that resolution 1441 authorised the use of force without a further resolution, Mr Blair replied:

"Yes, and the reason why he had done that was really very obvious, which was that the Blix reports indicated quite clearly that Saddam had not taken the final opportunity."[292]

Preparing the legal case

715. Lord Goldsmith had several meetings on the afternoon of 13 March.

716. The primary purpose of the meetings appears to have been discussion of the arrangements for preparing statements on the legal basis for action for Cabinet and Parliament.

717. A team was established to help Lord Goldsmith to explain in public the legal basis "as strongly and unambiguously as possible".

718. By the afternoon of 13 March, the UK and the US were discussing announcing the withdrawal of the draft resolution in the Security Council on 17 March and a planned debate in the House of Commons on 18 March.

719. Mr Brummell recorded that Lord Goldsmith had agreed on 13 March to explore whether Professor Greenwood:

"… could be instructed now, for the purpose of assisting in the development of the legal arguments in support of the view that there was a sound legal basis for the use of force without a second resolution. This would be useful both in terms of preparing the public statement of the legal position and in terms of being ready to meet any legal challenge at short notice."[293]

720. A postscript to Mr Brummell's note indicated that Lord Goldsmith had spoken to Professor Greenwood "later that morning", who confirmed that he shared Lord Goldsmith's analysis of the legal position and that "he also considered that the better view was that a second resolution was not legally necessary".

721. Ms Adams wrote to Professor Greenwood "following" his "conversation with the Attorney General this morning", requesting his "assistance in drawing up a paper setting out the legal arguments which may be made in support of the view that military action

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[291] Public hearing, 29 January 2010, page 156.
[292] Public hearing, 29 January 2010, page 158.
[293] Minute Brummell, 13 March 2003, 'Iraq: Legal Basis for Use of Force – Note of Discussion with Attorney General Thursday, 13 March 2003'.

may be taken against Iraq to enforce the terms of the UNSCR in the absence of a further resolution of the Security Council".[294]

722. Ms Adams stated that there were two issues to consider:

- "Is the revival argument valid?"; and
- "Is resolution 1441 sufficient?"

A "conference" with Lord Goldsmith had been arranged for 1630 that afternoon.

723. Lord Goldsmith met Lord Mayhew, the Conservative Attorney General from 1987 to 1992, late on the afternoon of 13 March.[295]

724. Lord Goldsmith told the Inquiry that Lord Mayhew had asked for the meeting because he had wanted, and been given, Lord Goldsmith's view; and that in the debate on the legality of the use of force in Iraq in the House of Lords on 17 March, Lord Mayhew had professed himself in agreement with Lord Goldsmith's view.[296]

725. Lord Goldsmith's meeting with Lord Mayhew was followed by one with Mr Straw, which Mr Brummell also attended.[297]

726. In what was described as a "lengthy meeting", Lord Goldsmith was reported to have said that "having decided to come down on one side (1441 is sufficient), he had also decided that in public he needed to explain his case as strongly and unambiguously as possible".[298] A legal team under Professor Greenwood was "now working" on that. Mr Straw arranged for Mr Macleod and Mr Patrick Davies, one of his former Private Secretaries, to join the team.

727. Mr Straw's request that the team should produce a draft letter explaining the legal position for him to send to the Chairman of the Foreign Affairs Committee (FAC) had been agreed. Mr Straw's Private Office also recorded that Lord Goldsmith had said "he thought he might need to tell Cabinet when it met on 17 March that the legal issues were finely balanced".

728. The record stated that Mr Straw had responded by saying that Lord Goldsmith:

> "… needed to be aware of the problem of leaks from … Cabinet. It would be better, surely, if the Attorney General distributed the draft letter from the Foreign Secretary to the FAC as the basic standard text of his position and then made a few comments. The Attorney General agreed."

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[294] Letter Adams to Greenwood, 13 March 2003, 'Iraq: Resolution 1441'.
[295] Diary extract Attorney General, 13 March 2003.
[296] Public hearing, 27 January 2011, page 197.
[297] Diary extract Attorney General, 13 March 2003.
[298] Minute McDonald, 17 March 2003, 'Iraq: Meeting with the Attorney General'.

729. Lord Goldsmith told the Inquiry that the main thrust of the meeting with Mr Straw on 13 March was planning for what was going to happen.[299]

730. Asked if the record of the meeting on 13 March made by Mr Straw's Private Office reflected his recollection of the decision on how to present his legal advice to Cabinet, Lord Goldsmith replied:

> "It isn't actually. There wasn't any question of distributing the longer FAC document as my opinion. That wasn't at all what I was going to do."[300]

731. A note on the Attorney General's file listed the "further material to be assembled", as discussed by Lord Goldsmith and Mr Straw, as "evidence showing" that Iraq was "in further material breach", as:

"
- Any examples of false statements/omissions and (significant) non-co-operation reported to Security Council pursuant to OP4 of SCR 1441.
- Any examples of Iraqi interference reported by Blix or ElBaradei [Dr Mohamed ElBaradei, the Director General of the IAEA] to the Council pursuant to OP11.
- For these purposes, we need to trawl through statements from the draft Command Paper on Iraqi non-compliance which is to be published.
- See attached FCO paper Iraqi non-compliance with UNSCR 1441 of 13 March 2003."[301]

Lord Goldsmith's meeting with Lord Falconer and Baroness Morgan, 13 March 2003

732. The last meeting in Lord Goldsmith's diary on 13 March was with Lord Falconer, who in March 2003 was the Minister of State in the Home Office responsible for Criminal Justice, and Baroness Morgan.

733. Lord Goldsmith informed Lord Falconer and Baroness Morgan of his clear view that it was lawful under resolution 1441 to use force without a further UN resolution.[302]

734. Asked to comment on press allegations to the effect that he had been "more or less pinned to the wall at a Downing Street showdown with Lord Falconer and Baroness Morgan who allegedly had performed a pincer movement" on him, Lord Goldsmith told the Inquiry that that was:

> "… absolute complete and utter nonsense. I had not spoken to Lord Falconer about this issue before. When I saw them [on 13 March] I, of course, had reached my

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[299] Public hearing, 27 January 2010, page 198.
[300] Public hearing, 27 January 2010, page 213.
[301] File note [on Attorney General's files], [undated], 'Iraq Further Material to be Assembled (as discussed by the Attorney General and Foreign Secretary on 13 March 2003)'.
[302] *Review of Intelligence on Weapons of Mass Destruction* ["The Butler Report"], 14 July 2004, HC 898, paragraph 381.

opinion, I communicated it to my officials, to the Foreign Secretary and as it happens to Lord Mayhew as well. There was no question of them performing a pincer movement."[303]

735. Lord Goldsmith told the Inquiry:

"I told them the conclusion that I had reached, and I think briefly why, and I think we then went on to discuss – I think by that stage it was known that there was going to be a debate the following Monday in the House of Lords, and I think we discussed something about how that debate would be dealt with, the debate on the legality issue, I think a Liberal Democrat Peer put down a motion."[304]

736. Asked for a statement about the purpose of her involvement in a number of meetings with Lord Goldsmith throughout the period before 18 March 2003, Baroness Morgan wrote that the purpose of the meetings was to share information.[305] Her role was to explain her perception of the Parliamentary and political mood. She was aware of claims that she had somehow exerted pressure on the Attorney General to alter his advice to provide a legal justification for military action, but wished to state without equivocation that such allegations were untrue:

"… at no point during any discussion at which I was present did I witness any effort to engage with Lord Goldsmith as to the correctness of his legal analysis. I am certain there was never any attempt by me, or by anyone else present, at any of the four meetings to challenge the Attorney's legal analysis **or otherwise to influence the Attorney's legal opinion."**

737. On 15 March, Baroness Morgan informed Mr Campbell by email that the Attorney General would "make clear during the course of the week that there [was] a sound legal basis for action should that prove necessary".[306]

Mr Blair's conversation with President Bush, 13 March 2003

738. On 13 March, Mr Blair and President Bush discussed withdrawing the draft resolution on 17 March followed by a US ultimatum to Saddam Hussein to leave within 48 hours. There would be no US military action until after the vote in the House of Commons on 18 March.

739. Mr Blair and President Bush discussed the prospects for a vote in the House of Commons and a 'Road Map' for the Middle East on 13 March.[307]

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[303] Public hearing, 27 January 2010, page 201.
[304] Public hearing, 27 January 2010, page 202.
[305] Statement, 5 August 2011, pages 2-4.
[306] Email Morgan to Campbell, 15 March 2003, 'AG'.
[307] Letter Cannon to McDonald, 13 March 2003, 'Iraq and MEPP: Prime Minister's Conversation with Bush, 13 March'.

740. On the UN draft resolution, Mr Blair commented that the "haggling over texts in New York was frustrating and muddied the waters. But it was buying the vital time we needed this weekend."

741. A discussion on the military timetable was reported separately.[308] It was envisaged that the withdrawal of the resolution on 17 March would be followed by a speech from President Bush which would give Saddam Hussein an ultimatum to leave within 48 hours. President Bush would call for freedom for the Iraqi people and outline the legal basis for military action.

742. There would be no military action before a vote in the UK Parliament on 18 March. President Bush would announce the following day that military action had begun. The plan was for the main air campaign to begin on 22 March.

Confirmation of Mr Blair's view

The exchange of letters on 14 and 15 March 2003

743. On 14 March, Lord Goldsmith asked for confirmation of Mr Blair's view that Iraq had "committed further material breaches as specified in [operative] paragraph 4 of resolution 1441".

744. Mr Brummell wrote to Mr Rycroft on 14 March:

> "It is an essential part of the legal basis for military action without a further resolution of the Security Council that there is strong evidence that Iraq has failed to comply with and co-operate fully in the implementation of resolution 1441 and has thus failed to take the final opportunity offered by the Security Council in that resolution. The Attorney General understands that it is unequivocally the Prime Minister's view that Iraq has committed further material breaches as specified in [operative] paragraph 4 of resolution 1441, but as this is a judgement for the Prime Minister, the Attorney would be grateful for confirmation that this is the case."[309]

745. In his response on 15 March, Mr Rycroft recorded that it was Mr Blair's "unequivocal view that Iraq is in further material breach of its obligations, as in OP4 of UNSCR 1441".

746. Mr Rycroft replied to Mr Brummell on 15 March:

> "This is to confirm that it is indeed the Prime Minister's unequivocal view that Iraq is in further material breach of its obligations, as in OP4 of UNSCR 1441, because of 'false statements or omissions in the declarations submitted by Iraq pursuant

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[308] Letter Cannon to McDonald, 13 March 2003, 'Iraq: Military Timetable'.
[309] Letter Brummell to Rycroft, 14 March 2003, 'Iraq'.

to this resolution and failure to comply with, and co-operate fully in the implementation of, this resolution'."[310]

747. Lord Goldsmith gave evidence to the Inquiry about the purpose of this exchange of letters.

748. Lord Goldsmith told the Inquiry:

"… if this ever came to court … we would have to persuade a court of our interpretation of 1441, but they would also say, 'What's the evidence that they [Iraq] did actually fail?', and I was saying, at that stage, there needs to be strong factual evidence of failure."[311]

749. Lord Goldsmith described a briefing from Mr John Scarlett focused on the question of Iraqi compliance:

"… the clear intelligence, the clear advice I was being given by him was that Saddam Hussein in Iraq had not complied with the resolution, not just that there were specific elements of … serious non-co-operation, including, for example, intimidation of potential interviewees …"[312]

750. Asked what his opinion was on the weight of the intelligence, Lord Goldsmith replied:

"At the end of the day … like any lawyer who is dependent upon the facts from his client - I was dependent upon the assessment by the Government which had all the resources it had … and that was why I particularly wanted to be sure … the week before the events, that the Prime Minister, who did have access to all that information, was of the view that there had been a failure."[313]

751. Lord Goldsmith stated that the UK Government did not have to decide whether there had been a material breach, because:

"… the pre-determination had been made [by the Security Council in resolution 1441] that if there was a failure, it would be a material breach … we had to decide whether there was a failure but, if there was a failure, then the Security Council's pre-determination would come in and clothe that with the character of material breach."[314]

752. Addressing the purpose of seeking Mr Blair's views, Lord Goldsmith stated:

"First of all, because it did depend upon the failure, it was important to point out you need to be satisfied about that and secondly, I wanted the Prime Minister,

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[310] Letter Rycroft to Brummell, 15 March 2003, 'Iraq'.
[311] Public hearing, 27 January 2010, pages 162-163.
[312] Public hearing, 27 January 2010, page 163.
[313] Public hearing, 27 January 2010, page 164.
[314] Public hearing, 27 January 2010, page 167.

consciously and deliberately to focus on that question. I wanted it to be a question that he would really apply his mind to. Forgive me for even suggesting that he wouldn't have done. That wasn't the point. That he should have focused his mind on whether there was, in fact, a failure, and that was the purpose of saying, 'I want this in writing', it was so there was a really conscious consideration of that."[315]

753. Lord Goldsmith later stated:

"I think I'm saying two things. First of all, I wasn't actually saying there needed to be a declaration by him [Mr Blair]. I was saying 'You need to be satisfied. You need to judge that there really is a failure to take the final opportunity. You need to judge that on the basis of the resources, the intelligence and the information that you have got' … This was going to be a very controversial decision, whichever way it went. There would be a lot of scrutiny. We had had sort of legal actions bubbling up already. So, 'whereas in the past a reasonable case was sufficient, you can expect a degree of scrutiny on this occasion'."[316]

754. Lord Goldsmith told the Inquiry that he had received Mr Blair's view orally, but thought it was important to have it in writing.[317]

755. In his statement, Lord Goldsmith wrote:

"I was asking the Prime Minister to confirm that Iraq had submitted false statements or omissions in its declarations submitted pursuant to the resolution and had failed to comply with and co-operate fully in the implementation of resolution [1441] so that the authority to use force under resolution 687 revived."[318]

756. In response to the question whether Mr Blair could decide if Iraq was in further material breach of resolution 1441, Lord Goldsmith wrote: "No."[319]

757. Lord Goldsmith added:

"Only the Security Council could decide whether or not a particular failure or set of failures by Iraq to meet an obligation imposed by the Security Council resolution had the quality of being a 'material breach' of resolution 687."[320]

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[315] Public hearing, 27 January 2010, page 168.
[316] Public hearing, 27 January 2010, page 175.
[317] Public hearing, 27 January 2010, pages 210-211.
[318] Statement, 4 January 2011, paragraph 5.1.
[319] Statement, 4 January 2011, paragraph 5.2.
[320] Statement, 4 January 2011, paragraph 5.3.

758. Lord Goldsmith's view that resolution 1441 authorised the use of force relied on the conclusion that OP4:

> "… constituted a determination in advance that if the particular set of circumstances specified in it arose, so that Iraq failed to take the final opportunity it had been given, that would constitute a further material breach.
>
> "The resolution therefore constituted authority for the use of force provided that such a factual situation had occurred, namely that Iraq had failed to comply with and co-operate fully in the implementation of the resolution. In that event a Council discussion would need to take place.
>
> "I had concluded that in any such Council discussion the assessment contemplated by OP4 was not an assessment of the quality of the breaches, since the Council had already resolved that any failure on Iraq's part would constitute a material breach, but rather an assessment of the situation as a result of those breaches having occurred … Accordingly, the Council did not need to conclude that breaches had taken place (though I believe that at the discussion no member of the Security Council took the view that they had not occurred).
>
> "Nonetheless the authorisation in resolution 678 could not revive unless in fact breaches had occurred. We needed therefore to be satisfied that this factual situation existed, and to be in a position if necessary to justify that to a court. That was why I said … that there would have to be strong factual grounds for concluding that Iraq had failed to take the final opportunity."[321]

759. Lord Goldsmith wrote:

> "As I explained giving my oral evidence, this was an issue on which I wanted the Prime Minister consciously and deliberately to focus, hence my request for written confirmation that he had reached this view."[322]

Mr Blair's view

760. *The Review of Intelligence on Weapons of Mass Destruction* ('The Butler Report') records it was:

> "… told that, in coming to his view that Iraq was in further material breach, the Prime Minister took account both of the overall intelligence picture and of information from a wide range of other sources, including especially UNMOVIC information."[323]

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[321] Statement, 4 January 2011, paragraphs 5.6-5.7.
[322] Statement, 4 January 2011, paragraph 5.7.
[323] *Review of Intelligence on Weapons of Mass Destruction* ["The Butler Report"], 14 July 2004, HC 898, paragraph 385.

761. Mr Blair told the Liaison Committee on 21 January 2003 that, if the reported breach was a pattern of behaviour rather than conclusive proof would require "more considered judgement".[324]

762. As the Inquiry indicates in Sections 3.7 and 3.8, Mr Blair and his advisers in No.10 had been very closely involved, particularly since the beginning of March, in examining the reports of the UN weapons inspectors and had access to advice from the JIC on the activities of the Iraqi regime.

763. In his 7 March advice Lord Goldsmith had advised that Mr Blair "would have to consider extremely carefully whether the evidence of non-co-operation and non-compliance by Iraq [was] sufficiently compelling to justify the conclusion that Iraq had failed to take its final opportunity".

764. But Mr Blair did not seek and did not receive considered advice from across government specifically examining whether the evidence was "sufficiently compelling" to provide the basis for a judgement of this magnitude and seriousness.

765. In mid-March, UNMOVIC was reporting increased co-operation, and the IAEA had confirmed that Iraq had no nuclear weapons or nuclear weapons programmes.

766. The Inquiry has not seen any evidence of consideration of whether the reports by UNMOVIC and the IAEA to the Security Council during January to March 2003 constituted reports to the Council under OP11 of resolution 1441; or whether the subsequent Security Council discussions constituted "consideration" as required by OP12.

767. There was clearly no majority support in the Security Council for a conclusion that the process set in hand by resolution 1441 had reached the end of the road.

768. Asked if he had been working from the definition of material breach set out by Mr Straw in November 2002, Mr Blair told the Inquiry:

> "Yes, absolutely."[325]

769. Asked about the process that he had followed before giving the determination requested by Lord Goldsmith, Mr Blair told the Inquiry:

> "We went back over the Blix reports and it was very obvious to me, particularly on the subject of interviews, that they weren't co-operating. They were co-operating more, as you rightly say. They started to give out a little bit more, but there was

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[324] Minutes, Liaison Committee (House of Commons), 21 January 2003 [Minutes of Evidence], Q&A 24.
[325] Public hearing, 21 January 2011, page 111.

absolutely nothing to suggest that this co-operation was full, immediate and unconditional. It was actually not full, not immediate. In fact, even Blix himself said it wasn't immediate even on 7 March and was not unconditional.

"In addition to that I had I think JIC Assessments as well … where it was clear that Saddam was putting heavy pressure internally on people not to co-operate …"[326]

770. The Inquiry asked Mr Blair whether the process had involved only No.10 or if he had consulted more widely, Mr Blair stated:

"I am sure I would have spoken to Jack [Straw] particularly at the time … I don't recollect … This literally was the whole time a conversation … [O]ur view was that he [Saddam Hussein] was not co-operating in the terms of 1441, and that … remains my view today that he wasn't, and that he … never had any intention of doing that.

"Now it is correct … that he was offering up more, but … even in February he wasn't offering up what they were asking him."[327]

771. Asked whether he was comfortable with the situation whereby the Prime Minister confirmed the existence of a further material breach at a time when the head of the IAEA had reported there was no nuclear programme and the head of UNMOVIC was reporting improved co-operation. Mr Straw replied:

"Yes … and if I had not been I wouldn't have stayed in the Cabinet …"[328]

772. Mr Straw added that the two tests in OP4 were "conjunctive" not "disjunctive", and that:

"What OP4 talks about is false statements or omissions in the declarations. Well, the declaration was incomplete. There was no question about that. And …

"… They did fail to comply fully. The obligation on them was not to comply a bit … The obligation on Iraq was to comply fully. It is a positive obligation on them, not a negative one, not to disregard the whole of the resolution, and they had failed to do that."[329]

773. The Government motion tabled for the debate on 18 March included provisions asking the House of Commons to:

- note that in the 130 days since resolution 1441 was adopted Iraq had not co-operated actively, unconditionally and immediately with the weapons inspectors, and had rejected the final opportunity to comply and is in further

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[326] Public hearing, 21 January 2011, pages 111-112.
[327] Public hearing, 21 January 2011, pages 112-113.
[328] Public hearing, 2 February 2011, page 86.
[329] Public hearing, 2 February 2011, page 87.

material breach of its obligations under successive mandatory UN Security Council resolutions; and

- note the opinion of the Attorney General that, Iraq having failed to comply and Iraq being at the time of resolution 1441 and continuing to be in material breach, the authority to use force under resolution 678 has revived and so continued that day.[330]

774. In his speech Mr Blair did not address the events that had taken place since the declaration "as the House is familiar with them". He stated that "all members" of the Security Council "accepted" the Iraq declaration was false. He added:

> "That in itself, incidentally, is a material breach. Iraq has taken some steps in co-operation but, no one disputes that it is not fully co-operating."[331]

775. Mr Blair did not address how, in the absence of a consideration in the Security Council, the UK Government had reached the judgement that Iraq had failed to take its final opportunity.

776. The debate in the House of Commons and the details of Mr Blair's speech are described in Section 3.8.

Mr Blair's conversation with President Bush, 15 March 2003

777. In his discussion with President Bush on 15 March, Mr Blair proposed that the main message from the Azores Summit should be that this was the final chance for Saddam Hussein to demonstrate that he had taken the strategic decision to avert war; and that members of the Security Council should be able to sanction the use of force as Iraq was in material breach of its obligations.

778. When Mr Blair spoke to President Bush on 15 March, he said that the "main message" for the Azores Summit "should be that this was a final chance for the UN to deliver, and that countries should be able to sanction the use of force as Iraq was in material breach".[332]

779. Mr Blair spoke to Mrs Margaret Beckett, Secretary of State for the Environment, Food and Rural Affairs, before her appearance on the *BBC*'s *The World at One* on 16 March.[333]

780. Asked why he was not putting the second resolution to the vote, Mr Blair explained that losing a vote "… might cause legal difficulties". Mr Annan was "very keen to avoid

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[330] House of Commons, *Official Report*, 18 March 2003, column 760.
[331] House of Commons, *Official Report*, 18 March 2003, column 762.
[332] Letter Rycroft to McDonald, 15 March 2003, 'Iraq and Middle East: Prime Minister's Telephone Conversation with President Bush, 15 March'.
[333] Minute No.10 [junior official] to Matthews, 17 March 2003, 'Note for File'.

that outcome since he believed it would make it harder for the UN to move forward after the conflict".

781. Mr Blair told Mrs Beckett that Lord Goldsmith would make it clear that "existing UN resolutions provided a legal base for military action", in Cabinet, "which would probably be on Monday afternoon".

The presentation of the Government's position

FCO paper, 'Iraqi Non-Compliance with UNSCR 1441', 15 March 2003

782. The FCO finalised a paper providing examples of Iraq's failure to comply with the obligations in resolution 1441 on 15 March.

783. The FCO paper, produced by officials in the FCO but drawn largely from official reports and statements by UN inspectors, examined the extent of Iraq's non-compliance with the obligations placed upon it by the United Nations Security Council in resolution 1441.[334]

784. In a note of a conversation on 14 March with Ms Kara Owen, an official in Mr Straw's Private Office, Mr Brummell recorded that he had made the following points on Lord Goldsmith's behalf regarding the FCO paper being prepared:

- "Demonstration of breaches of UNSCR 1441 are critical to our legal case. Therefore we must be scrupulously careful to ensure that the best examples of non-compliance are referred to."
- "It would be distinctly unhelpful to our legal case if the examples of non-compliance … were weak or inadequate; and it would be difficult – indeed it would be too late – to seek to add further (better) examples 'after the event'."
- The FCO needed to check the document they were preparing "very carefully" and subject it to "the tightest scrutiny".
- The document should include "a caveat … acknowledging that the examples of non-compliance … were not exhaustive but illustrative".
- The submission to Mr Straw should reflect those points.[335]

785. Mr Brummell's record of his conversation with Ms Owen on 14 March also stated that he had been informed that the FCO paper would be sent out with a letter from Mr Blair to Ministerial colleagues on 17 March, "after Cabinet". Mr Blair's letter would also contain a "one page" summary of the legal position, which was "news" to Mr Brummell. A subsequent conversation with Mr Rycroft had "confirmed that it would be helpful if" Lord Goldsmith's staff would draft that summary.

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[334] Paper FCO, 15 March 2003, 'Iraqi Non-Compliance with UNSCR 1441'.
[335] Minute Brummell, 14 March 2003, 'Iraqi Non-Compliance with UNSCR 1441: Note of Telephone Conversation with Kara Owen'.

786. The FCO paper, 'Iraqi Non-Compliance with UNSCR 1441', was finalised on 15 March and published on 17 March (see Section 3.8).[336]

Sir Jeremy Greenstock's discussions in New York, 16 March 2003

787. Sir Jeremy Greenstock consulted colleagues in New York on 16 March to consider whether the Security Council could agree an ultimatum to Saddam Hussein.

788. Sir Jeremy reported that he had agreed with his US and Spanish colleagues to tell the press during the following "late morning" that there was no prospect of putting the resolution to a vote, and blaming France.

789. After the Azores Summit on 16 March, Sir David Manning spoke to Sir Jeremy Greenstock to ask him to phone his Security Council colleagues that evening to establish whether there had been any change in their positions on the draft resolution.[337]

790. Reporting developments in New York on 16 March, Sir Jeremy Greenstock wrote that, following the conclusion of the Azores Summit, the UK Mission in New York had spoken to all Security Council colleagues with the message that:

> "… there was now a short time left to consider whether the Council could agree at last on an ultimatum to Saddam which, if he did not fulfil it, would result in serious consequences. If their respective governments were in a position to engage in such a discussion, I would need to hear it as early as possible on 17 March. When asked (as the majority did), I said that I had no (no) instructions as to whether to put the text … to a vote …"[338]

791. Sir Jeremy commented that the French and Russians did not like the message. Mr Jean-Marc de La Sablière, French Permanent Representative to the UN, had claimed that the French had moved significantly over the last two days as President Chirac's interview would show. The "undecided 6" were "only slightly more positive".

792. Sir Jeremy also reported that he had agreed with his US and Spanish counterparts to tell the press during the "late morning" of 17 March that there was "no prospect of putting our resolution to the vote, casting heavy blame on the French". The key elements of the statement should be:

> "(a) the Azores summit had called for a last effort to see if the Council could unite around an ultimatum;

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[336] Paper FCO, 15 March 2003, 'Iraqi Non-Compliance with UNSCR 1141'.
[337] Letter Manning to McDonald, 16 March 2003, 'Iraq: Summit Meeting in the Azores: 16 March'.
[338] Telegram 452 UKMIS New York to FCO London, 17 March 2003, 'Iraq: Developments on 16 March'.

(b) having contacted every member it was clear that Council consensus was not possible within the terms of 1441, given the determination of one country in particular to block any ultimatum;

(c) we would therefore not be pursuing a vote;

(d) the Azores communiqué had made clear the positions of our governments on the way forward."

793. Sir Jeremy had informed Mr Annan and Dr Blix that he would be receiving final instructions "eg on whether to stop pursuing the resolution on the morning [Eastern Standard Time] of 17 March".

794. Sir Jeremy asked for instructions and comments on a draft statement, writing: "I have assumed you will want to be fairly strong on the French."

Preparing the legal argument

795. A team of lawyers assembled in Lord Goldsmith's chambers over the weekend of 15/16 March to prepare arguments and documents to deploy in support of the Government's position.

796. Mr Macleod told the Inquiry that Lord Goldsmith and Ms Harriet Harman (the Solicitor General), Professor Greenwood, Mr Brummell, Ms Adams, Mr Wood, Mr Grainger, Mr Davies and himself were present.[339]

797. Sir Michael Wood explained the team's role to the Inquiry:

> "Firstly there was the drafting of the Parliamentary answer. Secondly there was the drafting of the longer note that the Foreign Secretary sent to members of Parliament, the so-called Foreign Office note, but it was drafted at the Attorney's …
>
> "I think I was more or less on the sidelines, because my views were known, but I probably did read through the drafts and no doubt in my usual way made editorial suggestions and the like, but I don't think I had a major part in the preparation of those questions of … the Parliamentary Question and the longer FCO note … I should stress that by that stage, as I saw it, we were in the advocacy mode as opposed to the advisory decision-making mode. This was a matter of presentation: how is this to be presented in public?"[340]

798. Mr Macleod told the Inquiry that the team had produced:

> "… essentially a collection of documents to help the Attorney and the Ministers with a difficult explanation in Parliament. Technically difficult rather than politically difficult."[341]

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[339] Public hearing, 30 June 2010, page 63.
[340] Public hearing, 26 January 2010, pages 59-60.
[341] Public hearing, 30 June 2010, page 64.

799. Asked if he agreed with Sir Michael's description that the team was in an advocacy mode, Mr Macleod replied:

> "Yes … The decision had already been made in the sense that we knew what the Attorney's view was. The question was how to help present it in a way that would be easy to present, easy to understand, because … the full advice of 7 March is a fairly complex, dense legal document and you needed something else which brought out the key points which could be used in Parliament and in other places."[342]

800. Ms Adams told the Inquiry:

> "I think the understanding of everybody sitting round the table on 16 March was not that the Attorney General was giving legal advice to Parliament through that statement but he was setting out a view of the legal position …. coming back to the difference between the earlier cases, where there had been legal advice from Law Officers saying there is a reasonable case, what had happened on those occasions was not that the Attorney General had gone to Parliament and said 'This is lawful because there is an overwhelming humanitarian catastrophe', or 'Because there is a revival', it had been the Government Minister in the Foreign Office or the Ministry of Defence."[343]

801. On the morning of Monday 17 March, preparations for Cabinet later that day and Parliamentary debates the following day were put in place.

802. Lord Goldsmith set out his view of the legal basis for military action in a Written Answer on 17 March 2003.

803. In parallel, Mr Straw wrote to the Chairman of the Foreign Affairs Committee with a copy of Lord Goldsmith's Answer and an FCO paper which addressed the legal background.

804. Mr Straw also wrote to Parliamentary colleagues drawing their attention to the documents being published and the statements issued at the Azores Summit the previous day.

Lord Goldsmith's Written Answer, 17 March 2003

805. Lord Goldsmith replied on the morning of Monday 17 March to a Written Question tabled by Baroness Ramsey of Cartvale (Labour):

> "To ask Her Majesty's Government what is the Attorney General's view of the legal basis for the use of force against Iraq."[344]

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[342] Public hearing, 30 June 2010, page 65.
[343] Public hearing, 30 June 2010, pages 51-52.
[344] House of Lords, *Official Report*, 17 March 2003, column 2WA.

806. The text of Lord Goldsmith's response is set out in the Box below.

Text of Lord Goldsmith's Written Answer of 17 March 2003

"Authority to use force against Iraq exists from the combined effect of resolutions 678, 687 and 1441. All of these resolutions were adopted under Chapter VII of the UN Charter which allows the use of force for the express purpose of restoring international peace and security:

1. In resolution 678 the Security Council authorised force against Iraq, to eject it [Iraq] from Kuwait and to restore peace and security in the area.
2. In resolution 687, which set out the cease-fire conditions … the Security Council imposed continuing obligations on Iraq to eliminate its weapons of mass destruction in order to restore international peace and security in the area. Resolution 687 suspended but did not terminate the authority to use force under resolution 678.
3. A material breach of resolution 687 revives the authority to use force under resolution 678.
4. In resolution 1441 the Security Council determined that Iraq has been and remains in material breach of resolution 687, because it has not fully complied with its obligations to disarm under that resolution.
5. The Security Council in resolution 1441 gave Iraq 'a final opportunity to comply with its disarmament obligations' and warned Iraq of the 'serious consequences' if it did not.
6. The Security Council also decided in resolution 1441 that, if Iraq failed at any time to comply with and co-operate fully in the implementation of resolution 1441, that would constitute a further material breach.
7. It is plain that Iraq has failed so to comply and therefore Iraq was at the time of resolution 1441 and continues to be in material breach.
8. Thus the authority to use force under resolution 678 has revived and so continues today.

Resolution 1441 would in terms have provided that a further decision of the Security Council to sanction force was required if that had been intended. Thus, all that resolution 1441 requires is reporting to and discussion by the Security Council of Iraq's failures, but not an express further decision to use force."[345]

807. Ms Harman repeated Lord Goldsmith's Written Answer in the House of Commons as a pursuant answer to Mr Blair's response on 14 March to a Question from Mr Cash, asking Mr Blair if he would "make a statement on the legal basis for military intervention against Iraq".[346]

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[345] House of Commons, *Official Report*, 17 March 2002, column WA2.
[346] House of Commons, *Official Report*, 17 March 2002, columns 515-516W.

808. Mr Blair had replied on 14 March:

> "There is a longstanding convention, followed by successive Governments and reflected in the Ministerial Code, that legal advice to the Government remains confidential. This enables the Government to obtain frank and full legal advice in confidence, as everyone else can.
>
> "We always act in accordance with international law. At the appropriate time the Government would of course explain the legal basis for any military action that may be necessary."[347]

809. Mr Straw sent a copy of Lord Goldsmith's Written Answer to Mr Anderson, the Chairman of the Foreign Affairs Committee, on the morning of 17 March, together with an FCO paper giving "the legal background in more detail".[348]

810. The Inquiry asked Ms Adams whether she agreed that the Attorney General was not giving a Law Officer's advice on 17 March. Ms Adams replied:

> "He was essentially asserting the Government's view of the legal position, which was based on his advice … I think that [using the Attorney General to make the public statement on the legal position] may have been a mistake."[349]

811. Mr Macleod had expressed a similar view:

> "There is a question whether it was right to place on the Attorney General the onus of explaining the legal position publicly, so that he became perceived as the arbiter of whether the war should take place or not. The general practice on other legal issues is that the Attorney does not present the Government's legal position: that is left to the Minister with policy responsibility for the issue under discussion. That is what was done in relation to Kosovo or Iraq in 1998."[350]

812. Sir Michael Wood explicitly endorsed Mr Macleod's view.[351]

813. Lord Goldsmith told the Inquiry:

> "… there was a huge interest in what my view was in relation to the legality of war, and I had had, for example, almost weekly calls from the Shadow Attorney General [Mr Cash], who had both been telling me what his view was, which was that it was lawful, and saying 'You will have to tell Parliament what your view is in relation to this'.

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[347] House of Commons, *Official Report*, 14 March 2002, column 482W.
[348] Letter Straw to Anderson, 17 March 2003, 'Iraq: Legal Position Concerning the Use of Force' attaching PQ and Paper FCO, 17 March 2003, 'Iraq: Legal Basis for the Use of Force'.
[349] Public hearing, 30 June 2010, page 52.
[350] Statement, 24 June 2010, paragraph 33.
[351] Statement, 15 March 2011, page 25.

> "Normally, a Law Officer's opinion is not disclosed. It was in fact, impossible in these circumstances not to disclose what my conclusion was, because the clamour to know … would have been frankly impossible to avoid. So I knew that I would have to make some sort of statement as to what my position was. So that is the point about the Parliamentary answer."[352]

814. Parliamentary Questions and Parliamentary Committees after 2003 sought to probe whether Lord Goldsmith's Written Answer to Baroness Ramsey on 17 March constituted the Attorney General's advice, and by implication, whether the Government had waived, in the case of the legal advice on the basis of military action in Iraq, the convention that neither the fact that the Attorney General had advised nor the content of that advice were disclosed.[353]

815. In his responses, Lord Goldsmith was always very careful to point out that Baroness Ramsey had asked for, and he had provided, his view of the legal basis for the use of force, not his advice.[354]

816. The FCO paper, 'Iraq: Legal Basis for the Use of Force', stated that the legal basis for the use of force in Iraq was the revival of the authorisation in resolution 678.[355]

817. Specifically, the paper stated that in resolution 1441:

> "… the Security Council has determined –
>
> (1) that Iraq's possession of weapons of mass destruction (WMD) constitutes a threat to international peace and security;
>
> (2) that Iraq has failed – in clear violation of its legal obligations – to disarm; and
>
> (3) that, in consequence, Iraq is in material breach of the conditions for the ceasefire laid down by the Council in SCR 687 at the end of hostilities in 1991, thus reviving the authorisation in SCR 678."

818. Referring to the Security Council's power under Chapter VII of the Charter to authorise States to take military action, the paper set out the occasions during the 1990s when action had been taken on the basis that Iraq's non-compliance had broken the conditions of the cease-fire in resolution 687 and the authority to use force in resolution 678 had been "revived", as the "legal background" to resolution 1441.

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[352] Public hearing, 27 January 2010, pages 198-199.
[353] House of Lords, *Official Report*, 6 November 2003, column 129WA; House of Lords, *Official Report*, 28 February 2005, column 1WA; House of Lords, Constitution Committee, *Minutes of Evidence,* 22 March 2006, Q41; House of Lords, Constitution Committee, *Minutes of Evidence,* 22 March 2006, Q41, Q241.
[354] House of Lords, *Official Report*, 6 November 2003, column 129WA; House of Lords, *Official Report*, 28 February 2005, column 1WA; House of Lords, Constitution Committee, *Minutes of Evidence,* 22 March 2006, Q41; House of Lords, Constitution Committee, *Minutes of Evidence,* 22 March 2006, Q41, Q241.
[355] Paper FCO, 17 March 2003, 'Iraq: Legal Basis for the Use of Force'.

819. The FCO paper stated that the preambular paragraphs of resolution 1441:

- confirmed "once more" by the reference to resolution 678 "that that resolution was still in force";
- "recognised the threat which Iraq's non-compliance … posed to international peace and security"; and
- "recalled" that resolution 687 "imposed obligations on Iraq as a necessary step for the achievement of its objective of restoring international peace and security".[356]

820. The paper stated that operative paragraph one (OP1) of resolution 1441 decided that "Iraq 'has been and remains in material breach' of its obligations" and, paraphrasing the resolution, added:

> "The use of the term 'material breach' is of the utmost importance because the practice of the Security Council during the 1990s shows that it was just such a finding of material breach by Iraq which served to revive the authorisation of force …
>
> "On this occasion, however, the Council decided (paragraph two) to offer Iraq a 'final opportunity to comply with its disarmament obligations'. Iraq was required to produce an accurate, full and complete declaration of all aspects of its prohibited programmes (paragraph three), and to provide immediate and unrestricted access to UNMOVIC and IAEA (paragraph five). Failure by Iraq to comply with the requirements of SCR 1441 was declared to be a further material breach of Iraq's obligations (paragraph four), in addition to the continuing breach identified in paragraph one. In the event of a further breach (paragraph four), or interference by Iraq with the inspectors or failure to comply with any of the disarmament obligations under any of the relevant resolutions (paragraph 11), the matter was to be reported to the Security Council. The Council was then to convene 'to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security' (paragraph 12). The Council warned Iraq (paragraph 13) that 'it will face serious consequences as a result of its continued violations of its obligations'."

821. The paper stressed that the authority to use force did not revive immediately and there had been "no 'automaticity'". The provision "for any failure by Iraq to be 'considered' by the Security Council" did not:

> "… mean that no further action can be taken without a new resolution. Had that been the intention, it would have provided that the Council would decide what needed to be done … not that it would consider the matter. The choice of words was deliberate; a proposal that there should be a requirement for a decision by the Council … was

[356] Paper FCO, 17 March 2003, 'Iraq: Legal Basis for the Use of Force'.

not adopted. Instead the members of the Council opted for the formula that the Council must consider the matter before action is taken.

"That consideration has taken place regularly since the adoption of resolution 1441. It is plain, including from UNMOVIC's statement to the Security Council, its Twelfth Quarterly Report and the so-called 'Clusters Document', that Iraq has not complied as required … Whatever other differences there may have been in the Security Council, no member of the Council questioned this conclusion. It therefore follows that Iraq has not taken the final opportunity offered to it and remains in material breach of the disarmament obligations which, for twelve years, the Council has insisted are essential for the restoration of peace and security. In these circumstances, the authorisation to use force contained in resolution 678 revives."

822. On 17 March, Mr Straw wrote to all Parliamentary colleagues with a copy of the FCO paper on Iraq's non-compliance, a copy of his letter to the Chairman of the Foreign Affairs Committee, and copies of the statements made at the Azores Summit the previous day.[357]

823. Mr Straw wrote that the FCO paper on non-compliance stated that Iraq had "failed to comply fully with 14 previous UN resolutions related to WMD" and assessed Iraq's "progress in complying with relevant provisions of UNSCR 1441 with illustrative examples".

824. To supplement the Command Paper of UN documents published in February (CM 5769) Mr Straw also published a further Command Paper (CM 5785) with UN documents from early March.[358]

Cabinet, 17 March 2003

825. A specially convened Cabinet at 1600 on 17 March 2003 endorsed the decision to give Saddam Hussein an ultimatum to leave Iraq and to ask the House of Commons to endorse the use of military action against Iraq to enforce compliance, if necessary.

826. Mr Blair told his colleagues that he had called a meeting of Cabinet because "an impasse" had been reached at the United Nations.[359]

827. The Government had tried its "utmost", and had "tabled a draft … resolution, amended it, and then been prepared to apply tests against which Iraq's co-operation … could be judged". Although the UK had been "gathering increasing support from members of the Security Council", the French statement "that they would veto a

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[357] Letter Straw to Parliamentary Colleagues, 17 March 2003, [untitled] attaching Statement, 16 March 2003, 'A Vision for Iraq and the Iraqi People'; Statement, 16 March 2003, 'Commitment to Transatlantic Solidarity'; Paper FCO, 15 March 2003, 'Iraqi-Non Compliance with UNSCR 1441'.
[358] Command Paper (CM 5785), 17 March 2003, 'Iraq – UN Documents of early March 2003'.
[359] Cabinet Conclusions, 17 March 2003.

resolution in all circumstances had made it impossible to achieve a new … resolution". France, with Russia in support, "were not prepared to accept" that if Saddam Hussein "did not comply with the United Nations obligations, military action should follow". The UK was in a situation it had "striven to avoid": "There would be no second resolution and military action was likely to be necessary … to enforce compliance by Saddam Hussein with Iraq's obligations."

828. Mr Blair stated that the US "had now undertaken to produce a 'Road Map' for the Middle East Peace Process, once the new Palestinian Prime Minister's appointment had been confirmed". That would "open the way to a full and final settlement within three years". The US "had also confirmed" that it "would seek a UN mandate for the post-conflict reconstruction of Iraq", and that: "Oil revenues would be administered under the UN's authority."

829. Mr Blair stated:

> "A lot of work was needed to repair the strains which had arisen internationally over the past few weeks. He regretted that the international community had sent mixed messages to Saddam Hussein, whose regime could have been disarmed peacefully if confronted by international solidarity. The blockage we had encountered in the United Nations impeded any progress."

830. Mr Straw said that Mr Blair:

> "… had persuaded President Bush … to go down the United Nations route in order to achieve the maximum authority for the disarmament of Iraq, but the diplomatic process was now at an end."

831. Mr Straw added:

> "Progress had been made towards forging a consensus before the French and Russians had indicated their intention to veto any Security Council resolution proposed which indicated that military action would follow Saddam Hussein's failure to comply. His assessment was that President Chirac of France had decided to open up a strategic divide between France and the United Kingdom; the row in Brussels in late 2002 had been manufactured. Effectively, one member of the Security Council had torpedoed the whole process."

832. Mr Straw concluded:

> "… the one chance now remaining to Saddam Hussein was to seek exile. If that course failed, the Government would seek the support of the House of Commons for military action against Iraq. There would be a substantive motion in a debate now scheduled for Tuesday [18 March]."

833. Lord Goldsmith told Cabinet that he had answered a Parliamentary Question in the House of Lords that day "on the authority for the use of force against Iraq"; and

that Mr Straw had also sent a document "on the legal basis" to the Foreign Affairs Committee.

834. The minutes record that Lord Goldsmith informed Cabinet that:

> "Authority existed from the combined effect of United Nations Security Council resolutions 678, 687 and 1441, all of which were adopted under Chapter VII of the United Nations Charter. The latter allowed the use of force for the express purpose of restoring international peace and security … resolution 1441 determined that Iraq had been and remained in material breach of … resolution 687 and gave Iraq a final opportunity to comply with its disarmament obligations, warning of serious consequences if it did not do so. It was plain that Iraq had failed so to comply and therefore continued to be in material breach. The authority to use force under … resolution 678 was revived as a result … [R]esolution 1441 did not contain a requirement for a further … resolution to authorise the use of force."

835. The points made during discussion included:

- The attitude of France "had undermined the mechanism of the United Nations to enforce the will of the international community".
- The Government's supporters "needed a comprehensive statement to explain the position": a second resolution "had been politically desirable but not legally essential".
- "It was important to focus on Saddam's failure to comply, and to avoid the impression that the failure to gain a further … resolution was the issue".

836. Mr Prescott stated that Mr Blair:

> "… had played a major role in upholding the credibility of the United Nations. French intransigence had thwarted success in taking the United Nations process to its logical conclusion. Nevertheless, the use of force against Iraq was authorised by existing … resolutions."

837. Mr Blair concluded:

> "… the diplomatic process was now at an end. Saddam Hussein would be given an ultimatum to leave Iraq; and the House of Commons would be asked to endorse the use of military action against Iraq to enforce compliance, if necessary."

838. Cabinet "Took note."

839. Mr Cook's decision to resign from the Government was announced during Cabinet, which he did not attend.[360]

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[360] Campbell A & Hagerty B. *The Alastair Campbell Diaries. Volume 4. The Burden of Power: Countdown to Iraq.* Hutchinson, 2012.

840. Lord Goldsmith told the Inquiry that he had attended Cabinet:

> "… ready to answer any questions which were put to me and to explain my advice. Certainly the view I took was that producing my answer to Parliament would be a good framework for explaining to them what the legal advice was, and I would have been happy to answer the questions which were put to me. I was ready, fully briefed, ready to debate all these issues.
>
> "What actually happened was that I started to go through the PQ [Parliamentary Question], which had been handed out as this framework. Somebody, I can't remember who it was, said 'You don't need to do that. We can read it.' I was actually trying to use it as a sort of framework for explaining the position, and there was a question that was then put. I do recall telling Cabinet, 'Well there is another point of view, but this is the conclusion that I have reached', and then the discussion on the legality simply stopped, and Cabinet then went on to discuss all the other issues, the effect on international relations, domestic policy, and all the rest of it.
>
> "So the way it took place was that I was ready to answer questions and to deal with them and in the event that debate did not take place."[361]

841. Lord Turnbull told the Inquiry that there was:

> "… a kind of tradition which says you rely on the Attorney General to produce definitive advice. Once he has done it, you don't say, 'I don't think much of that'. His job is to produce the version we can all work on."[362]

842. Mr Blair told the Inquiry:

> "The whole purpose of having the Attorney there … was so that he could answer anybody's questions …"[363]

843. Ms Short told the Inquiry that she thought that Lord Goldsmith had:

> "… misled the Cabinet. He certainly misled me, but people let it through … I think now we know everything we know about his doubts and his changes of opinion and what the Foreign Office Legal Advisers were saying and that he had got this private side deal that Tony Blair said there was a material breach when Blix was saying he needed more time. I think for the Attorney General to come and say there is an unequivocal legal authority to go to war was misleading."[364]

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[361] Public hearing, 27 January 2010, pages 214-215.
[362] Public hearing, 13 January 2010, page 69.
[363] Public hearing, 29 January 2010, page 233.
[364] Public hearing, 2 February 2010, page 24.

844. Addressing the evidence given to the Inquiry by Lord Goldsmith and Mr Blair, Ms Short stated:

> "I see that both Tony Blair and he [Lord Goldsmith] said the Cabinet were given the chance to ask questions. That is untrue."[365]

845. Asked what she was trying to discuss and why she was not able to do so, Ms Short told the Inquiry that she had asked for a meeting with Lord Goldsmith but:

> "There was a piece of paper round the table. We normally didn't have any papers, apart from the agenda. It was the PQ answer, which we didn't know was a PQ answer then, and he started reading it out, so everyone said 'We can read' … and then … everyone said, 'That's it'. I said, 'That's extraordinary. Why is it so late? Did you change your mind?' And they all said 'Clare!'
>
> "Everything was very fraught by then and they didn't want me arguing, and I was kind of jeered at to be quiet. That's what happened."[366]

846. Asked if she then went quiet, Ms Short replied:

> "If he won't answer and the Prime Minister is saying, that's it, no discussion, there is only so much you can do … the Attorney, to be fair to him, says he was ready to answer questions, but none was allowed."[367]

847. Ms Short added that she had later asked Lord Goldsmith, "How come it was so late?", and that he had replied, "Oh, it takes me a long time to make my mind up."[368]

848. Mr Campbell wrote that Ms Short had asked Lord Goldsmith "if he had any doubts". Lord Goldsmith had replied that "lawyers all over the world have doubts but he was confident in the position".[369]

849. Dr Reid told the Inquiry: "everyone was allowed to speak at these [Cabinet] meetings. I don't recognise some descriptions of some of the least quiescent of my colleagues claiming to have been rendered quiescent …"[370]

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[365] Public hearing, 2 February 2010, page 28.
[366] Public hearing, 2 February 2010, pages 28-29.
[367] Public hearing, 2 February 2010, page 29.
[368] Public hearing, 2 February 2010, pages 29-30.
[369] Campbell A & Hagerty B. *The Alastair Campbell Diaries. Volume 4. The Burden of Power: Countdown to Iraq*. Hutchinson, 2012.
[370] Public hearing, 3 February 2010, page 75.

850. Addressing Ms Short's evidence that she had been "kind of jeered at", Mr Straw told the Inquiry:

> "… that's not my recollection. Obviously if that's what she felt … but this was a very serious Cabinet meeting. People weren't, as I recall … going off with that kind of behaviour. We all understood the gravity of the situation."[371]

851. Asked if he recognised Ms Short's description of events, Lord Boateng, who was Chief Secretary to the Treasury from 2002 to 2005, told the Inquiry that he did not.[372]

852. Ms Short sent a letter to colleagues in the Parliamentary Labour Party the following morning, explaining her reasons for deciding to support the Government.[373] She wrote that there had been "a number of important developments over the last week", including:

> "Firstly, the Attorney General has made clear that military action would be legal under international law. Other lawyers have expressed contrary opinions. But for the UK Government, the Civil Service and the military, it is the view of the Attorney General that matters and this is unequivocal."

853. Asked at what point he had initiated the process of working out what he was going to tell the Cabinet, and how much, Lord Goldsmith told the Inquiry:

> "So far as Cabinet is concerned, I can't remember at what stage I was told the Cabinet was going to meet and I was going to be asked to come to Cabinet on that occasion. I think it would have been the second occasion ever that I had attended Cabinet."[374]

854. Asked how it was decided that he would present the advice to Cabinet in the way he did, and whether that decision was taken in discussion with Mr Blair or with Mr Straw, Lord Goldsmith told the Inquiry that it was his decision:

> "… the point for me was to determine how to express my view to Parliament, and the Parliamentary answer then seemed to be a convenient way, as a framework really, for what I would then say to Cabinet about my view on legality."[375]

855. Asked if anyone asked him to restrict what he said to Cabinet, Lord Goldsmith replied: "No."[376]

856. Asked why, given the concerns of the Armed Forces and the Civil Service, Cabinet had not taken the opportunity to discuss the finely balanced legal arguments,

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[371] Public hearing, 8 February 2010, page 61.
[372] Public hearing, 14 July 2010, page 7.
[373] Short C. *An Honourable Deception: New Labour, Iraq and the Misuse of Power*. The Free Press, 2004.
[374] Public hearing, 27 January 2010, page 199.
[375] Public hearing, 27 January 2010, page 200.
[376] Public hearing, 27 January 2010, page 200.

Lord Goldsmith stated that a number of the Cabinet Ministers present had seen his 7 March advice, although things had moved on since then.

857. Lord Goldsmith added that the issues were well known in Parliament, but Cabinet did not want to debate them:

> "… thinking about it afterwards, I could sort of understand that … for this reason: that actually debating the legal question with the Attorney General was a slightly sterile exercise … because they could have put to me, 'What about this and what about that?' and I would have answered them, but what mattered, I thought, was that they needed to know whether or not this had the certificate, if you like, of the Attorney General. Was it lawful? That was a necessary condition. Then they would need to consider whether it was the right thing to do … So they were looking at the much bigger question of 'Is it right?' not just 'Is it lawful?'."[377]

858. Asked for his view on the proposition that there was never a full discussion in Cabinet about his opinion which was "caveated and was finely balanced", Lord Goldsmith replied that his advice was:

> "… caveated in one respect … It takes the central issue of the interpretation of 1441 and identifies that there are two points of view, and then I have come down in favour of one of them.
>
> "The Cabinet, I'm sure knew that there were two points of view because that had been well-travelled in the press. The caveat was you need to be satisfied that there really has been a failure to take the final opportunity. That, of course, was something which was right in the forefront of Cabinet's mind, I have no doubt, and I'm sure was mentioned by the Prime Minister and the Foreign Secretary and others in the course of the debate. I would expect so."[378]

859. Asked whether Cabinet should have had a discussion of Lord Goldsmith's fuller opinion before they came to a decision Lord Turnbull stated: "I think what they needed was "yes" or "no", and that's what they got."[379]

860. Asked if he thought that his Cabinet colleagues would have wished to have a discussion of the considerations in Lord Goldsmith's full advice, Mr Hoon replied:

> "I'm not sure that it would be appropriate for Cabinet to have that kind of discussion, because, in the end, what you would be inviting people to do was to speculate on the legal judgment that the Attorney General had reached, and it is not the same as having a political discussion about options or policies.

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[377] Public hearing, 27 January 2010, pages 216-217.
[378] Public hearing, 27 January 2010, pages 218-219.
[379] Public hearing, 13 January 2010, page 69.

> "This is someone whose decision is that this was lawful, and I can't see how Cabinet could look behind that and have the kind of discussion that you are suggesting. This was not policy advice. This was not, 'On the one hand … and on the other hand, we might take this course of action'. What he was saying is that this was lawful in his judgment, and I can't see how we could have had a sensible discussion going beyond that."[380]

861. Mrs Beckett told the Inquiry:

> "Peter Goldsmith came to Cabinet. He made it clear what was his view. It was open to people to ask questions … I was never the slightest bit surprised to learn that in earlier iterations he had drawn attention to, 'On the one hand … on the other hand' … that's what lawyers do."[381]

862. Mr Straw was asked whether it would have been better if Cabinet had had Lord Goldsmith's full opinion, whether he had persuaded Lord Goldsmith to present only the (PQ) answer, whether it was incumbent on Cabinet to satisfy itself that it was be aware of the arguments, and why Lord Goldsmith had reached his conclusion. He told the Inquiry:

> "I did that, partly for the reasons I have explained … but also, because we were concerned about leaks, and … what the military wanted to know wasn't the process by which a decision had been arrived at."[382]

863. Asked whether he had been given the opportunity to look at the full legal opinion of 7 March, Dr Reid told the Inquiry:

> "I was given the opportunity, but I didn't particularly want to look at some long 'balancing' legal opinion, I wanted to know 'is what we are about to do lawful, or is it illegal?' … [A]s far as I was aware, the constitutional convention and legality in Great Britain for the Cabinet is dependent on the judgment of the Attorney General."[383]

864. In a statement he sent the Inquiry before his second hearing on 8 February 2010, Mr Straw wrote that, in the absence of the ability to secure an authoritative determination of the law from the courts, "a great weight of responsibility" rested on the shoulders of the Attorney General, and that his role was to determine whether the UK Government could consider the merits of taking military action.[384]

865. Mr Straw was asked whether Cabinet could meet its responsibilities to address the key moral as well as political issues, as stated by Mr Straw in his 'Supplementary

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[380] Public hearing, 19 January 2010, page 70.
[381] Public hearing, 26 January 2010, pages 53-55.
[382] Public hearing, 8 February 2010, pages 62-63.
[383] Public hearing, 3 February 2010, page 76.
[384] Statement, February 2010, 'Supplementary Memorandum by the Rt Hon Jack Straw MP', page 5.

Memorandum' for the Inquiry, without being fully alive to the fact that the legal issues were finely balanced. Mr Straw replied:

> "The Cabinet were fully aware that the arguments were finely balanced. It was impossible to open a newspaper without being fully aware of the arguments."[385]

866. In response to the point that newspaper articles were not legal advice, Mr Straw added:

> "With great respect, we had lawyers from both sides arguing the case in the public print. So it was very clear … that there were two arguments going on. One was about the … moral and political justification, and that, in many ways, in the public print, elided with arguments about whether it was lawful … no one in the Cabinet was unaware of the fact that there had been and was a continuing and intense legal debate about the interpretation of 1441 … But the issue for the Cabinet was: was it lawful or otherwise?
>
> "… [W]hat was required … at that stage was essentially a yes/no decision from the Attorney General, yes/no for the Cabinet, yes/no for the military forces. It was open to members of the Cabinet to question the Attorney General … it wasn't necessary to go into the process by which Peter Goldsmith had come to his view. What they wanted to know was what the answer was."[386]

867. Mr Straw told the Inquiry:

> "… any member of the Cabinet could easily have asked about the finely balanced nature [of the legal arguments] … [T]he finely balanced arguments are part of the process by which he came to that decision.
>
> "… He was going through all the arguments …
>
> "But there is nothing unusual about legal decisions being finely balanced … [W]hat Cabinet wanted … and needed to know … was what was the decision.
>
> "Nobody was preventing anybody from asking the Attorney … what the position was. In the event they chose not to. A number of lawyers were around the table. The legal issues had been extremely well aired in public, the press, and people were briefed anyway."[387]

868. Asked for an assurance that Cabinet was sufficiently informed, separately and collectively, to share responsibility for the risks a decision to invade Iraq entailed, "including risks, individual and collective, to Crown Servants, and … themselves", Mr Straw replied: "yes".[388]

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[385] Public hearing, 8 February 2010, page 59.
[386] Public hearing, 8 February 2010, pages 59-60.
[387] Public hearing, 8 February 2010, pages 62-63.
[388] Public hearing, 8 February 2010, page 64.

869. Mr Straw added:

> "… we were being publicly bombarded with the arguments, and arguments about the consequences. We received detailed legal advice, for example, from CND saying why it was unlawful and what the personal consequences would be.
>
> "So everybody understood what the issues were and the level of responsibility, personal and individual …"[389]

870. Mr Straw also stated that Cabinet "was more involved in this decision" because members of Cabinet had to "explain themselves in the House of Commons as well as publicly and to their constituency parties".

871. Asked if he was fully satisfied with the advice that was given to Cabinet about the legality of the conflict, Mr Brown told the Inquiry that Lord Goldsmith's role was to give Cabinet advice, and that "he was certain about the advice he gave" but it was Cabinet's job to "make our decisions on the basis, not simply of the legal advice, but the moral, political and other case for taking action".[390]

872. Asked if he had been aware that Lord Goldsmith had earlier taken a different view, Mr Brown replied that he was not aware of the details and that he had not been involved in previous discussions with Lord Goldsmith. Mr Brown added:

> "We had this straightforward issue. We were sitting down as a Cabinet, to discuss the merits of taking action once the diplomatic avenues had been exhausted, unfortunately, and we had to have straightforward advice from the Attorney General: was it lawful or was it not? His advice in the Cabinet meeting was unequivocal."[391]

873. Asked if he had seen Lord Goldsmith's advice of 7 March, Mr Brown replied:

> "As I understand it, the constitutional position is very clear, that before a decision of such magnitude is made, the Attorney General has to say whether he thinks it is lawful or not. That was the straightforward question that we had to answer. If he had answered equivocally … then of course there would have been questions, but he was very straightforward in his recommendation.
>
> "To me, that was a necessary part of the discussion about the decision of war, but it wasn't sufficient, because we had to look at the political and other case that had to be examined in the light of the period of diplomacy at the United Nations."[392]

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[389] Public hearing, 8 February 2010, page 66.
[390] Public hearing, 5 March 2010, page 50.
[391] Public hearing, 5 March 2010, page 51.
[392] Public hearing, 5 March 2010, pages 51-52.

874. After further questioning, Mr Brown told the Inquiry:

> "I think in retrospect, people, as historians … will look at it very carefully … and what was said between different people at different times and what were the first … second … and the third drafts. But the issue for us was very clear … Did the Attorney General, who is our legal officer who is responsible for giving us legal advice … have a position … that was unequivocal? And his position on this was unequivocal.
>
> "… [I]t laid the basis on which we could take a decision, but it wasn't the reason that we made the decisions. He gave us the necessary means … but it wasn't sufficient in itself."[393]

875. Asked if his view would have changed if he had known that 10 days before the Cabinet discussion Lord Goldsmith's position had been equivocal, Mr Brown stated:

> "I don't think it would have changed my view, because unless he was prepared to say that his unequivocal advice was that this was not lawful, then the other arguments that I thought were important … the obligations to the international community, the failure to honour them, the failure to disclose, the failure to discharge the spirit and letter of the resolutions, particularly 1441 … But it seemed to me the Attorney General's advice was quite unequivocal."[394]

876. Asked whether Cabinet was able to take a genuinely collective decision or if it was being asked to endorse an approach at a time when the die had effectively been cast, Mr Brown replied:

> "I have got to be very clear. I believed we were making the right decisions for the right cause. I believed I had sufficient information before me to make a judgement … I wasn't trying to do the job of the Foreign Secretary or trying to second guess something that had happened at other meetings. I was looking at the issue on its merits and … I was convinced of the merits of our case."[395]

877. Asked if he thought he should have seen the full legal advice, Lord Boateng said:

> "On reflection, I think it would have been helpful if we had seen it. I think we would have had a fuller debate and discussion and I think that we ought to have been trusted with it, frankly. But be that as it may, we weren't, and we therefore acted upon the best legal advice we had. I don't think, if we had seen the full opinion, we would necessarily have come to a different conclusion. I think it would have been helpful if we had seen it. We didn't."[396]

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[393] Public hearing, 5 March 2010, pages 53-54.
[394] Public hearing, 5 March 2010, page 54.
[395] Public hearing, 5 March 2010, pages 55-56.
[396] Public hearing, 14 July 2010, page 11.

878. Mr Blair told the Inquiry that, in respect of Lord Goldsmith's legal opinion:

> "… the key thing really was … Cabinet weren't interested in becoming part of the legal debate, they just wanted to know, 'Is the Attorney General saying it is lawful or not?'"[397]

879. Mr Blair stated that the legal issues were "one aspect" of the Cabinet discussion, but Cabinet was "really focused on the politics".[398]

880. Asked whether Cabinet should have weighed up the legal risk, Mr Blair replied:

> "I think they were weighing the risks up for the country, but … in respect of the law … I don't think members of the Cabinet wanted to have a debate … Peter was there and could have answered any questions they had, but their basic question to him was: is there a proper legal basis for this or not and his answer was, 'Yes.'
>
> "… the reason why we had Peter there … he was the lawyer there to talk about it."[399]

881. In a letter written to Lord Goldsmith in March 2005, Ms Short stated that the way the legal advice had been presented to Cabinet was a breach of the Ministerial Code.[400]

882. In 2003, the relevant provision of the Ministerial Code stated:

> "When advice from the Law Officers is included in correspondence between Ministers, or in papers for the Cabinet or Ministerial Committees, the conclusions may if necessary be summarised but, if this is done, the complete text of the advice should be attached."[401]

883. Lord Goldsmith told the Inquiry:

> "… the Ministerial Code, which talks about providing the full text of the Attorney General's opinion, is actually dealing with a quite different circumstance. That's dealing with the circumstance where a Minister comes to Cabinet and says 'I have got clearance from the Attorney General. He says this is all right, or she says this is all right'. In those circumstances, the Ministerial Code requires that the full text should be there rather than just the summary. You can summarise it but you need to produce the full text as well.

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[397] Public hearing 21, January 2011, page 232.
[398] Public hearing 21, January 2011, page 233.
[399] Public hearing 21, January 2011, page 234.
[400] Letter Short to Goldsmith, March 2005. Previously available on the website of Clare Short MP and referred to the public hearing of Clare Short, 2 February 2010, at page 41, and discussed during the Select Committee on Public Administration, 10 March 2005, Q240 *et sequitur.*
[401] Cabinet Office. *Ministerial Code: A code of conduct and guidance on procedures for Ministers,* 2001.

> "I was there. I was therefore in a position to answer all questions. I was in a position to say that my opinion was that this was lawful. I did manage to say – I did say that there was another point of view, but they knew that very well in any event."[402]

884. Lord Turnbull confirmed that in his view the requirements of the Ministerial Code had not been breached because Lord Goldsmith was present in person, rather than another Minister reporting his advice.[403]

885. Asked about the fact that Lord Goldsmith's advice of 7 March had raised the issue of the exposure of Ministers and Crown servants, both military and civil, to risk, Mr Brown told the Inquiry:

> "I knew … that the Permanent Secretary to the Civil Service [sic] and the military Chiefs [of Staff] had required, as they should, clear guidance … So I knew that they were satisfied that they had got the legal assurances that were necessary."[404]

Mr Straw's statement to the House of Commons, 17 March 2003

886. In his Statement to the House of Commons on the evening of 17 March, Mr Straw stated that the Government had reluctantly concluded that France's actions had put a consensus in the Security Council on a further resolution "beyond reach".

887. As a result of Saddam Hussein's persistent refusal to meet the UN's demands, Cabinet had decided to ask the House of Commons to support the UK's participation in military operations should they be necessary to achieve the disarmament of Iraq "and thereby the maintenance of the authority of the United Nations".

888. Mr Straw stated that Lord Goldsmith's Written Answer "set out the legal basis for the use of force".

889. Mr Straw drew attention to the significance of the fact that no-one "in all the discussions in the Security Council and outside" had claimed that Iraq was in full compliance with its obligations.

890. Mr Straw made a statement to the House of Commons at 8.24pm.[405]

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[402] Public hearing 21 January 2011, pages 217-218.
[403] Public hearing, 13 January 2010, page 68.
[404] Public hearing, 5 March 2010, pages 65-66.
[405] House of Commons, *Official Report*, 17 March 2003, columns 703-705.

891. Referring to the statement issued at the Azores Summit calling on all members of the Security Council to adopt a resolution challenging Saddam Hussein to take a strategic decision to disarm, Mr Straw told the House of Commons:

> "Such a resolution has never been needed legally, but we have long had a preference for it politically."

892. Mr Straw stated that there had been "intense diplomatic activity to secure that end over many months, culminating in the last 24 hours". Despite "final efforts" by Sir Jeremy Greenstock the previous evening and his own conversations with his "Spanish, American, Russian and Chinese counterparts that morning", the Government had:

> "… reluctantly concluded that a Security Council consensus on a new resolution would not be possible. On my instructions, Sir Jeremy Greenstock made a public announcement to that effect at the United Nations at about 3.15 pm UK time today."

893. Mr Straw continued that, since the adoption of resolution 1441 in November 2002, he, Mr Blair and Sir Jeremy Greenstock had "strained every nerve" in search of a consensus "which could finally persuade Iraq by peaceful means, to provide the full and immediate co-operation demanded by the Security Council".

894. Mr Straw stated that it was significant that "in all the discussions in the Security Council and outside" no-one had claimed that Iraq was "in full compliance with the obligations placed on it" and:

> "Given that, it was my belief, up to about a week ago, that we were close to achieving a consensus that we sought on the further resolution. Sadly, one country then ensured that the Security Council could not act. President Chirac's unequivocal announcement last Monday that France would veto a second resolution containing that or any ultimatum 'whatever the circumstances' inevitably created a sense of paralysis in our negotiations. I deeply regret that France has thereby put a Security Council consensus beyond reach."[406]

895. Mr Straw told the House of Commons that the proposals submitted by France, Germany and Russia for "more time and more inspections" sought to "rewrite" resolution 1441. They "would have allowed Saddam to continue stringing out inspections indefinitely, and he would rightly have drawn the lesson that the Security Council was simply not prepared to enforce the ultimatum … at the heart of resolution 1441".

896. Mr Straw pointed out that "in the event of non-compliance" Iraq should, as OP13 spelt out, expect "serious consequences". Mr Straw stated:

> "As a result of Saddam Hussein's persistent refusal to meet the UN's demands, and the inability of the Security Council to adopt a further resolution, the Cabinet has decided to ask the House to support the United Kingdom's participation in

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[406] House of Commons, *Official Report*, 17 March 2003, columns 703-705.

military operations, should they be necessary, with the objective of ensuring the disarmament of Iraq's weapons of mass destruction, and thereby the maintenance of the authority of the United Nations."

897. Mr Straw confirmed that Parliament "would have an opportunity to debate our involvement in military action prior to hostilities" the following day; and that the debate would be on a substantive motion "proposed by the Prime Minister and Cabinet colleagues". He also drew the attention of the House to Lord Goldsmith's Written Answer, which "set out the legal basis for the use of force against Iraq", and the documents provided earlier that day.

898. Mr Straw concluded:

"Some say that Iraq can be disarmed without an ultimatum, without the threat or the use of force, but simply by more time and more inspections. That approach is defied by all our experience over 12 weary years. It cannot produce the disarmament of Iraq; it cannot rid the world of the danger of the Iraq regime. It can only bring comfort to tyrants and emasculate the authority of the United Nations …"

899. Mr Straw's statement was repeated in the House of Lords that day by Baroness Symons during a debate on the legality of the use of armed force in Iraq initiated by Lord Goodhart (see Section 3.8).[407]

900. In answer to the responses from Lord Howell of Guildford and Lord Wallace of Saltaire, Baroness Symons stated that she believed:

"… the legality of the position is indeed settled. I do not think we have ever had such a clear statement from the Attorney General at a juncture like this … I believe that this Government have gone further than any other Government to put that advice into the public arena, and the Law Officer with his principal responsibility has given a clear statement of his opinion …

"… [W]e have already put into the public arena a full history of the United Nations Security Council resolutions … That is in Command Paper 5769. We have also published a full statement on the legal basis – a fuller statement than that which my noble and learned friend gave in answer to … Baroness … Ramsey …"[408]

[407] House of Lords, *Official Report*, 17 March 2003, columns 97-103.
[408] House of Lords, *Official Report*, 17 March 2003, columns 101-102.

901. Responding to points made in the debate by Lord Goodhart and Lord Howell about the absence of Lord Goldsmith, Baroness Symons stated in her speech closing the debate:

> "The Attorney General has been more open-handed than any of his predecessors in publishing his advice in the way that he has. Furthermore … the Foreign Secretary has also tried to help … by circulating a further paper."[409]

902. Baroness Symons added that, "In recognition of the enormous importance of this issue", Lord Goldsmith had "decided to disclose his view of the legal basis for the use of force". That was:

> "… almost unprecedented. The last time a Law Officer's views were disclosed concerned the Maastricht Treaty in 1992. It is right that what has happened today remains the exception rather than the rule."

Conclusions

The timing of Lord Goldsmith's advice on the interpretation of resolution 1441

903. Following the adoption of resolution 1441, a decision was taken to delay the receipt of formal advice from Lord Goldsmith.

904. On 11 November Mr Powell told Lord Goldsmith that there should be a meeting some time before Christmas to discuss the legal position.

905. On 9 December, formal "instructions" to provide advice were sent to Lord Goldsmith. They were sent by the FCO on behalf of the FCO and the MOD as well as No.10.

906. The instructions made it clear that Lord Goldsmith should not provide an immediate response.

907. When Lord Goldsmith met Mr Powell, Sir David Manning and Baroness Morgan on 19 December, he was told that he was not, at that stage, being asked for his advice; and that, when he was, it would be helpful for him to discuss a draft with Mr Blair in the first instance.

908. Until 7 March 2003, Mr Blair and Mr Powell asked that Lord Goldsmith's views on the legal effect of resolution 1441 should be tightly held and not shared with Ministerial colleagues without No.10's permission.

909. Lord Goldsmith agreed that approach.

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[409] House of Lords, *Official Report*, 17 March 2003, columns 117-118.

910. Lord Goldsmith provided draft advice to Mr Blair on 14 January 2003. As instructed he did not, at that time, provide a copy of his advice to Mr Straw or to Mr Hoon.

911. Although Lord Goldsmith was invited to attend Cabinet on 16 January, there was no discussion of Lord Goldsmith's views.

912. Mr Straw was aware, in general terms, of Lord Goldsmith's position but he was not provided with a copy of Lord Goldsmith's draft advice before Cabinet on 16 January. He did not read it until at least two weeks later.

913. The draft advice of 14 January should have been provided to Mr Straw, Mr Hoon and the Cabinet Secretary, all of whose responsibilities were directly engaged.

914. Lord Goldsmith provided Mr Blair with further advice on 30 January. It was not seen by anyone outside No.10.

915. Lord Goldsmith discussed the negotiating history of resolution 1441 with Mr Straw, Sir Jeremy Greenstock, with White House officials and the State Department's Legal Advisers. They argued that resolution 1441 could be interpreted as not requiring a second resolution. The US Government's position was that it would not have agreed to resolution 1441 had its terms required one.

916. When Lord Goldsmith met No.10 officials on 27 February, he told them that he had reached the view that a "reasonable case" could be made that resolution 1441 was capable of reviving the authorisation to use force in resolution 678 (1990) without a further resolution, if there were strong factual grounds for concluding that Iraq had failed to take the final opportunity offered by resolution 1441.

917. Until that time, No.10 could not have been sure that Lord Goldsmith would advise that there was a basis on which military action against Iraq could be taken in the absence of a further decision of the Security Council.

918. In the absence of Lord Goldsmith's formal advice, uncertainties about the circumstances in which the UK would be able to participate in military action continued, although the possibility of a second resolution remained.

919. Lord Goldsmith provided formal written advice on 7 March.

Lord Goldsmith's advice of 7 March 2003

920. Lord Goldsmith's formal advice of 7 March set out alternative interpretations of the legal effect of resolution 1441. He concluded that the safer route would be to seek a second resolution, and he set out the ways in which, in the absence of a second resolution, the matter might be brought before a court. Lord Goldsmith

identified a key question to be whether or not there was a need for an assessment of whether Iraq's conduct constituted a failure to take the final opportunity or a failure fully to co-operate within the meaning of OP4, such that the basis of the cease-fire was destroyed.

921. **Lord Goldsmith wrote (paragraph 26): "A narrow textual reading of the resolution suggested no such assessment was needed because the Security Council had pre-determined the issue. Public statements, on the other hand, say otherwise."**

922. **While Lord Goldsmith remained "of the opinion that the safest legal course would be to secure a second resolution", he concluded (paragraph 28) that "a reasonable case can be made that resolution 1441 was capable of reviving the authorisation in resolution 678 without a further resolution".**

923. **Lord Goldsmith wrote that a reasonable case did not mean that if the matter ever came to court, he would be confident that the court would agree with this view. He judged a court might well conclude that OPs 4 and 12 required a further Security Council decision in order to revive the authorisation in resolution 678.**

924. **Lord Goldsmith noted that on a number of previous occasions, including in relation to Operation Desert Fox in Iraq in 1998 and Kosovo in 1999, UK forces had participated in military action on the basis of advice from previous Attorneys General that (paragraph 30) "the legality of the action under international law was no more than reasonably arguable".**

925. **Lord Goldsmith warned Mr Blair (paragraph 29):**

> **"… the argument that resolution 1441 alone has revived the authorisation to use force in resolution 678 will only be sustainable if there are strong factual grounds for concluding that Iraq failed to take the final opportunity. In other words, we would need to be able to demonstrate hard evidence of non-compliance and non-cooperation … the views of UNMOVIC and the IAEA will be highly significant in this respect."**

926. **Lord Goldsmith added:**

> **"In the light of the latest reporting by UNMOVIC, you will need to consider extremely carefully whether the evidence of non-cooperation and non-compliance by Iraq is sufficiently compelling to justify the conclusion that Iraq has failed to take its final opportunity."**

927. **Mr Straw, Mr Hoon, Dr Reid and the Chiefs of Staff had all seen Lord Goldsmith's advice of 7 March before the No.10 meeting on 11 March, but it is not clear how and when it reached them.**

928. Other Ministers whose responsibilities were directly engaged, including Mr Brown and Ms Short, and their senior officials, did not see the advice.

Lord Goldsmith's arrival at a "better view"

929. At the meeting on 11 March, Mr Blair stated that Lord Goldsmith's "advice made it clear that a reasonable case could be made" that resolution 1441 was "capable of reviving" the authorisation of resolution 678, "although of course a second resolution would be preferable". There was concern, however, that the advice did not offer a clear indication that military action would be lawful.

930. Lord Goldsmith was asked, after the meeting, by Adm Boyce on behalf of the Armed Forces, and by the Treasury Solicitor, Ms Juliet Wheldon, in respect of the Civil Service, to give a clear-cut answer on whether military action would be lawful rather than unlawful.

931. On 12 March, Mr Blair and Mr Straw reached the view that there was no chance of securing a majority in the Security Council in support of the draft resolution of 7 March and there was a risk of one or more vetoes if the resolution was put to a vote.

932. There is no evidence to indicate that Lord Goldsmith was informed of their conclusion.

933. Lord Goldsmith concluded on 13 March that, on balance, the "better view" was that the conditions for the operation of the revival argument were met in this case, meaning that there was a lawful basis for the use of force without a further resolution beyond resolution 1441.

The exchange of letters on 14 and 15 March 2003

934. Mr Brummell wrote to Mr Rycroft on 14 March:

> "It is an essential part of the legal basis for military action without a further resolution of the Security Council that there is strong evidence that Iraq has failed to comply with and co-operate fully in the implementation of resolution 1441 and has thus failed to take the final opportunity offered by the Security Council in that resolution. The Attorney General understands that it is unequivocally the Prime Minister's view that Iraq has committed further material breaches as specified in [operative] paragraph 4 of resolution 1441, but as this is a judgment for the Prime Minister, the Attorney would be grateful for confirmation that this is the case."

935. Mr Rycroft replied to Mr Brummell on 15 March:

> "This is to confirm that it is indeed the Prime Minister's unequivocal view that Iraq is in further material breach of its obligations, as in OP4 of UNSCR 1441,

because of 'false statements or omissions in the declarations submitted by Iraq pursuant to this resolution and failure to comply with, and co-operate fully in the interpretation of, this resolution'."

936. **It is unclear what specific grounds Mr Blair relied upon in reaching his view.**

937. **In his advice of 7 March, Lord Goldsmith had said that the views of UNMOVIC and the IAEA would be highly significant in demonstrating hard evidence of non-compliance and non-co-operation. In the exchange of letters on 14 and 15 March between Mr Brummell and No.10, there is no reference to their views; the only view referred to was that of Mr Blair.**

938. **Following receipt of Mr Brummell's letter of 14 March, Mr Blair neither requested nor received considered advice addressing the evidence on which he expressed his "unequivocal view" that Iraq was "in further material breach of its obligations".**

939. **Senior Ministers should have considered the question posed in Mr Brummell's letter of 14 March, either in the Defence and Overseas Policy Committee or a "War Cabinet", on the basis of formal advice. Such a Committee should then have reported its conclusions to Cabinet before its members were asked to endorse the Government's policy.**

Lord Goldsmith's Written Answer of 17 March 2003

940. **In Parliament during the second week of March, and in the media, there were calls on the Government to make a statement about its legal position.**

941. **When Lord Goldsmith spoke to Mr Brummell on 13 March, they agreed that a statement should be prepared "setting out the Attorney's view of the legal position which could be deployed at Cabinet and in Parliament the following week".**

942. **The message was conveyed to No.10 during the morning of 15 March that Lord Goldsmith "would make clear during the course of the week that there is a sound legal basis for action should that prove necessary".**

943. **The decision that Lord Goldsmith would take the lead in explaining the Government's legal position to Parliament, rather than the Prime Minister or responsible Secretary of State providing that explanation, was unusual.**

944. **The normal practice was, and is, that the Minister responsible for the policy, in this case Mr Blair or Mr Straw, would have made such a statement.**

Cabinet, 17 March 2003

945. Cabinet was provided with the text of Lord Goldsmith's Written Answer to Baroness Ramsey setting out the legal basis for military action.

946. That document represented a statement of the Government's legal position – it did not explain the legal basis of the conclusion that Iraq had failed to take "the final opportunity" to comply with its disarmament obligations offered by resolution 1441.

947. Lord Goldsmith told Cabinet that it was "plain" that Iraq had failed to comply with its obligations and continued to be in "material breach" of the relevant Security Council resolutions. The authority to use force under resolution 678 was, "as a result", revived. Lord Goldsmith said that there was no need for a further resolution.

948. Cabinet was not provided with written advice which set out, as the advice of 7 March had done, the conflicting arguments regarding the legal effect of resolution 1441 and whether, in particular, it authorised military action without a further resolution of the Security Council.

949. Cabinet was not provided with, or informed of, Mr Brummell's letter to Mr Rycroft of 14 March; or Mr Rycroft's response of 15 March. Cabinet was not told how Mr Blair had reached the view recorded in Mr Rycroft's letter.

950. The majority of Cabinet members who gave evidence to the Inquiry took the position that the role of the Attorney General on 17 March was, simply, to tell Cabinet whether or not there was a legal basis for military action.

951. None of those Ministers who had read Lord Goldsmith's 7 March advice asked for an explanation as to why his legal view of resolution 1441 had changed.

952. There was little appetite to question Lord Goldsmith about his advice, and no substantive discussion of the legal issues was recorded.

953. Cabinet was not misled on 17 March and the exchange of letters between the Attorney General's office and No.10 on 14 and 15 March did not constitute, as suggested to the Inquiry by Ms Short, a "side deal".

954. Cabinet was, however, being asked to confirm the decision that the diplomatic process was at an end and that the House of Commons should be asked to endorse the use of military action to enforce Iraq's compliance. Given the gravity of this decision, Cabinet should have been made aware of the legal uncertainties.

955. Lord Goldsmith should have been asked to provide written advice which fully reflected the position on 17 March, explained the legal basis on which the UK could take military action and set out the risks of legal challenge.

956. **The advice should have addressed the significance of the exchange of letters of 14 and 15 March and how, in the absence of agreement from the majority of members of the Security Council, the point had been reached that Iraq had failed to take the final opportunity offered by resolution 1441.**

957. **The advice should have been provided to Ministers and senior officials whose responsibilities were directly engaged and should have been made available to Cabinet.**

EXHIBIT 2

EXHIBIT 2

IRAQ INQUIRY

Statement by Sir Michael Wood

This statement describes my role and responsibilities between 2001 and February 2006. It also sets out, briefly, my views on the following matters:

- *the legal position on the use of force against Iraq before UNSCR 1441*
- *the legal position on the use of force against Iraq after UNSCR 1441*
- *the duties and responsibilities of Occupying Powers and UNSCR 1483*
- *how the process for obtaining legal advice and decision making worked.*

My role and responsibilities between 2001 and February 2006

1. I was the Legal Adviser to the Foreign and Commonwealth Office (FCO) between December 1999 and the end of February 2006. I had been an FCO lawyer since 1970. Between 1991 and 1994 I was posted to the United Kingdom Mission to the United Nations in New York (UKMis New York).

2. During the period that I was the head of the FCO Legal Advisers, there were about 27 lawyers based in the FCO in London, and another nine or so working outside the FCO. Two were posted to UKMis New York, and others were posted in Brussels, Geneva, Bridgetown and The Hague. As had been the case for many years, a senior FCO lawyer was seconded to the Attorney General's Office (then known as the Legal Secretariat to the Law Officers – LSLO). From May 2003, an FCO lawyer was posted in Baghdad, initially working with ORHA/CPA and the UK Representative in Baghdad, then in the British Embassy.

3. The lawyers were (and are) members of HM Diplomatic Service. As the head of the FCO Legal Advisers, I had overall responsibility for the legal advice given within the FCO, with direct access to Ministers and when necessary the Attorney General. I was responsible for the management of the team of lawyers based in the FCO, and for overseeing their work. In practice, I shared these duties with other senior lawyers. I dealt directly with some legal issues, for example when acting as Agent for the UK in international litigation. During 2002-2003, in addition to Iraq, I was dealing with the negotiations with Libya over Lockerbie; two arbitral cases between Ireland and the UK over the Sellafield MOX Plant; and the International Criminal Court (including the election campaign for the British judge). I was abroad for at least six weeks of

official meetings or court hearings in 2002-2003, during which time a Deputy Legal Adviser was in charge of the Legal Advisers.

4. FCO Legal Advisers work on the whole range of legal matters relevant to the FCO. These include public international law, on which FCO lawyers often assist other government departments. The work also includes European Union law; international human rights law; the constitutional and other law of the British overseas territories; and UK law relevant to the work of the FCO (such as employment law, data protection, freedom of information, official secrets). During this time, the FCO was increasingly involved in litigation, before the English courts as well as before international courts and tribunals.

5. Legal advice is given within the FCO and to other government departments both orally and in writing. But even written advice rarely takes the form of a formal legal opinion, such as a barrister in private practice might give. Legal advice is usually fully integrated into the development of policy. Any policy submission raising legal issues will be based on, and where necessary include, legal advice. Advice often takes the form of commenting on drafts prepared by policy colleagues; such advice may be given in the form of textual changes or oral comment. Much advice is given in the course of meetings with Ministers and officials, or by email or phone. A huge volume of papers is copied to the Legal Advisers, which enables them to volunteer advice where necessary, without waiting to be asked.

6. Iraq was naturally a high priority for FCO Legal Advisers; at a rough estimate I would say that it took up about 10% of my time during 2002-2003, and much of the time of a number of other lawyers, both senior and more junior. We worked together as a team.

7. Given the importance and difficulty of the issues, a considerable number of FCO lawyers worked on various aspects of Iraq. While the emphasis changed over time, the issues included UN sanctions; enforcement of the No-fly Zones; the use of force (*jus ad bellum*); the application of the laws of war, including targeting and rules of engagement (*jus in bello*); and post-invasion matters, such as the responsibilities and duties of belligerent Occupants; constitutional developments within Iraq; and trials in Iraq, including the trial of Saddam Hussein. On many of these issues, FCO lawyers worked closely with lawyers in the Ministry of Defence, and with the Attorney General and his officials.

8. The Attorney General is the Government's chief legal adviser, including on public international law. The usual procedure by which the Government obtains legal advice from the Attorney General was described in the Butler Report[1].

[1] HC 898, at paragraphs 368 to 373. An account of the development of the Attorney General's advice on the legality of the use of force against Iraq in 2003 is given in the Disclosure Statement prepared by the LSLO which forms Annex 6 to the Information

The close relationship between FCO lawyers and the Attorney General and his officials is an important part of the machinery for ensuring that HMG comply with their legal obligations, including those under public international law. The Attorney General's support for the FCO lawyers, and their assistance to him or her, are key parts of this relationship. For reasons that I have set out elsewhere,[2] I agree with the Joint Committee on the Constitutional Renewal Bill, which concluded - in 2008 - as follows:

> "We have carefully considered the evidence we have received and the recommendation of the House of Commons Justice Committee. We recognise that there are different and strongly held views on this issue. On balance, however, we are not persuaded of the case for separating the Attorney General's legal and political functions. We therefore support the current arrangement which combines these functions, and support the retention of the Attorney's present status as a Government Minister."[3]

Legal position on the use of force against Iraq before UNSCR 1441

9. The starting point is the fundamental rule of international law that all States must refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state[4]. Under the Charter of the United Nations, there are two exceptions to the prohibition on the use of force. The use of force is prohibited unless: (i) it is in exercise of the inherent right of individual or collective self-defence, recognised in Article 51; or (ii) it is authorized by the Security Council acting under Chapter VII. In addition, HMG has taken the position that, exceptionally, a limited degree of force may be used to avert an overwhelming humanitarian catastrophe.

10. Self-defence requires an actual or imminent attack. There must be more than a 'threat'. Talk in some quarters of a right of pre-emption, in so far as it suggests a right going beyond self-defence, has no basis in international law. On the information available in the summer of 2002, there was no basis for the UK to exercise the right of self-defence against Iraq. Nor was it suggested that the conditions for an exceptional right to use force to avert an overwhelming humanitarian catastrophe were met.

Commissioner's Enforcement Notice of 22 May 2006, available on the Information Commissioner's website.

[2] Memorandum to the Joint Committee on the Draft Constitutional Renewal Bill, HL Paper 166-II, HC Paper 551-II, Evidence, pp.433-435.

[3] Joint Committee on the Draft Constitutional Renewal Bill, HL Paper 166-I, HC Paper 551-I, Report, para. 84.

[4] Article 2(4) of the Charter of the United Nations. I shall not refer further to the Charter prohibition on the threat of force, the application of which raises difficult issues.

11. The question of a possible revival of the Security Council's authorization to use force given in Security Council resolution (SCR) 678 (1990) (the "all necessary means" resolution prior to Operation Desert Storm in 1991) was more complex. In the UK's view, a breach of Iraq's obligations which undermined the basis for the cease-fire laid down by the Security Council in SCR 687 (1991) could revive the authorization to use force in SCR 678. The critical element was that it was for the Security Council itself (not for individual states) to determine whether or not the Council's authorization should be revived. As the cease-fire was proclaimed by the Council in SCR 687, it was for the Council to determine whether such breach had occurred. What was needed was a clear indication that the Council did so determine, if the revival of the authorization to use force was to provide a proper legal basis.

12. In the UK view, the authorization to use force in SCR 678 had been revived in this way on earlier occasions. For example, when Iraq refused to co-operate with the United Nations Special Commission (UNSCOM) in 1998, a series of SCRs condemned this as unacceptable. SCR 1154 stressed that any violation of Iraq's obligations to accord immediate, unconditional and unrestricted access to UNSCOM and the IAEA would have severest consequences for Iraq. In SCR 1205 the Council recalled that the effective operation of UNSCOM and the IAEA was essential for the implementation of SCR 687, and condemned Iraq's decision to cease cooperation with UNSCOM as a flagrant violation of SCR 687 and other relevant resolutions. In the UK view, SCR 1205 had the effect of reviving the authorization to use force in SCR 678; this provided the legal basis for Operation Desert Fox in December 1998.

13. Military action in 1998 (and on previous occasions) followed from specific decisions of the Security Council. By 2002 there had not been any significant decisions of the Council since 1998. The UK interpretation of SCR 1205 was in any event controversial. Many others did not think the legal basis was sufficient, as the authority to use force was not explicit. Reliance on SCR 1205 in 2002 would have been unlikely to have received any support.

14. It is important to stress (as the Attorney General did in the final paragraph of his advice of 7 March 2003), that even where the use of force has a sound legal basis, the extent of the use of force is crucial to its lawfulness. Force may only be used if and to the extent that it is necessary and proportionate to achieve the objective for which the legal basis exists, in the present case, to ensure compliance with the WMD provisions of the SCRs.

Legal position on the use of force against Iraq after UNSCR 1441

Summary

15. I considered that the use of force against Iraq in March 2003 was contrary to international law. In my opinion, that use of force had not been authorized by the Security Council, and had no other legal basis in international law.

16. I therefore did not agree with the position, stated in the Parliamentary Answer of 17 March 2003 and the paper of the same date entitled "Iraq: Legal Basis for the Use of Force", that SCRs 678, 687 and 1441, read together, amounted to such authorization. Nor did I agree with the view expressed in the advice of 7 March 2003 "that a reasonable case can be made out that resolution 1441 is capable of reviving the authorisation in 678 without a further resolution" (paragraph 28).

Detail

17. The Security Council, acting under Chapter VII of the Charter of the United Nations, may authorize the use of force. The question was whether it had done so. The legality of the use of force in March 2003 turned on the interpretation of a series of SCRs. Either that use of force had been authorized by the Council, or it had not.

18. While international law has developed rules for the interpretation of treaties (codified in the Vienna Convention on the Law of Treaties of 1969), there are no similarly authoritative rules for the interpretation of SCRs. Some guidance may be found in the Vienna Convention rules, but account needs to be taken of the differences between SCRs and treaties. Given the way SCRs emerge, and that for the most part they are intended to be political documents, one should not expect them to be drafted with the same attention to legal detail and consistency as is usual in the case of a treaty or Act of Parliament.

19. The Vienna Convention distinguishes between a general rule of interpretation and supplementary means of interpretation (including recourse to the negotiating history). This distinction is perhaps less significant in the case of SCRs than in the case of treaties, given the importance of the historical background for the interpretation of SCRs. In any event, any serious attempt to interpret an SCR needs to have regard to the available preparatory work (*travaux préparatoires*); to the circumstances of the resolution's adoption; to the Council's practice; and to subsequent developments.

20. The series of resolutions at issue in relation to the use of force against Iraq in 2003 were complex. Their interpretation was not straightforward. I agreed with

most of what was said in the Attorney General's advice of 7 March 2003. I agreed with his statement of the possible legal bases for the use of force (paragraphs 2 to 5); that the Security Council's authorization of the use of force given in SCR 678 could be 'revived' by the finding by the Security Council of a material breach of SCR 687 (paragraphs 7 to 11); that there were precedents for this dating from 1993 and 1998 (paragraph 8); and that (contrary to the US Government's view) such 'revival' could not be based on the views of individual members of the Council (paragraph 9).

21. I also agreed with much of the analysis of the material and the arguments about the effect of SCR 1441 (paragraphs 11 to 25). Where I had a different view was on whether a 'reasonable case' could be made for saying that, by adopting SCR 1441, the Security Council had already made a finding of material breach which had the effect of reviving the authorization in SCR 678 for some future use of force, without the need for a further decision by the Council. In other words, I did not consider that the Council, by adopting SCR 1441, had left to individual States the decision whether at some point in the future a material breach had occurred sufficient to revive the authorization to use force. I reached this conclusion after considering the wording of SCR 1441, its negotiating history, the circumstances of its adoption, subsequent developments in the Council, and the Council's practice[5].

22. The key provisions of SCR 1441, for present purposes, were paragraphs 4, 11, 12 and 13. In paragraph 4 the Council decided that false statements or omissions in Iraq's declarations and "failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution shall constitute a further material breach of Iraq's obligations and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below". In paragraph 11, the Council directed UNMOVIC's Executive Chairman and the IAEA Director-General "to report immediately to the Council any interference by Iraq with inspection activities, as well as any failure by Iraq to comply with its disarmament obligations, including its obligations regarding inspections under this resolution". In paragraph 12, the Council decided "to convene immediately upon receipt of a report in accordance with paragraphs 4 or 11 above, in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security". And in paragraph 13 the Council recalled, "in that context" (i.e., in the context of paragraph 12), that it had repeatedly warned Iraq "that it will face serious consequences as a result of its continued violations of its obligations".

23. My reading was that the Council had decided in paragraph 12 to convene upon a certain event (the submission of a report) for the purpose of considering certain

[5] A good deal of relevant material is described in Professor Sean Murphy's article "Assessing the Legality of Invading Iraq", 92 *The Georgetown Law Journal* 173-257 (2004).

matters (the situation and the need for full compliance with all relevant SCRs). Paragraph 4 spoke of a material breach being referred to the Council 'for assessment'. In my view, the ordinary meaning to be given to the terms of these provisions in their context was that the Council would consider the situation, and assess the nature of any breach. Paragraph 12 made no express mention of subsequent Council action. But neither did it clearly indicate that no such action was needed before the Council's authorization of the use of force revived. In my view, the natural reading of the provisions in question, in context, was that the purpose of Council consideration and assessment was for the Council to decide what measures were needed in the light of the circumstances at the time. Among such circumstances, as it turned out, was the ongoing work of UNMOVIC and the view strongly held by many that the inspectors should be given more time. A strong hint of what might come was given in paragraph 13. This reading of the text was not, in my view, contradicted by anything in the preparatory work of the resolution. If anything it was reinforced by the preparatory work. And many statements made in connection with the adoption of SCR 1441 pointed towards this view set out in the present paragraph[6].

24. One factor underlying the differing views on the effect of SCR 1441 may have been different perceptions of its negotiating history[7]. I did not think that much weight could be given to the recollections of informal discussions or to differences between successive versions of elements of the draft resolution that were exchanged among Council members. The negotiating record of an international instrument is rarely clear; it rarely points in one direction. Negotiators often convince themselves - they genuinely believe - that the outcome of a negotiation meets their objectives. But that does not mean that they are right, or that a court would agree.

The duties and responsibilities of Occupying Powers and UNSCR 1483

25. From the commencement of the occupation until the adoption of SCR 1483 on 22 May 2003, the UK and USA had the duties and responsibilities of belligerent

[6] See S/PV.4644.

[7] The Attorney General spoke with some of those directly involved in the negotiations, in the FCO, at the UK Mission to the United Nations, and with American officials in Washington (paragraphs 1 and 28 of the advice of 7 March 2003). See, for example, paragraph 28: "having regard to the information on the negotiating history which I have been given and to the arguments of the US Administration which I heard in Washington, I accept that a reasonable case can be made that resolution 1441 is capable in principle of reviving the authorisation in 678 without a further resolution."

occupants (Occupying Powers). Thereafter they also had additional authorities granted by the Security Council.

26. As Occupying Powers, the UK and USA were bound by the rules of international law on belligerent occupation, which are set out in the 1907 Hague Regulations (articles 42 to 56) and the Fourth Geneva Convention of 1949 (articles 27 to 34 and 47 to 78) (GCIV) [8].

27. The rules are complex, but the following indicates in general terms the limitations on the authority of an Occupying Power:

- Article 43 of the Hague Regulations provides that the Occupying Power "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety ['l'ordre et la vie publics'], while respecting, unless absolutely prevented, the laws in force in the country'. While some changes to the legislative and administrative structure may be permissible if they are necessary for public order and safety, more wide-reaching reforms of governmental and administrative structures are not lawful. That includes the imposition of major economic reforms.

- GCIV prohibits, subject to limited exceptions, any alteration in the status of public officials.

- GCIV requires that the penal laws of the occupied territory must remain in force except where they constitute a threat to security or an obstacle to the application of GCIV. In addition, again with limited exceptions, the courts in the occupied territory must be allowed to continue to operate.

28. There is a close relationship between SCR 1483 and the law of occupation. In their joint letter of 8 May 2003 to the President of the Security Council, the USA and UK said that they "will strictly abide by their obligations under international law". The Security Council noted this letter in SCR 1483, and recognised "the specific authorities, responsibilities, and obligations under applicable international law" of the USA and the UK "as occupying powers under unified command (the "Authority")".

29. SCR 1483 conferred 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. It clarified the scope of activity of the Occupying Powers and authorized them to undertake actions for the reform and reconstruction of Iraq

[8] See, inter alia, the Manual of the Law of Armed Conflict, published by the UK Ministry of Defence in 2004. A draft of the Manual was available within Whitehall in 2003.

going beyond what was permitted under the Hague Regulations and GCIV. It endorsed the view that the activities mentioned in the letter of 8 May 2003 might lawfully be carried out under the law of occupation. Subsequent SCRs added to these authorities. In some cases, these actions were to be carried out in coordination with the SRSG or in consultation with the interim Iraqi administration (IIA).

How the process for obtaining legal advice and decision making worked

30. Four issues may be worth considering: the relevance of the rules of international law on the use of force in circumstances such as those of March 2003; the need for timely legal advice; the strength of the legal case that should be required before something as serious as the use of force against Iraq in 2003 is undertaken; and the role of government lawyers advising on public international law.

31. It is clear that in the United Kingdom great importance attaches to compliance with the rules of international law on the use of force. Ministers frequently assure Parliament that any use of force will be in accordance with international law, and this is taken very seriously.

32. If it is to be useful and effective, legal advice needs to be timely. Within government, this usually means that lawyers should be integrated into the policy-making process, and that their views should be known throughout the process. This was the case, for example, in the period before the adoption of SCR 1441, during the conflict itself (targeting), and as regards the post-conflict phase. For example, in respect of the post-conflict phase FCO Legal Advisers regularly attended the daily FCO meetings, and kept in close touch with MOD lawyers, and with LSLO. The Attorney General's advice was sought and given on many occasions, and factored into policy as it developed.

33. The negotiation of SCR 1441 was conducted in an exceptional way, over some seven or eight weeks. Some of it took place through direct contact among Foreign Ministers; much of the debate and drafting seems to have taken place within the US Administration itself. If Ministers had needed a definitive legal view on whether the draft resolution met their political objective, the Attorney General's advice should have been sought during the negotiation and on the final draft before the resolution was adopted by the Security Council.

34. Following the adoption of SCR 1441, legal advice was given within the FCO, whenever necessary, on whether by adopting SCR 1441 the Security Council had revived the authorization to use force. In my view it had not, but it was fully understood that it was ultimately for the Attorney General, as the government's chief legal adviser, to advise on this matter.

35. The lesson I would draw is that on matters such as this it is important that Ministers seek legal advice, where necessary from the Attorney General, in a timely manner. Where the use of force is under consideration, this probably means throughout the process of policy formation.

36. Another issue is the strength of the legal case that should be required before the Government goes to war. Is a 'reasonable' legal case sufficient? A 'respectable' case? An 'arguable' case? Or should there be a higher degree of legal certainty? This is ultimately a policy question, and one that perhaps cannot be answered in the abstract.

37. The events leading to the use of force against Iraq in 2003 also raise the question of the role of government lawyers advising on public international law, in circumstances as acute as this, where the likelihood of the matter coming before an international or national court is remote. In my view, the seriousness of the matter and the absence of a court places a special responsibility on the lawyer to do his or her best to ensure that the law is upheld.

Michael Wood

15 January 2010

Postscript

As the Iraq Inquiry knows, there is a convention of neither confirming nor denying whether the Law Officers have advised on an issue. I understand that the Attorney General is content for witnesses to give written and oral evidence to the Inquiry notwithstanding the convention. Thus a deliberate exception has been made to the convention for this purpose.

1. The Inquiry has asked for a statement as to my role and involvement in advising on legal issues relating to Iraq.

2. I joined the FCO in 1974. Between 1999 and April 2003 I was a deputy legal adviser at the FCO, with a six month break between March and September 2001. In the course of my career, I have given legal advice on various issues relating to Iraq: for example, in relation to the first Gulf war, when I was in the Law Officers' Department in 1990; and, during 1998 in the FCO, in relation to self-defence in the No Fly Zones, military action to enforce Iraq's obligations and targeting decisions.

3. In 2002 and 2003, my role as a deputy legal adviser included primary responsibility for some legal issues, and shared responsibility for others such as those concerning Iraq. It is probably true to say that all major legal issues leading up to the 2003 conflict were fully discussed between the Legal Adviser Sir Michael Wood, myself and the relevant Legal Counsellor. We worked as a team.

4. Before the adoption of UN Security Council resolution 1441, the advice given by FCO legal advisers was that an invasion of Iraq would be contrary to international law in the absence of a new Security Council resolution. I shared and contributed to this view. The legal principles are well-known. In summary, the UN Charter prohibits the use of force against another State; the exceptions to this prohibition are first, action in self-defence, as referred to in Article 51 of the UN Charter, second, action authorised by UN Security Council resolutions and, as a possible third, more controversial, exception, action to avert a humanitarian catastrophe. Of these exceptions, force in self-defence may be used only against an attack, actual or imminent; only where it is necessary to use force in the absence of other means; and only where the force is proportionate to the object of averting the attack. In the circumstances of Iraq, the facts did not justify the use of force in self-defence. Existing Security Council resolutions did not authorise the use of force. There was no other legal justification. A desire to change the regime did not give a legal basis for military action.

5. After the adoption of resolution 1441, the legal advice given in the FCO, and to which I contributed, was that a second Security Council decision was necessary if military action were to be lawfully taken against Iraq; resolution 1441 was not sufficient. The reasoning has been sufficiently explained elsewhere. In summary, the resolution had introduced an enhanced

inspection regime to give Iraq a final opportunity to comply with its obligations; it stated that reports of non-compliance by Iraq would be referred to the Security Council for assessment. 'Assessment' did not mean merely an inconclusive discussion in the Council. The decision that Iraq had failed to take its final opportunity was to be one for the Council and not simply for individual governments. Advice that a second resolution was legally required was given by the FCO Legal Adviser consistently after the adoption of resolution 1441 and in the following three months.

6. An alternative view was discussed in the Attorney General's minute of 7 March 2003. The view was that resolution 1441 itself constituted the decision of the Council to revive the authorisation - given in resolution 678 in 1990 - to use force in order to restore international peace and security in the region. The Government participated in the invasion of Iraq on this basis.

7. I regarded the invasion of Iraq as illegal, and I therefore did not feel able to continue in my post. I would have been required to support and maintain the Government's position in international fora. The rules of international law on the use of force by States are at the heart of international law. Collective security, as opposed to unilateral military action, is a central purpose of the Charter of the United Nations. Acting contrary to the Charter, as I perceived the Government to be doing, would have the consequence of damaging the United Kingdom's reputation as a State committed to the rule of law in international relations and to the United Nations.

Elizabeth Wilmshurst
18 January 2010

Carne Ross: Testimony to the Chilcot Inquiry, 12 July 2010

Tribute

Before offering my testimony, I would like to pay tribute to a man who should have been here to give his account. His testimony would have been authoritative, rigorous and honest, for these were his qualities. At the UK Mission in New York, we relied considerably on David Kelly as one of the few experts able to interpret and convey, with a scientist's discipline and objectivity, the complex and uncertain picture of Iraq's WMD. I hope that this inquiry will do all it can to restore the values which David's work exemplified.

Introduction

1. I was the First Secretary responsible for the Middle East at the UK Mission to the United Nations 1997-2002. While my work covered all aspects of the Middle East as they arose at the UN, my particular responsibility was Iraq. Specifically, I was responsible for liaison with the UN weapons inspectors (UNSCOM and later UNMOVIC), for reporting on discussion of Iraq at the UN, and the UN Security Council in particular, and for managing negotiations of Security Council resolutions on Iraq, which related to sanctions and weapons inspections. As part of my responsibilities, I oversaw the 3rd or 2nd Secretary who represented the UK on the 661 Iraq sanctions committee, which I also often attended. I had occasional contact with members of the Iraqi mission to the UN: New York, like Amman, was designated by the FCO as one of the UK's very limited official contact points with the Iraqi government during those years.

2. I attach the testimony I sent to the Butler inquiry in 2004 (annex A). This still represents my overall views. In this testimony, I want to address the questions the inquiry has asked me to consider (in particular on British policy on Iraq at the UN), go into more detail on some of the issues mentioned in my Butler testimony and try to offer some lessons from my experience.

Iraq at the UN 2001-2

3. During 2001-02, the UK's position on Iraq was under considerable pressure. Our goal was to maintain international support for implementation of the resolutions (SCRs) which provided the legal basis for the UK/US policy of containment. There was unceasing pressure, mainly from Iraq's allies at the UN Security Council, for sanctions to be eased to reward Iraq for past progress in disarming itself of its WMD (as required under SCR 687) and to incentivize Iraq to cooperate once more with the weapons inspectors. There was also significant concern over the humanitarian impact of sanctions (on which, see below). There was also a broader complaint, particularly in the Arab world, that the UK/US practiced double standards in demanding the full implementation of resolutions on

Iraq, but ignoring Israel's failure to implement resolutions demanding that it leave the occupied Palestinian territories.

4. In response to this pressure, the UK sought to maintain international unity behind the resolutions with measures including the introduction of a revised sanctions resolution (the Goods Review List (GRL) approach) and a readiness to negotiate within the P5 a clarification of SCR 1284, the resolution establishing UNMOVIC which also set out, in rather tortuous fashion, the terms for sanctions suspension. We had some success. Despite opposition, above all from Russia, the Security Council passed the new sanctions arrangements in May 2002[1]. We had begun to discuss with the US the possibility of clarifying SCR 1284, and had shared with them a paper outlining post-suspension controls to limit Iraq's potential to rearm. We had also begun to discuss with the US reducing the scope and frequency of patrols in the No-Fly Zones. Certain operations outside the NFZs, for instance into central Iraq, had threatened to end regional support for containment[2] (though allied operations in NFZs in general provided for surprisingly little debate in the UN Security Council).

5. New York was in effect the front line of the UK's work to sustain international support for controls on Iraq. Although this diplomacy was difficult and tendentious, it was not our view in New York that containment was collapsing either through the ineffectiveness of sanctions or the deterioration of international support. While there were serious sanctions breaches, it was not the UK judgement that these permitted significant rearmament, which was our major concern[3]. Politically, we noted a renewed French willingness to reunite the Council to pressurize Iraq to comply with the SCRs. In New York, the French ambassador spoke with enthusiasm about a new "package" to reaffirm the Council's position that Iraq must fulfill all its disarmament obligations. It remained our view, which we explained to all at the UN, that the best method to control the WMD danger was through inspections, and Iraq's compliance with its SCR obligations[4].

6. The UK did not judge that Iraq had the means substantially to rearm, which was the key test of the effectiveness of the containment policy. It is therefore inaccurate to claim, as some earlier witnesses have done, that containment was failing and that sanctions were collapsing (and thus to claim that there was little alternative to military action to deal with the Iraqi threat). Although it required a substantial diplomatic effort, Security Council support for the resolutions had not

[1] SCR 1409 (2002)
[2] One particular so-called RO4 operation in February 2001 was controversial in that US/UK aircraft attacked air defence sites (used to coordinate, sometimes by remote-control, AAA and missile defences *inside* the NFZs) well outside the NFZs in central Iraq and indeed Baghdad.
[3] One earlier FCO witness described sanctions as "leaking all over the place" and that "people had little faith [in them]": this was not the official assessment at the time and is a judgement that is not borne out in the relevant policy documents.
[4] Among many examples, the Policy Advisory Board (PAB) at the FCO considered on 23 February 2001 that "inspectors were the best way to limit Iraq's WMD programme"

collapsed. Indeed, had there been more diplomatic effort, above all from the US, this position could have been maintained for some time longer. But as 2002 drew on, it became clear that the US had a different agenda and had waning interest in negotiating a diplomatic way forward at the UN.

UNMOVIC

7. The inquiry asked me about the role of UNMOVIC. UNMOVIC was set up under SCR 1284, which I helped negotiate from 1998-99, a year-long negotiation. It was the UK view that UNMOVIC was a robust inspection body; its mandate in SCR 1284 made clear that Iraq was required to provide its inspectors access at any time, anywhere. The UK and US had chosen Hans Blix as their preferred candidate for chairman, believing that he would be robust in dealing with Iraq but also carry more international credibility than the chairman of the UN Special Commission (UNSCOM), which preceded UNMOVIC. Indeed, it was the US and UK who engineered Blix's appointment (we did not publicly advocate for him, as to do so would have undermined his candidacy, but nonetheless we were instrumental behind the scenes in his selection[5]).

8. SCR 1284 makes clear that UNMOVIC required lengthy periods to conduct inspections inside Iraq before reaching any conclusions about the state of Iraq's disarmament of its WMD. This is because the task to "baseline" and inspect all relevant sites in Iraq was considerable. SCR 1284 is a complex resolution but these periods in total add up to a minimum 9 months[6] before UNMOVIC could reach a credible judgement that Iraq had sufficiently disarmed. During the negotiation of SCR 1284, the UK and US were adamant in insisting on a period long enough to establish credible and comprehensive knowledge of Iraq's potential WMD sites. By contrast, negotiated in the run-up to the 2003 invasion, SCR 1441 gave UNMOVIC only 60 days after starting work before it was required to "update" the Security Council[7]. This discrepancy has not been mentioned by previous witnesses, even though they were asked about the time period for inspections by UNMOVIC in 02/03. The comparison of the inspection periods in the two resolutions suggests that the purpose of SCR 1441 was different from that of SCR 1284, which was to use inspectors credibly to verify Iraq's disarmament and prevent any rearmament.

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[5] As far as I can see, no previous witness has mentioned that Blix's appointment was in fact engineered by the UK/US.

[6] SCR 1284 (1999) makes clear that UNMOVIC cannot effectively report on Iraq's progress in disarmament until it has fully established its reinforced system of ongoing monitoring and verification (ROMV): the system of monitors, both human and technical, and regular and "no-notice" inspections at the many hundreds of sites of potential WMD concern. In 2001/2, and before SCR 1441, UNMOVIC told us that such a system would take at least 6 months to establish; others such as the US estimated a longer period. This period was mis-described by earlier witnesses to the inquiry, who suggested that SCR 1284 meant that sanctions could be suspended 120 days after inspectors began work; this is inaccurate: the 120-day "test" period would begin only after ROMV had been fully established: a total of least 9 months if not more.

[7] OP5 of SCR 1441(2002)

The Alternative to War

9. In just war theory and international law, any country must exhaust all non-violent alternatives before resorting to force. It's clear in this case that the UK government did not adequately consider let alone pursue non-military alternatives to the 2003 invasion.

10. The alternative that existed requires some explanation. For all the years that Iraq was subjected to comprehensive economic sanctions following the 1991 Gulf War, the Saddam regime succeeded in sustaining itself and its core military capabilities by engaging in illegal oil smuggling via its neighbours, Jordan[8], Turkey, Syria and the Gulf (interestingly, Iran did not significantly assist these efforts). These breaches of sanctions were a cause of continual concern to the UK and US; they amounted, according to our estimates at the time, to perhaps $1-2 bn per year (post-war estimates of the smuggling, such as in the Volcker report on the oil-for-food scandal, were much higher). Such sanctions "busting" provided me and my colleagues at the UK Mission with continual work at the UN, and in particular the 661 Iraq sanctions committee, where we battled Iraq's allies, France and Russia, for sanctions breaches to be addressed.

11. On repeated occasions, I and my colleagues at the mission (backed by some but not all of the responsible officials in London) attempted to get the UK and US to act more vigorously on the breaches. We believed that determined and coordinated action on sanctions breaches, led by us and the US, would have had a substantial effect in particular to pressure Iraq to accept the weapons inspections and would have helped undermine the Iraqi regime. We proposed on several occasions the establishment of a multinational body (a UN body, if we could get the Security Council to agree it) to police sanctions enforcement. I proposed coordinated action with Iraq's neighbours to pressure them to help, including by controlling imports into Iraq. I held talks with a US Treasury expert on financial sanctions, an official who had helped trace and seize Milosevic's illegal financial assets. He assured me that, given the green light, he could quickly set up a team to target Saddam's illegal accounts. This was never done.

12. The resolutions provided already robust and unanimously-agreed legal coverage for the interception and seizure of both illegally-smuggled goods, including oil, and financial assets. We could for instance have seized the illegal bank accounts held by Saddam in Amman, Jordan[9]. Instead, this egregious breach of sanctions was ignored. Likewise, we could have intercepted Syria's illegal exports of Iraqi oil from Banias (on which, see below); no such attempt was made.

13. One episode illustrates that such efforts were not futile and that the collapse of effective sanctions was not a foregone conclusion, as some witnesses have

[8] Jordan's oil "protocol" with Iraq, allowing it to import through barter substantial quantities of oil, was de facto tolerated by the US/UK, and was not addressed in the 661 Committee.
[9] FOOTNOTE 9 REDACTED ON GROUNDS OF INTERNATIONAL RELATIONS

misleadingly suggested. In early and mid-2001, we undertook in New York sustained and detailed work in the 661 Iraq sanctions committee to end Iraq's manipulation of the official price of its oil exports, so that it could extract an illegal "surcharge" from the purchasers of Iraq's oil[10]. Iraq deliberately pressured the UN to set the price much higher than the market price, leaving a margin in which it could demand illegal cash payments from purchasers, amounting to a significant source of illegal revenue for the regime. We knew about this practice, and through detailed technical work and diplomacy, we succeeded in ending it[11]. We achieved this result with little support from ministers or senior officials in London, or from our allies. Indeed, for some time the US failed to support our initiative in New York, and were only brought on board after we deliberately leaked this failure to the *Washington Post* which wrote up the story (see Annex B). This public embarrassment had more effect than the low-level remonstrations of British officials in Washington[12]. In another example, we made considerable headway in reducing Russian objections to the Goods Review List (the "narrower and deeper sanctions" we had designed to maintain international support as well as controls upon Iraq) when, for once, before a meeting in New York the Foreign Secretary was briefed in detail on the proposed measures and was able to take his Russian opposite number (Ivanov) through the arguments, and defeat Russian objections, point by point. But such occasions were the exception, not the rule.

14. Inertia in the FCO and the inattention of key ministers combined to the effect that the UK never made any coordinated and sustained attempt to address sanctions busting. Earlier witnesses have downplayed or failed to mention the successes that we had e.g. on the GRL and oil surcharge[13]. This echoes the lack of attention the issue received at the time. The US, despite its professed concern about breaches, was never engaged at senior level to organise such a campaign. There were instead sporadic and half-hearted initiatives. Our bilateral embassies in Iraq's neighbours would always find a reason to let their hosts off the hook (the most egregious example was the embassy in Ankara). Official visitors to the neighbours always placed other issues higher on the agenda.

15. One example illustrates the point. According to media reports from the region and elsewhere, Syria had re-opened an illegal pipeline in November/December 2000 which transported Iraqi oil to the Syrian port of Banias for export. The reconstruction and then re-opening of the pipeline caused us at official level considerable concern: this was a major and egregious breach of sanctions. The Prime Minister visited Syria in October 2001. At the UK Mission, we sent a telegram beforehand urging him to press Assad on the illegal pipeline carrying

[10] We learned about the surcharge from reports in the oil and energy press; it apparently amounted to a charge to purchasers of some 25-30 cents per barrel.
[11] Through the mechanism of retroactive pricing
[12] In New York, we were surprised that our efforts to secure US support enjoyed no attention from the British ambassador in Washington, nor senior officials or ministers in London.
[13] One relevant FCO witness claimed to the inquiry that there were only "minor successes" in tackling sanctions breaches and mentions activity with Jordan and Turkey. He made no mention of the oil surcharge issue.

Iraqi oil through Syria. Despite requests for the relevant documents, I have seen no evidence that the subject was mentioned. In October 2001 the UK ambassador to the UN expressed surprise to the Prime Minister's National Security Adviser at the lack of UK/US activity on the pipeline. This episode is revealing of the failure at the highest level to address smuggling as a means of controlling or undermining the Saddam regime.

16. The subject of sanctions breaches was repeatedly raised at official-level contacts with the US, but it was never done so with the same energy and coordination as the preparation for war, or regularly at a senior level. There is no evidence of senior official level, let alone ministerial, discussion of this or any other alternatives to war in the period leading up the 2003 invasion (eg in the form of Cabinet discussion, or Cabinet Office or JIC discussion). Coordinated, determined and sustained action to prevent illegal exports and target Saddam's illegal revenues would have consumed a tiny proportion of the effort and resources of the war (and fewer lives), but could have provided a real alternative. It was clearly justified under existing Security Council resolutions. It was never properly considered, let alone attempted.

The assessment of Iraq's threat

17. It remains my view that the internal government assessment of Iraq's capabilities was intentionally and substantially exaggerated in public government documents during 2002 and 2003. Throughout my posting in New York, it was the UK and US assessment that while there were many unanswered questions about Iraq's WMD stocks and capabilities, we did not believe that these amounted to a substantial threat. At no point did we have any firm evidence, from intelligence sources or otherwise, of significant weapons holdings: most of the unanswered questions derived from discrepancies in Iraq's accounting for its past stocks and the destruction of these stocks.

18. The UK believed that the Iraqi threat had been effectively contained. Indeed, at many of the UK/US FCO/State Department bilateral discussions of Iraq policy which I attended between 1998-2002, discussion would often begin with an overall assessment of whether containment was working or not. Invariably, the conclusion, shared by both the US and UK, was positive. The last of these discussions that I attended took place in June 2002.

19. Before I took the New York post in late 1997, I was briefed by relevant departments in the FCO. At Non-Proliferation Department (NPD), which was responsible for the Iraq disarmament issue, I was told that the UK did not believe that Iraq possessed *any* substantial stocks of CW, BW or nuclear weapons or the means to deliver them. None of the intelligence I saw subsequently in the 4 ½ years that I covered the issue, where I read on most days a thick folder of

"humint" and "sigint"[14] relating to Iraq, or the Joint Intelligence Committee assessments, during this period, substantially changed this assessment.

20. In all the policy documents I reviewed in preparation for this testimony, there is no mention prior to 9/11 of any increase in the threat assessment for Iraq. Instead, these documents discuss the difficulty in maintaining support for sanctions in the absence of clear evidence of WMD violations by Iraq. Post 9/11, the prevailing FCO view is summed up in a minute from the Political Director to the Foreign Secretary on 22 March 2002 to the effect that the assessment of Iraq's WMD capability had not changed over recent years, but that the UK *reaction* to that assessment had changed[15]. This minute explains that there had been "not much" advance in Iraq's WMD programmes over recent years and that they had not been stepped up. The minute adds that there was no evidence whatsoever of any connection between Al Qaida terrorists and the Saddam Hussein regime. This judgement is repeated in many different documents during this period[16].

21. What changed however was the presentation of that evidence, notably in the WMD dossier published in September 2002. In these public documents, of which there were several, the nuanced judgements contained in the internal JIC assessments, for instance, were massaged into more robust and frightening statements about Iraq's WMD capability. For instance, in all the years of my work on Iraq, it was the UK assessment that Iraq might have a "handful" or *up to* 12 dismantled Scud missiles remaining of its originally many hundreds of imported Scud missiles. This estimate was based on a careful accounting, corroborated with UNSCOM and Iraqi records, of the numbers of missiles imported, minus those expended in warfare or destroyed by UNSCOM's inspectors after the 1991 Gulf War. In the September dossier, up to 12 Scuds became up to 20 Al-Hussain variant extended range Scud missiles, a significant increase, for which there was no corresponding basis in the intelligence data. These Scud missiles were apparently the basis for the government's claim that Iraq could launch WMD within 45 minutes, although the dossier offered no explanation for the 45 minute claim. This claim also had no basis in firm intelligence[17]. There were in fact no dismantled Scud missiles, of any variant, found in Iraq after the 2003 invasion.

22. In another illustration of this process of deliberate public exaggeration, in March 2002, a paper on Iraq's WMD was sent to the Parliamentary Labour Party (PLP) which included the claim that "if Iraq's weapons programmes remain unchecked, Iraq could develop a crude nuclear device in about five years"[18]. This was not

[14] "Humint" is intelligence derived from human sources such as defectors or agents in-country. "Sigint" is derived from the interception and decryption of Iraqi electronic signals, and was generally regarded as a more reliable source.
[15] quoted in his testimony
[16] FOOTNOTE 16 REDACTED ON GROUNDS OF INTERNATIONAL RELATIONS
[17] The 45-minute claim is fundamentally unclear but seems to relate to the time required to prepare a Scud missile for launch. I prepared a briefing document on this subject in advance of the 1991 Gulf War.
[18] Such a claim, by the way, would be true of almost any moderately-industrialized country.

and had not been the government's assessment hitherto which was instead more or less the opposite, that "if controls [ie sanctions] are lifted, then Iraq could develop a crude nuclear device in about five years". In other words, it had been the government's assessment that sanctions were effectively *preventing* Iraq from developing a nuclear capability. The head of Non-Proliferation Department sent a minute to the Foreign Secretary's Special [Political] Adviser of 13 March 2002 drawing attention to this discrepancy (the Head of NPD had not been consulted on the preparation of the PLP paper) which pointed out that the UK's public formulation ("if controls were lifted..") was based on JIC assessments. The minute was apparently ignored; the PLP paper was not corrected: indeed, it was later circulated as briefing for the Cabinet[19]. (This episode was not mentioned by earlier witnesses, as far as I have seen.) The September '02 dossier uses an even starker formulation, namely that,

> "if Iraq obtained fissile material and other essential components from foreign sources the timeline for production of a nuclear weapon would be shortened and Iraq could produce a nuclear weapon in between one and two years."

This statement is purely hypothetical, and was as true in 1991 as it was in 2002; there was no evidence at either point that Iraq was close to obtaining the necessary material. On the contrary, it remained the UK assessment in 2002 that sanctions had successfully prevented this possibility.

23. Notably, the WMD dossier and other public statements on the alleged threat said very little about the *means* of delivery of WMD, apart from dubious and exaggerated statements like that about the alleged number of Scud missiles. Yet any coherent threat assessment would include such, as no WMD can be delivered except by missile, aircraft, rocket or artillery shell (unless by terrorists and there was no evidence of Iraqi collusion with such). In fact, Iraq's conventional military capabilities, in terms of armies, air force and naval forces, were far less than they had been at the time of the 1991 Gulf War. In particular, Iraq's air force was reduced to the point of almost total ineffectiveness and presented no plausible match for allied air assets based in the region, as allied activity in the NFZs had amply demonstrated over many years. Thus, short of the alleged Scud missiles, Iraq had scant available means to deliver any WMD against its neighbours or anyone else. It is striking that this crucial element of the overall assessment was absent in the dossier and other public statements about the alleged threat.

24. This process of exaggeration was gradual, and proceeded by accretion and editing from document to document, in a way that allowed those participating to convince themselves that they were not engaged in blatant dishonesty. But this process led

[19] The PLP paper was sent by the Foreign Secretary to be shared with the Cabinet. This paper also contains such scare-mongering claims as "less than a teaspoon of anthrax can kill over a million people" without explaining the extremely difficult process for anthrax to be weaponized and delivered in an effective method.

to highly misleading statements about the UK assessment of the Iraqi threat that were, in their totality, lies.

Sanctions

25. On another note, and given the absence of any other opportunity, there is one further crucial lesson from the experience of sanctions on Iraq. Comprehensive economic sanctions on Iraq did enormous damage to the Iraqi people and economy, damage which is still evident today in Iraq's dilapidated infrastructure and weakened middle class, many of whom remain outside the country, further hindering economic recovery. UK officials and ministers were well aware of the negative effects of sanctions, but preferred to blame them on the Saddam regime's failure to implement the oil-for-food programme.

26. While the UK put in place measures to ameliorate these effects, in the form of the oil-for-food (OFF) programme, these were insufficient and were also manipulated by the Saddam regime to reinforce its control of the population (for instance, the regime used the programme to control food distribution). The effects of sanctions were one of the main reasons for the unpopularity of containment among the international community. UK efforts to narrow the scope of sanctions and target them more effectively on goods of dual-use concern began in late 2001 and were a case of "too little, too late". With targeted sanctions and aggressive measures to control illegal smuggling, arms imports and illegal financial holdings, effective containment was feasible without humanitarian damage.

27. One earlier witness characterised sanctions in 2001 as comprising measures against only dual-use goods and military exports. This is a very minimalist way of describing measures that, even after the Goods Review List revision of sanctions, controlled *all* exports from and imports into Iraq. All revenues from Iraq's legal oil sales were controlled in a UN escrow account. All Iraqi purchases, including of humanitarian goods, had to be notified and approved by the UN in order to trigger the release of funds from the escrow account. This created a vast bureaucracy, which both stifled any private business and gave enormous power to the Iraqi state apparatus in purchasing and distributing goods of all kinds.

28. Today, Israel is widely criticised for prohibiting the export of many categories of goods into Gaza, yet these measures are very similar to those which the UK was instrumental in imposing for many years upon Iraq's people. One lesson from this episode is that comprehensive sanctions should not be considered in future upon any subject country: the only likely victims will be the civilian population. As in Iraq, the regime is likely to evade their worst effects.

Lessons

29. As a former mid-level official who worked extensively on conflict, including Iraq and Afghanistan, and who was in New York at the time of the September 11th attacks[20], I am very aware of the forces at work inside government in times of crisis, and particularly in wartime. These forces are very powerful and militate against measured and objective judgement and decision-making. There is enormous pressure upon officials to go along with the choices of ministers, and the political mood of the day, whatever their own convictions. The era of "sofa government", where even more decision-making power is concentrated in the hands of a tiny few, has made these pressures worse. I have consulted retired and senior officials, who tell me that in the past there was a much stronger culture within the FCO, and government in general, of questioning ministerial choices and offering alternative views of policy. Such questioning was celebrated and encouraged; in the years that I worked on the Middle East, it was discouraged. In myriad subtle ways it was made clear that even mildly critical views were unwelcome. The culture of questioning, of debate, was little in evidence in the years and months leading up to the Iraq war. There was in effect a deep politicization of the civil service; contrary opinion was suppressed.

30. The Iraq war sheds light on a broader problem of government. It is not sufficient to censure or point fingers at particular individuals, even though there are several who should be strongly condemned for the irresponsibility, incompetence and mendacity of their actions. Nor is it sufficient to rely upon parliament or the press to hold the government to account. Both institutions largely failed to do so in the run-up to the Iraq war, and largely aped and were led by the mendacities of those in government[21]. If government is to retain the responsibility to decide and wage war, it is essential to create in government a structure, and restore a culture, that will ensure in future a place for serious consideration of alternative courses, for contrary voices, and ultimately to foster disinterested, objective and measured policy-making. It is not sufficient simply to ordain the resumption of such a culture; specific measures must be taken to institute it more robustly.

31. Measures that should be considered include that individual officials should be held personally and legally accountable for their actions in government. There is little such accountability today; instead officials are protected by anonymity, the secrecy cloaking so much of their work, and the legal immunity largely accorded to civil servants, including in conducting actions of such enormous import as sanctions or wars. If officials like me or my colleagues know that one day they might personally be held legally accountable for these actions, it should, one

[20] I negotiated on behalf of the UK the Security Council resolution (SCR 1368 (2001)) of 12 September 2001 condemning the attacks of the day before.
[21] It would take a further essay to explain why but in summary – places like Iraq and issues like WMD are now too complex for parliament or the press effectively to offer expertise that can compete with the enormous and intimidating resources of government.

hopes, instill in them a greater sense of responsibility and integrity than that which is sometimes evident in the Iraq case. It goes without saying that the same legal accountability should also be applied to the political masters who make such decisions. The UK accepted this principle in recent negotiations on the powers of the International Criminal Court whose parties, including the UK, have recently agreed that the crime of aggression should be a prosecutable offence, including for heads of state.

32. Processes such as this inquiry are rare indeed and only instituted for the most egregious cases. And even here, a process devoted only to "learning lessons" does not provide for proper legal accountability, including the possible prosecution of those who may have committed criminal offences. Moreover, there is no legal measure to prevent perjury, just as there is no cross-examination to uncover facts that might otherwise be too easily concealed[22]. It is striking that in my preparations for this testimony, I found several documents germane to the inquiry whose existence was not revealed by earlier witnesses, including those who authored them. Other documents by certain officials contradicted the testimony they have given at this inquiry and yet these witnesses were not questioned about these contradictions.

33. In parallel, the prevailing culture of secrecy in government feeds upon and permits a culture of unaccountability and, sometimes, dishonesty. Before appearing here today, I was informed by the inquiry staff that I was not in public session to refer to or reveal the contents of classified documents which I reviewed in preparing my testimony. But I saw very little in any document that could not withstand the light of day. Few would dispute the requirement to protect certain intelligence sources, such as the technical methods of "signals intelligence". But a remarkably small amount of the relevant documents in this case require such protection. Most relate to the internal policymaking processes inside government, and as such deserve to be openly examined and released to the public, in whose name and with whose consent government operates. I therefore urge that with very limited exceptions, this inquiry coincide with the full release of documents relating to the Iraq war.

34. More generally, much more needs to be done to open up government. I have reflected long and hard on my experience of policymaking on Iraq, Afghanistan[23] and other subjects on which I worked. It is not plausible that such complex places and events can be arbitrated successfully and accurately by small groups of people, often far distant, discussing policy largely in secret. Yet the whole Whitehall foreign policy machine rests on such a premise – that the world can be

[22] It is striking to compare the Saville inquiry into the "Bloody Sunday" killings, which investigated an event which cost 14 lives, with this process which refers to a war that cost tens of thousands of lives. No one would wish a repeat of an inquiry lasting 12 years and costing hundreds of millions of pounds, but the principle of legal accountability did not need to be sacrificed in the attempt to avoid repetition of these costs.

[23] I was appointed the UK's Afghanistan "expert" at the UN Security Council after September 11th, 2001, and also briefly served in the British Embassy, Kabul, after the 2002 invasion.

successfully and accurately interpreted by such groups. The case of the '03 invasion, but also other cases, including the justified but misconceived invasion of Afghanistan suggest this conclusion. What is to be done instead? One answer is to establish much broader mechanisms to involve and consult outside expertise than currently exist. There might be standing forums of consultation with academic experts, journalists, NGOs – above all those in the field who have an on-the-ground understanding of the local realities, an understanding woefully lacking in the preparation for the Iraq invasion, and indeed Afghanistan. Perhaps the public too, whose sons and daughters are sacrificed by government in the public's name, should be deliberately consulted at such moments. The Iraq war episode makes clear that there is no monopoly on wisdom.

35. But would even this be enough if similar circumstances were to arise again? We can hope that for a generation at least, as for Suez, the Iraq war will serve as a lesson on how not to conduct policy. But what about thereafter? It seems that there is something more fundamental at work here, a state of mind and of attitude which is all too evident in the actions of the officials and ministers who conducted the war, and which is also embodied in the *form* of government and policymaking we see today. That is an unstated belief in the understanding and right of government to explain the world (Iraq and its threats) and deal with them, and generally without scrutiny. The evidence of the invasion of Iraq and its aftermath, and Afghanistan too, suggests that henceforward those engaged in such policymaking should do so with a greater humility to the complexity, intrinsic uncertainty and unknowability of such endeavours, and eschew forever the hubris that states, "we know, we understand, trust us".

Carne Ross
12 July 2010

Annex A:

Submission to Butler Review

I am in the Senior Management Structure of the FCO, currently seconded to the UN in Kosovo. I was First Secretary in the UK Mission to the United Nations in New York from December 1997 until June 2002. I was responsible for Iraq policy in the mission, including policy on sanctions, weapons inspections and liaison with UNSCOM and later UNMOVIC.

During that time, I helped negotiate several UN Security Council resolutions on Iraq, including resolution 1284 which, inter alia, established UNMOVIC (an acronym I coined late one New York night during the year-long negotiation). I took part in policy debates within HMG and in particular with the US government. I attended many policy discussions on Iraq with the US State Department in Washington, New York and London.

My concerns about the policy on Iraq divide into three:

1. The Alleged Threat

I read the available UK and US intelligence on Iraq every working day for the four and a half years of my posting. This daily briefing would often comprise a thick folder of material, both humint and sigint. I also talked often and at length about Iraq's WMD to the international experts who comprised the inspectors of UNSCOM/UNMOVIC, whose views I would report to London. In addition, I was on many occasions asked to offer views in contribution to Cabinet Office assessments, including the famous WMD dossier (whose preparation began some time before my departure in June 2002).

During my posting, at no time did HMG assess that Iraq's WMD (or any other capability) posed a threat to the UK or its interests. On the contrary, it was the commonly-held view among the officials dealing with Iraq that any threat had been effectively contained. I remember on several occasions the UK team stating this view in terms during our discussions with the US (who agreed). (At the same time, we would frequently argue, when the US raised the subject, that "régime change" was inadvisable, primarily on the grounds that Iraq would collapse into chaos.)

Any assessment of threat has to include both capabilities and intent. Iraq's capabilities in WMD were moot: many of the UN's weapons inspectors (who, contrary to popular depiction, were impressive and professional) would tell me that they believed Iraq had no significant matèriel. With the exception of some unaccounted-for Scud missiles, there was no intelligence evidence of significant holdings of CW, BW or nuclear material. Aerial or satellite surveillance was unable to get under the roofs of Iraqi facilities. We therefore had to rely on inherently unreliable human sources (who, for obvious reasons, were prone to exaggerate).

Without substantial evidence of current holdings of WMD, the key concern we pursued was that Iraq had not provided any convincing or coherent *account* of its past holdings. When I was briefed in London at the end of 1997 in preparation for my posting, I was told that we did not believe that Iraq had any significant WMD. The key argument therefore to maintain sanctions was that Iraq had failed to provide convincing evidence of destruction of its past stocks.

Iraq's ability to launch a WMD or any form of attack was very limited. There were approx 12 or so unaccounted-for Scud missiles; Iraq's airforce was depleted to the point of total ineffectiveness; its army was but a pale shadow of its earlier might; there was no evidence of any connection between Iraq and any terrorist organisation that might have planned an attack using Iraqi WMD (I do not recall any occasion when the question of a terrorist connection was even raised in UK/US discussions or UK internal debates).

There was moreover no intelligence or assessment during my time in the job that Iraq had any intention to launch an attack against its neighbours or the UK or US. I had many conversations with diplomats representing Iraq's neighbours. With the exception of the Israelis, none expressed any concern that they might be attacked. Instead, their concern was that sanctions, which they and we viewed as an effective means to contain Iraq, were being delegitimised by evidence of their damaging humanitarian effect.

I quizzed my colleagues in the FCO and MOD working on Iraq on several occasions about the threat assessment in the run-up to the war. None told me that any new evidence had emerged to change our assessment; what had changed was the government's determination to present available evidence in a different light. I discussed this at some length with David Kelly in late 2002, who agreed that the Number 10 WMD dossier was overstated.

2. Legality

The legality of the war is framed by the relevant Security Council resolutions, the negotiation and drafting of which was usually led by the UK.

During the negotiation of resolution 1284 (which we drafted), which established UNMOVIC, the question was discussed among the key Security Council members in great detail how long the inspectors would need in Iraq in order to form a judgement of Iraq's capabilities.

The UK and US pushed for the longest period we could get, on the grounds that the inspectors would need an extensive period in order to visit, inspect and establish monitoring at the many hundreds of possible WMD-related sites. The French and Russians wanted the shortest duration. After long negotiation, we agreed the periods specified in 1284. These require some explanation. The resolution states that the head of UNMOVIC should report on Iraq's performance 120 days once the full system of ongoing monitoring and verification had been established (OMV, in the jargon). OMV

amounts to the "baseline" of knowledge of Iraq's capabilities and sites; we expected OMV to take up to six months to establish. In other words, inspectors would have to be on the ground for approximately ten months before offering an assessment. (Resolution 1441, though it requested Blix to "update" the Council 60 days after beginning inspections, did not alter the inspection periods established in 1284.) As is well-known, the inspectors were allowed to operate in Iraq for a much shorter period before the US and UK declared that Iraq's cooperation was insufficient.

Resolution 1441 did not alter the basic framework for inspections established by 1284. In particular, it did not amend the crucial premise of 1284 that any judgement of cooperation or non-cooperation by Iraq with the inspectors was to be made by the Council not UNMOVIC. Blix at no time stated unequivocally that Iraq was not cooperating with the inspectors. The Council reached no such judgement either.

Resolution 1441 did not authorise the use of force in case of non-cooperation with weapons inspectors. I was in New York, but not part of the mission, during the negotiation of that resolution (I was on Special Unpaid Leave from the FCO). My friends in other delegations told me that the UK sold 1441 in the Council explicitly on the grounds that it did not represent authorisation for war and that it "gave inspections a chance".

Later, after claiming that Iraq was not cooperating, the UK presented a draft resolution which offered the odd formulation that Iraq had failed to seize the opportunity of 1441. In negotiation, the UK conceded that the resolution amounted to authority to use force (there are few public records of this, but I was told by many former colleagues involved in the negotiation that this was the case). The resolution failed to attract support.

The UN charter states that only the Security Council can authorise the use of force (except in cases of self-defence). Reviewing these points, it is clear that in terms of the resolutions presented by the UK itself, the subsequent invasion was not authorised by the Security Council and was thus illegal. The clearest evidence of this is the fact that the UK sought an authorising resolution and failed to get it.

There is another subsidiary point on the legality question. During my spell at the UN, the UK and US would frequently have to defend in the Security Council attacks made by our aircraft in the No-Fly Zones (NFZs) in northern and southern Iraq. The NFZs were never authorised by the Security Council, but we would justify them on the grounds (as I recall it, this may be incorrect) that we were monitoring compliance with resolution 688 which called for the Iraqi government to respect the human rights of its people. If our aircraft bombed Iraqi targets, we were acting in self-defence (which was in fact the case as the Iraqis would try to shoot down our aircraft).

Reading the press in the months leading up to the war, I noticed that the volume and frequency of the attacks in the NFZs considerably increased, including during the period when UNMOVIC was in country inspecting sites (ie before even the UK/US declared that Iraq was not complying). I suspected at the time that these attacks were not in self-

defence but that they were part of a planned air campaign to prepare for a ground invasion. There were one or two questions in Parliament about this when the Defence Secretary claimed that the NFZ attacks were, as before, self-defence. His account was refuted at the time by quotations by US officials in the press and by later accounts, including Bob Woodward's "Plan of Attack", which confirmed that the attacks did indeed comprise a softening-up campaign, of which the UK was an active part.

3. Alternatives to war

I was responsible at the UK Mission for sanctions policy as well as weapons inspections. I had extensive contacts with those in the UN responsible for the oil-for-food programme, with NGOs active in Iraq, with experts in the oil industry and with many others who visited Iraq (I tried to visit on several occasions but was denied a visa by the Iraqi government). I read and analysed a great deal of material on Iraq's exports, both legal and illegal, sanctions and related subjects, such as the oil industry.

Much of my work and that of my close colleagues was devoted to attempting to stop countries breaching Iraqi sanctions. These breaches were many and took various forms.

The most serious was the illegal export of oil by Iraq through Turkey, Syria and Iranian waters in the Gulf. These exports were a substantial and crucial source of hard currency for the Iraqi regime; without them the regime could not have sustained itself or its key pillars, such as the Republican Guard. Estimates of the value of these exports ranged around $2bn a year.

In addition, there were different breaches, such as Iraq's illegal and secret surcharge on its legal sales of oil through the UN. Iraq would levy illegal charges on oil-for-food contracts. The regime also had substantial financial assets held in secret overseas accounts. The details of these breaches and our work to combat them are complicated.

On repeated occasions, I and my colleagues at the mission (backed by some but not all of the responsible officials in London) attempted to get the UK and US to act more vigorously on the breaches. We believed that determined and coordinated action, led by us and the US, would have had a substantial effect in particular to pressure Iraq to accept the weapons inspections and would have helped undermine the Iraqi regime.

I proposed on several occasions the establishment of a multinational body (a UN body, if we could get the Security Council to agree it) to police sanctions busting. I proposed coordinated action with Iraq's neighbours to pressure them to help, including by controlling imports into Iraq. I held talks with a US Treasury expert on financial sanctions, an official who had helped trace and seize Milosevic's illegal financial assets. He assured me that, given the green light, he could quickly set up a team to target Saddam's illegal accounts.

These proposals went nowhere. Inertia in the FCO and the inattention of key ministers combined to the effect that the UK never made any coordinated and sustained attempt to address sanctions busting. There were sporadic and half-hearted initiatives. Bilateral embassies in Iraq's neighbours would always find a reason to let their hosts off the hook (the most egregious example was the Embassy in Ankara). Official visitors to the neighbours always placed other issues higher on the agenda. The Prime Minister, for example, visited Syria in early 2002. If I remember correctly, the mission sent a telegram beforehand urging him to press Assad on the illegal pipeline carrying Iraqi oil through Syria. I have seen no evidence that the subject was mentioned. Whenever I taxed Ministers on the issue, I would find them sympathetic but uninformed.

Coordinated, determined and sustained action to prevent illegal exports and target Saddam's illegal monies would have consumed a tiny proportion of the effort and resources of the war (and fewer lives), but could have provided a real alternative. It was never attempted.

Carne Ross
Pristina, Kosovo
9 June 2004

Annex B: Oil pricing story in *Washington Post,* 21 August 2001

U.S., Ally Part Ways on Iraqi Oil British Pricing Plan's Disruption of Global Markets Feared

By Colum Lynch
Special to The Washington Post

UNITED NATIONS, Aug. 21 -- The United States declined this week to back a British proposal to tighten U.N. procedures for pricing Iraqi oil, citing concern that the proposal might disrupt global oil markets, according to U.N. diplomats and oil analysts.

Over the past year, Iraq has tried to set artificially low prices on its oil and to force buyers to make up the difference through secret payments that would circumvent U.N. sanctions, according to U.S. and European diplomats.

The British proposal seeks to stop the back-door payments by reducing Iraq's ability to sell oil below market value. It would require that Iraq and the United Nations jointly set prices every 10 days rather than every 30 days, hewing closely to world levels. It also would deprive the Iraqis of the right to request reductions whenever the market price drops.

"We are trying to reduce the gap between the market price and the prices being set [at the United Nations] for Iraqi crude," said a British official. "The excess margin allows unscrupulous buyers to make excessive profits and pay a cash surcharge to the Iraqi government."

U.S. officials are in favor of clamping down on Iraq's illicit revenue, which they suspect is used to purchase prohibited weapons and luxury goods for President Saddam Hussein's inner circle. But the United States, the largest consumer of Iraqi oil, is concerned that the British proposal could disrupt trade.

"We are certainly sympathetic to the intent of [the British proposal], but we're just not sure yet whether it's the right thing to do," a senior U.S. official said.

Under the United Nations' "oil for food" deal, Iraq is permitted to export as much oil as it wants. But the revenue -- which amounted to more than $17 billion last year -- must go into U.N. accounts and must be used only to purchase humanitarian supplies and to repair Iraq's civilian infrastructure.

Some industry analysts warned that the British proposal might not provide enough lead time for oil traders to charter tankers and identify buyers. Most major producers price their oil every month, said Larry Goldstein, president of the Petroleum Industry Research Foundation.

[After the publication of the story on 22 August, the US climbed down:]

U.S. Supports Britain in Move To Tighten Pricing of Iraqi Oil

By Colum Lynch
Special to The Washington Post

UNITED NATIONS, Aug. 24 -- The United States today threw its weight behind a British proposal to tighten procedures for pricing Iraqi oil, raising prospects for a new clash with Baghdad at the United Nations.

Iraq and Russia, its chief ally on the U.N. Security Council, oppose any effort to impose changes in a system that diplomats allege has allowed Baghdad to rake in an illegal 10- to 15-cent surcharge on every barrel of oil it sells.

"In principle, we don't like any change in the existing scheme," said Gennady Gatilov, Russia's deputy representative to the United Nations. "Oil exporters will experience difficulties in signing and fulfilling contracts."

Under the United Nations' "oil for food" program, Iraq is allowed to export as much oil as it desires. But the revenue must go into a U.N. account and be spent under U.N. supervision, primarily to purchase humanitarian supplies.

According to diplomats, Iraq has tried to set artificially low prices on its oil and to favor buyers who are willing to pay secret surcharges into offshore bank accounts, circumventing the United Nations' control over Iraqi oil revenue. U.S. and British officials say they suspect the illicit proceeds have been used to purchase weapons and luxury items for Iraq's ruling elite.

At present, Iraq and the United Nations jointly set oil prices every 30 days. But Baghdad also has been permitted to negotiate reductions in its prices whenever the world price for oil drops, ensuring that traders can earn enough of a profit to pay kickbacks.

Britain proposed last week that Iraq and the United Nations set prices every 10 days, making it more difficult for Baghdad to exploit fluctuations in the market. Britain also used its veto power on the U.N. committee that monitors Iraqi oil sales to prevent Iraq from setting new prices.

The United States initially balked at supporting its most important ally, citing concerns that the British plan would disrupt the global oil trade. But the Bush administration assured Britain today that it would back a compromise plan to set prices for 15-day periods.

The allies are expected to inform the Security Council on Monday that they will test the new policy beginning with September prices. "We have agreed to allow current August prices to be extended to the end of this month in order to avoid an immediate or short-

term disruption," said a British official. "But henceforth we will insist on prices being submitted every 15 days."

10 DOWNING STREET
LONDON SW1A 2AA

 - Via Secure White Hall Link

THE PRIME MINISTER

11 October 2001

CONFIDENTIAL AND PERSONAL FOR THE PRESIDENT

Dear George,

I've just seen the leaders of [redacted] Basically, they all support us and are strongly supportive of your statements and your leadership. All of them were enthusiastic about the way you had kept them on board. But they are under real pressure, more than I thought. Top flashpoints are: extending the war zone; and the MEPP. Here are my thoughts.

(1) Military

We are now well placed to move to the next stage of the military operation. We are reaching the limit on air strikes. We may be lucky on an air strike and hit Omar or UBL but we can't bank on it. We need boots on the ground and active, soon.

Otherwise, there is a risk that people will ask in the US/EU if we are really succeeding; the Taleban will take heart; the region will worry if it's on the winning side.

It is hard to see how we do this without removing the Taleban; and doing that will take pressure off "finding UBL". If they fall, we can clean him up later. But to take them out, we need Special Forces operations; and the Northern Alliance to make more gains.

For this we need firm bases; either in Uzbekistan; and/or in Northern Alliance occupied Afghanistan.

We need visible force coming in, plus something for them to do soon. The Lily Pad is great in the meantime; but it's still too far away to give us what we need, so I'm told. If the Joint Chiefs can provide us with a clear plan of their ideal Special Forces scenario we can then deliver politically what they want militarily.

(2) Extending War Aims

There is a real willingness in the Middle East to get Saddam out but a total opposition to mixing this up with the current operation. [redacted] all said: we know what you want; you can do it; but not whilst you are bombing Afghanistan. The uncertainty caused by Phase 2 seeming to extend to Iraq, Syria etc is really hurting them because it seems to confirm the UBL propaganda that this is West vs Arab. I have no doubt we need to deal with Saddam. But if we hit Iraq now, we would lose the Arab world, Russia, probably half the EU and my fear is the impact of all that on Pakistan. However, I am sure we can devise a strategy for Saddam deliverable at a later date. My suggestion is, in order to give ourselves space that we say: Phase 1 is the military action focused on Afghanistan because it's there that the perpetrators of 11 September hide. Phase 2 is the medium and longer term campaign against terrorism in all its forms. Of course we will discuss that and deliberate on it with allies and partners including in the Arab world. This kicks it away for the moment but leaves all options open. We just don't need it debated too freely in public until we know what exactly we want to do; and how we can do it. Incidentally, the leaders all warned about treating Syria like Iraq.

(3) MEPP

This is the huge undercurrent in this situation. It is the context in the Arab world. The trouble is it's damn difficult, though your comments on a Palestinian state and It will be very tough, but we need a big, new initiative. I wonder if we couldn't do as follows: pull out every stop to halt terrorist activity on the Palestinian side or at least have Arafat so clearly trying, that it's obvious to all; then use this break in the weather, to launch a new talks process, effectively accepting at the outset that the outcome will be 2 states living side by side.
involvement and it's your call but, for what it's worth, I have believed for 2 years now that the US just can't take the strain of this alone; and that contrary to Israeli worries, the into a reasonable deal.
After all, it is the

If we showed movement here, the Arab moderates would regain the upper hand quickly.

(4) Propaganda

The Arab world is just on a different media planet than us. And however controlled their media is viz their own governments, it comes at the Palestinian issue with a completely pre-set anti-Israel agenda; and it buys fairly heavily the West vs Islam story line (Berlusconi still reverberates). We need a dedicated, tightly knit propaganda unit for the war generally and for the Arab and Moslem world in particular: e.g. there is an

– she should be up there saying how Taleban-style regimes in the Arab world would return women to the Middle Ages. There are all sorts of propaganda hits we are taking in the Arab world which we don't need to; and gains we could make, that we're not making.

I hope this is helpful.

Lets talk soon.

Yours ever

Tony

The President of the United States of America

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TS 211/01
4 December 2001

THE WAR AGAINST TERRORISM: THE SECOND PHASE

(1) IRAQ

Iraq is a threat because it has WMD capability; is acquiring more; has shown its willingness to use it; and can export that capability. It is in breach of UN Security Council Resolutions (see Annex 1). Saddam also supports certain Palestinian terrorist groups, and uses terror tactics against Iraqi dissidents. But any link to 11 September and AQ is at best very tenuous; and at present international opinion would be reluctant, outside the US/UK, to support immediate military action though, for sure, people want to be rid of Saddam.

So we need a strategy for regime change that builds over time. I suggest:

(i) Softening up first

We draw attention to Saddam's breach of UN resolutions; we say regime change is "desirable" (though not yet setting it as a military objective); we signal willingness to support opposition groups and build a regional coalition against Saddam; we demand weapons inspectors go back in; and without specifying that we will take

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TS 711/01
4 December 2001

military action if the demand is not met, we let it be clearly seen that nothing is ruled out. But our time frame is deliberately vague.

This is presentationally difficult. We need to be very precise to avoid getting drawn into threats we are not yet ready to implement. But we would be unsettling Saddam; possibly forcing concessions out of him (see Annex 2); and giving ourselves room for manoeuvre.

Meantime we continue to enforce the No-Fly Zones on a more intensive basis.

(ii) We apply real pressure on Syria to stop the flow of Iraqi oil by closing the oil pipeline. This should be part of our wider Syria strategy. We clamp down hard on Saddam's illegal financial transactions and give Jordan help so that they are not dependent on Saddam for oil and close down his illegal bank accounts. Also the Turks would need to stop illegal oil imports.

(iii) We need to bring Russia on board, by ensuring their financial interests don't suffer adversely; that they will support a new UN resolution; and their withdrawal of support for Saddam will itself impact on him very negatively. (Putin is coming to stay at

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TS 3111/01
4 December 2001

Chequers on 20 December. I shall raise Iraq but only talk to him about the UN aspect at this stage).

(iv) We support opposition groups; but this time with far better operational security and with high quality political intelligence. We could set out an agenda for post-Saddam Iraq (see Annex 3). This must be seen as anti-Saddam but strongly pro the Iraqi people.

(v) We mount covert operations with people and groups with the ability to topple Saddam.

(vi) When the rebellion finally occurs we back it militarily. We provide air support, as well as support for Kurds in the North and Marsh Arabs in the South if they join the uprising. What everyone in Iraq and around it fears is that we will start this action but not finish it. They need to know, and we need to be clear, that if an uprising occurs we are willing to act militarily in support.

So: my strategy is to build this over time until we get to the point where military action could be taken if necessary; but meanwhile bring people towards us, undermine Saddam, without so alarming people about the immediacy of action that we frighten the horses, lose Russia and/or half

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TS 3../01
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the EU and nervous Arab states and find ourselves facing a choice between massive intervention and nothing.

(2) **PHILLIPINES**

There is useful work to be done in extending anti-money laundering provisions to counter-terrorism and promoting regional cooperation on terrorism within ASEAN. But the key policy should be to provide equipment, CT training and t to improve the capacity of the Philippine armed forces to deal with Islamic extremist groups in the south. We should be ready to join them in hitting terrorist concentrations and terrorist camps in and air operations.

(3) **SOMALIA**

A classic failed state. We need a) to interdict UBL fugitives on their way there and prevent supplies from reaching terrorist groups – that will require amongst other things the presence of coalition patrol vessels off the Somali coast b) to identify AQ cells and eliminate them through military strikes and covert operations c) in the longer term, we should look to build up economic and political stability, offering carrots to the Transitional National Government in return for their severing all links with terrorism.

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(4) **YEMEN**

The approach you took during Saleh's visit to Washington is the right one. We need to set out clear expectations for Yemeni action against terrorism. There may be scope for practical assistance on CT and defence cooperation if we are sure the Yemenis are genuinely committed to this. We should offer to mount and air operations against terrorists. Our strategy should be to work with the Yemenis if we can, but to leave them in no doubt that if they fail to take the necessary action, they run the risk of others doing it for them.

(5) **INDONESIA**

Megawati is exactly the kind of leader who should be confronting Islamic militancy. We should give her lots of political encouragement (I may visit Djakarta early next year). We should help Indonesian efforts to deal with Laskar Jihad through CT assistance and intelligence cooperation. We should also be ready, with Indonesian support/collaboration, to take military action against known terrorist training camps.

(6) **SYRIA AND IRAN**

If toppling Saddam is a prime objective, it is far easier to do it with Syria and Iran in favour or acquiescing rather than hitting all three at once. I favour giving these two a chance at a different relationship: help and

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support in building a new partnership with the West in return for closing down support for Hizbollah and Hamas and helping us over Iraq. I don't underestimate the problems of this but I think it is possible. We have an outline strategy here (see Annex 4).

Two final points:

A. THE INTERNATIONAL COALITION

I believe international support so far has been strong and also vital. The danger in any action we take is "unintended consequences". In Afghanistan, so far, there have been none. But that was in large measure due to Pakistan being with us, Russia on board, Iran passive, the

How we finish in Afghanistan is important to Phase 2. If we leave it a better country, having supplied humanitarian aid and having given new hope to the people, we will not just have won militarily but morally; and the coalition will back us to do more elsewhere. In particular we shall have given regime change a good name, which will help us in the argument over Iraq. So in my view the political and diplomatic must always be reinforcing the military.

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4 December 2001

B. **MEPP AND OTHER UNDERLYING ISSUES**

Sorry to be a bore on this. The Middle East is set for catastrophe. The issue is not whether Sharon takes tough action. He is bound to and so would any of us in this situation. The issue is whether a process of sorts can be put back on track. If it isn't, this will complicate everything in the Middle East for a wider struggle.

Secondly, we should be working now with Pakistan, Saudi Arabia but also all the other Moslem countries on a strategy for confronting Islamic fundamentalism and extremism.

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PM note 28/1/02
198/02

NOTE ON IRAQ

I will be with you, whatever. But this is the moment to assess bluntly the difficulties. The planning on this and the strategy are the toughest yet. This is not Kosovo. This is not Afghanistan. It is not even the Gulf War.

The military part of this is hazardous but I will concentrate mainly on the political context for success.

Getting rid of Saddam is the right thing to do. He is a potential threat. He could be contained. But containment, as we found with Al Qaida, is always risky. His departure would free up the region. And his regime is probably, with the possible exception of North Korea, the most brutal and inhumane in the world.

The first question is: in removing him, do you want/need a coalition? The US could do it alone, with UK support. The danger is, as ever with these things, unintended consequences. Suppose it got militarily tricky. Suppose Iraq suffered unexpected civilian casualties. Suppose the Arab street finally erupted, eg in . . Suppose Saddam felt sufficiently politically strong, if militarily weak in conventional terms, to let off WMD. Suppose that, without any coalition, the Iraqis feel ambivalent about being invaded and real Iraqis, not Saddam's special guard, decide to offer resistance. Suppose, at least, that any difficulties, without a coalition, are magnified and seized upon by a hostile international opinion. If we win quickly, everyone will be our friend. If we don't and they haven't been bound in beforehand, recriminations will start fast.

None of these things might happen. But they might, singly or in combination.

And there is one other point. We will need to commit to Iraq for the long term. Bedding down a new regime will take time. So, without support, the possibility of unintended consequences will persist through and beyond the military phase.

So, I'm keen on a coalition, not necessarily military but politically.

What Coalition?

I am a little alarmed at the report back I've had from our various officials' meetings in the US. They say everyone over on your side is pretty optimistic that we could neutralise or gain support from most of the Arabs; and that the EU, in particular even the French, but certainly the Italians, Spanish and Germans, would be with us. I have to say that's not my reading. The trouble is, everyone says: they will support action, but they add a rider and the rider is not always sufficiently heard or spoken. The Arabs may support but are far less likely to do so, if the MEPP is where it is now. When I met

– and said we would do Iraq, he said: 'fine – just do it with total force'. But when we started later to talk about the MEPP, he said he was far more optimistic about it. 'Why?', I asked. 'Because obviously, with Iraq coming up, the US will put it in a quite different place', he said. When I said, we couldn't guarantee that, he looked genuinely shocked. Then Iraq would be a very different proposition, he said.

In my opinion, neither the Germans or the French, and most probably not the Italians or Spanish either, would support us without specific UN authority. Again, they express this by saying 'yes' and then adding the rider. But the rider is real. Stoiber might be different from Schroeder, but again I doubt it. In fact, if we launched it in exactly the same state as we are now, there is a chance the French would actively oppose us and start to create real waves inside the EU.

I know the French are anxious to escape their anti-American outlook. I know Berlusconi and Aznar personally strongly support you. Stoiber will be desperate to come on board with the US. But some of them are very tied to specific positions about the UN which they will find it very hard to ditch.

And – and here is my real point – public opinion is public opinion. And opinion in the US is quite simply on a different planet from opinion here, in Europe or in the Arab world.

In Britain, right now I couldn't be sure of support from Parliament, Party, public or even some of the Cabinet. And this is Britain. In Europe generally, people just don't have the same sense of urgency post 9/11 as people in the US; they suspect – and are told by populist politicians – that it's all to do with 43 settling the score with the enemy of 41; and various other extraneous issues like steel etc have soured the atmosphere a little.

At the moment, oddly, our best ally might be Russia!

A Strategy for Achieving a Coalition

Here is what could bring opinion round.

(1) The UN.

We don't want to be mucked around by Saddam over this, and the danger is he drags us into negotiation. But we need, as with Afghanistan and the ultimatum to the Taleban, to encapsulate our casus belli in some defining way. This is certainly the simplest. We could, in October as the build-up starts, state that he must let the inspectors back in unconditionally and do so now, ie set a 7-day deadline. It might be backed by a UNSCR or not, depending on what support there was (and I'm not sure anyone, at present, would veto it if Russia was on

board). There would be no negotiation. There would be no new talks with Annan. It would be: take it or leave it.

I know there will be reluctance on this. But it would neutralise opposition around the UN issue. If he did say yes, we continue the build-up and we send teams over and the moment he obstructs, we say: he's back to his games. That's it. In any event, he probably would screw it up and not meet the deadline, and if he came forward after the deadline, we would just refuse to deal.

(2) The Evidence.

Again, I have been told the US thinks this unnecessary. But we still need to make the case. If we recapitulate all the WMD evidence; add his attempts to secure nuclear capability; and, as seems possible, add on Al Qaida link, it will be hugely persuasive over here. Plus, of course, the abhorrent nature of the regime. It could be done simultaneously with the deadline.

(3) MEPP.

My judgement is this is essential and whatever the Arabs say at one level, at another this is in the very soul of their attitudes. So it is worth a real effort to get a proper negotiation going. but at the moment there is no other option. But this negotiation won't start unless someone takes charge of the detail in the negotiation. But for the Arabs, MEPP doesn't have to be settled. It just has to start in earnest.

(4) Post Saddam

Suppose we were able to say as follows. Regime change is vital and, in the first instance, it must be one that protects Iraq's territorial integrity and provides stability; and hence might involve another key military figure. But it should lead in time to a democratic Iraq, governed by the people. This would be very

powerful. I need advice on whether it's feasible. But just swapping one dictator for another seems inconsistent with our values.

(5) **The Arab/Moslem World**

Some will fall into line. But others won't and others still – Syria and Iran to name but two – might be actively hostile or use it as a means to support terrorism in Israel. We need a dedicated effort to woo the Arab world, to offer the hardliners a very hard-headed partnership or put them on the 'axis of evil' list. But we shouldn't just leave this to chance and their own (bad) decision-making.

(6) **Afghanistan**

We need this to be going right, not wrong. It is our one act of regime change so far, so it had better be a good advertisement. My hunch is it needs renewed focus and effort.

It goes without saying that the Turks and the Kurds need to be OK. Strangely, I think they are going to be the easiest, despite the Turkish elections. They both want our help badly and will play ball, if offered enough.

I would be happy to try to put all this together, ie to dedicate myself to getting all these elements (1–6) sorted, including involving myself in the MEPP. But it needs a huge commitment in time and energy. So it's only really worth doing if we are all on the same page.

The Military Plan

Finally, obviously, we must have a workable military plan. I don't know the details yet, so this is at first blush.

The two options are running start and generated start.

The first has the advantage of surprise; the second of overwhelming force. My military tell me the risks of heavy losses on the running start make it very risky. Apparently it involves around 15-20,000 troops striking inside Iraq, with heavy air support. The idea would be to catch the regime off balance, strike hard and quickly and get it to collapse. The obvious danger is it doesn't collapse. And there is the risk of CW being used.

For that reason, a generated start seems better. It could always be translated into a more immediate option, should Saddam do something stupid. Also, the build-up of forces in such numbers will be a big signal of serious intent to the region and help to pull people towards us; and demoralise the Iraqis. This option allows us to hammer his air defences and infrastructure; to invade from the south and take the oilfields; to secure the north and protect/stabilise the Kurds. Then effectively with huge force we go on to Baghdad.

We would support in any way we can.

On timing, we could start building up after the break. A strike date could be Jan/Feb next year. But the crucial issue is not when, but how.

EXHIBIT 3

EXHIBIT 3

Professor Philippe Sands QC

Sir John Chilcot
Iraq Inquiry
35 Great Smith Street
London S1P 3BG

10 September 2010

Dear Sir John,

1. I write in response to the Inquiry's general invitation to international lawyers "to comment on the issues of law arising from the grounds on which the government relied for the legal basis for military action". My comments address two aspects: substance and process.

Substance

2. My views were originally set out in a letter to the Prime Minister dated 7 March 2003, published in *The Guardian* on that date, a copy of which is attached. No subsequent developments, or any new information that has been made public, including in the course of the Inquiry, has caused me to modify those views: there was no legal basis for military action. A detailed articulation is set out in Philippe Sands, *Lawless World* (Penguin, 2006), at Chapters 8 and 12.

3. I have been unable to find support in any academic article in an established United Kingdom legal journal for the view on which the previous British government relied. Distinguished members of the legal community in the United Kingdom have also concluded without ambiguity that the war was unlawful. This view has been set out with clarity and force by Lord Alexander of Weedon (the former Chairman of the Bar Council), in the *Justice/Tom Sargant Annual Memorial Lecture (2003)*, and Lord Bingham (the former Senior Law Lord) in his book *The Rule of Law* (Penguin, 2010, at pages 120-129). Copies are attached. Against this background, and having regard to the views of the Legal Adviser and Deputy Legal Adviser at the Foreign and Commonwealth Office, the substantive

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issues do not admit of any difficulty or doubt. Moreover, it cannot reasonably be claimed that there exists a balanced range of views amongst those with legal expertise: the overwhelming preponderance of views is entirely in one direction.

4. The Inquiry will also be aware that an independent Dutch Inquiry has recently concluded – unanimously and without ambiguity – that the war was not justified under international law. The Dutch inquiry Committee was presided by W.J.M. Davids, a distinguished former President of the Dutch Supreme Court, and four of its seven members were lawyers. The Dutch Committee was well-placed to address the substantive legal issues. I note, however, that the composition of this Inquiry includes no members with any legal background.

Process

5. The Inquiry has a significant role to play in restoring public trust in governmental decision-making, including the circumstances in which legal advice was sought, relied upon and presented. These aspects raise important legal issues of process. The legality and transparency of the advice-giving process are fundamental when substantive issues of international law are at stake, especially when, as here, the Government had indicated that it would only take military action if that action complied with international law. There is a great deal that could be written but for the present I will limit this submission to two main areas.

6. The first concerns the issue of *presentation*. The Attorney General expressed his opinion or "views" on numerous occasions, between July 2002 and March 2003. Until the end of that period his written opinions were consistent and clear: see Philippe Sands, 'A Very British Deceit', Volume LVII, Number 14, *New York Review of Books*, 30 September 2010, pages 55-56 (copy attached). A first change occurred with the advice of 7 March 2003, apparently the final occasion on which the Attorney General recorded – in writing at least – a formal legal opinion. The thirteen page 7 March 2003 document proceeded on the assumption of no further Security Council resolution, and did not conclude that the war would be lawful: it went no further than indicate that such a view could reasonably be argued. Ten days later, on 17 March 2003, the Attorney General provided a one page written answer to a Parliamentary question, in a document also placed before Cabinet. This document reflected a further change, a completing a 180 degree about turn in a short space of time and in the absence of any new factual or legal developments.

7. It is now clear that the document setting out the answer to a Parliamentary question was an advocacy piece written by committee, setting out the best possible argument for the legality of the war (and a weak one at that). It was not, and did not purport to be, an opinion or an advice (according to the Attorney General it set out his "view", which is not an established legal term of art). Nevertheless, the Prime Minister treated the document as though it was an opinion: see the resolution moved before the House of Commons on 18 March

2003, referring to the "opinion of the Attorney General" (Hansard, 18 March 2003, Column 760).

8. In this way, Parliament, the Cabinet and the public were misled. The Cabinet was not provided with a copy of the 7 March 2003 document (in apparent breach of the Ministerial Code of Conduct): members only received the one page 17 March 2003 document. The evidence before the Inquiry establishes that even at that late date the Attorney General believed the legal arguments to be finely balanced, but the one pager did not reflect that. Contemporaneous evidence before the Inquiry shows that the Attorney General was talked out of his desire to make that view known to the Cabinet (see *Note of 17 March 2003 from Simon Macdonald (FCO) about a meeting between Foreign Secretary Jack Straw and the Attorney General on 13 March 2003*). The Cabinet was entitled to know whether the Attorney's view was that the war would be lawful, or only that a reasonable case could be made. It was misleading to present the answer to the Parliamentary question as though it was an opinion, and to do so on the basis that such opinion was clear and unambiguous, without caveat or reservation. The approach taken has had the unhappy consequence of undermining public confidence in the independence and integrity of the office of Attorney General.

9. A second matter concerns the issue of *timing*. In matters as grave as the use of military force it is particularly important that legal advice be provided as early as possible. Paragraph 21 of the *Ministerial Code of Conduct (2001 version)* requires that the Attorney General be consulted "in good time before the Government is committed to critical decisions involving legal considerations". In the case of Iraq such advice could and should have been given following the adoption of resolution 1441, and that advice should have been the basis for the policy decisions and actions then adopted by the Prime Minister and the Government. This did not happen. By seeking final advice (or a "view") so late in the day, the Prime Minister placed the Attorney General in a situation in which he would be – or would be seen to be – subject to extraneous political pressures. This too has damaged perceptions as to the independence of the office of Attorney-General. This is especially problematic in circumstances where no persuasive reason has been offered for the Attorney's abrupt and complete change of position. Recently declassified documents setting out the Attorney's earlier written expressions only serve to further undermine the credibility of the reasons offered.

10. The issue of timing is also relevant to the relationship between legal advice, on the one hand, and policy and decision, on the other. It is self-evident that government policy and related actions should be fixed around the existing law, and not the other way round. Yet it seems that in this case the law (or legal advice) was fixed around the policy as determined by the Prime Minister without taking account of legal advice. This is illustrated, for example, by the events of 30/31 January 2003, which are of crucial significance. On 30 January 2003 the Attorney General advised the Prime Minister that resolution 1441 did not justify the use of force, and that a further determination by the Security Council was

necessary. Sir David Manning described this as "Clear advice from [the] Attorney on the need for further Resolution". The very next day, on 31 January 2003, the Prime Minister met with President Bush and was told by him that military action would begin in March with or without a further resolution. Sir David Manning, who was present, recorded the Prime Minister's reaction (in a five page memorandum dated 31 January 2003, still classified). The memorandum records the Prime Minister as telling the President that he was "solidly" with him, and makes clear that although the Prime Minister thought a further Security Council determination was desirable it was not necessary. The Prime Minister's unequivocal support for the view taken by the President was not informed, it seems, by the clear legal advice he had been given.

11. By addressing these matters of process – and in particular by making recommendations to promote the independence of the office of Attorney General and the importance of timeliness and presentational accuracy in relation to legal advice - the Inquiry can make a significant contribution to the restoration of public trust in governmental decision-making. This would also emphasise the importance of respect for the rule of law, on which the United Kingdom has a useful role to play at a time of considerable challenges at the international level.

12. I would be pleased to provide such further assistance as might assist the Inquiry, on these or related matters.

Yours sincerely

guardian.co.uk

Letters

War would be illegal

The Guardian, Friday 7 March 2003 10.31 GMT

We are teachers of international law. On the basis of the information publicly available, there is no justification under international law for the use of military force against Iraq. The UN charter outlaws the use of force with only two exceptions: individual or collective self-defence in response to an armed attack and action authorised by the security council as a collective response to a threat to the peace, breach of the peace or act of aggression. There are currently no grounds for a claim to use such force in self-defence. The doctrine of pre-emptive self-defence against an attack that might arise at some hypothetical future time has no basis in international law. Neither security council resolution 1441 nor any prior resolution authorises the proposed use of force in the present circumstances.

Before military action can lawfully be undertaken against Iraq, the security council must have indicated its clearly expressed assent. It has not yet done so. A vetoed resolution could provide no such assent. The prime minister's assertion that in certain circumstances a veto becomes "unreasonable" and may be disregarded has no basis in international law. The UK has used its security council veto on 32 occasions since 1945. Any attempt to disregard these votes on the ground that they were "unreasonable" would have been deplored as an unacceptable infringement of the UK's right to exercise a veto under UN charter article 27.

A decision to undertake military action in Iraq without proper security council authorisation will seriously undermine the international rule of law. Of course, even with that authorisation, serious questions would remain. A lawful war is not necessarily a just, prudent or humanitarian war.

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The Rule of Law in the International Legal Order

(8) The rule of law requires compliance by the state with its obligations in international law as in national law

I used to be much attracted by the description of public international law as 'The Law of Nations'. It seemed to reflect the lustre of Gentili and Grotius, to invest the subject with a grandeur and dignity separating it from the mundane concerns of everyday life, to conjure up a vision of proud and equal sovereigns, declining to bow the knee to one another but condescending to parley through the medium of their immune envoys. I now think, for very much the same reasons and others, that the expression, if not actually pernicious, is better avoided. For although international law comprises a distinct and recognizable body of law with its own rules and institutions, it is a body of law complementary to the national laws of individual states, and in no way antagonistic to them; it is not a thing apart; it rests on similar principles and pursues similar ends; and observance of the rule of law is quite as important on the international plane as on the national, perhaps even more so. Consistently with this, the current Ministerial Code, binding on British ministers, requires them as an overarching duty to 'comply with the law including international law and treaty obligations'.[1]

In his report of 23 August 2004 to the Security Council, the Secretary-General of the United Nations spoke of the rule of law as a concept at the very heart of the organization's mission. He continued:

> It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[2]

Nothing in this formulation points towards a concept different from that familiar in the domestic sphere. Nor does the formulation of Professor William Bishop, who, having posed the question 'What do we mean by "international Rule of Law"?' proceeded to answer the question:

> Without precise definition, I believe we could agree that the concept includes reliance on law as opposed to arbitrary power in international relations; the substitution of settlement by law for settlement by force; and the realization that law can and should be used as an instrumentality for the cooperative international furtherance of social aims, in such fashion as to preserve and promote the values of freedom and human dignity for individuals.[3]

He quoted a former president of the American Bar Association:

> The rule of law within nations ... connotes the existence of the hundreds of legal rules, the legal procedures, courts, and other institutions which in sum total add up to order and stability, equality, liberty, and individual freedom ... The rule of law among nations means the regulation of mutual intercourse of nations, and international contacts and relations of individuals, by legal concepts, standards, institutions and procedures.[4]

This would suggest that the rule of law in the international order is, to a considerable extent at least, the domestic rule of law writ large. Such an impression is fortified by two further sources. According to Professor Chesterman, '"the international rule of law" may be understood as the application of rule of law principles to relations between States and other subjects of international law'.[5] In their Millennium Declaration the member states of the United Nations resolved to 'strengthen respect for the rule of law in international as in national

affairs and, in particular, to ensure compliance by Member States with the decisions of the International Court of Justice, in compliance with the Charter of the United Nations, in cases to which they are parties'.[6]

The analogy, even if inexact, with the domestic situation makes plain, I suggest, why we should favour strict compliance with the law. However much any of us as individuals might relish the opportunity to live our lives free of all legal constraints – whether to pay taxes, observe the Highway Code, obtain planning permission, discharge our debts or refrain from assaulting our next-door neighbour – we know quite well that acceptance of these constraints is the necessary price to be paid for their observance by others and that a society in which no one was subject to such constraints would not be a very congenial one. Then there might indeed be no such thing as society. The same is true in the international sphere. However attractive it might be for a single state to be free of the legal constraints that bind all other states, those states are unlikely to tolerate such a situation for very long and in the meantime the solo state would lose the benefits and protections that international agreement can confer. The rule of the jungle is no more tolerable in a big jungle.

The point is not infrequently made that there is no international legislature, which is, of course, strictly speaking true, and that international law, as a result, lacks the legitimacy which endorsement by a democratic legislature would give. This does not impress me as a very powerful argument. The means by which an obligation becomes binding on a state in international law seem to be quite as worthy of respect as a measure approved, perhaps in haste and without adequate inquiry, perhaps on a narrowly divided vote, by a national legislature. This is true of treaties to which, by signature and ratification, the state has formally and solemnly committed itself. It is true of 'international custom, as evidence of a general practice accepted as law', since the threshold condition – very widespread observance, as a matter of legal obligation – is not easily satisfied. It is true of 'general principles of law recognized by civilized nations',[7] since such principles carry strong prescriptive authority. The failure of a national legislature to annul a treaty, or reject a rule of customary international law, or disown a general principle of law recognized by civilized nations, may properly be relied on as evidence at least of acquiescence.

In his illuminating recent book, *International Law*, Professor Vaughan Lowe QC poses the question: 'Why do people comply with international law?'[8] I pause to draw attention to the premise of his question, which is that by and large people, including of course states, do comply with international law. This is a very important premise, since it is easy, not least for lawyers, to become mesmerized by breaches of the law and overlook the overwhelming mass of transactions which proceed smoothly, routinely and lawfully. In the domestic sphere, goods are bought and sold, land is conveyed, testamentary bequests take effect and people walk unmolested in the streets because the law is clear and departure from it is the exception, not the rule. So it is in the international sphere also, and international law is not, as sometimes supposed, a code more honoured in the breach than in the observance. Indeed, Professor Lowe observes that this 'view, particularly widespread among those whose vision is unsullied by any knowledge or experience of the matter, is hopelessly wrong'.[9] In answering his own question, the Professor relies on the fact that international law is not imposed on states by an external legislature,[10] and suggests that a powerful reason why states do comply, and always have complied, with international law is that they make the rules to suit themselves.[11] They are the rules of a members', not a proprietor's, club. He suggests other reasons also, among them the tendency to err on the side of caution, habit, and the similarity of outlook among many of those who govern the nations and among the high priesthood of international lawyers who advise the chancelleries of the world.[12]

Most potent of all reasons for compliance by states with international law is the sheer necessity of their doing so. The point was well made by Douglas Hurd, in a passage in a 1997 book quoted by Professor Lowe at the outset of his own book:

> [N]ation states are ... incompetent. Not one of them, not even the United States as the single remaining super-power, can adequately provide for the needs that its citizens now articulate. The extent of that incompetence has become sharply clearer during this century. The inadequacy of national governments to provide security, prosperity or a decent environment has brought into being a huge array of international rules, conferences and institutions; the only answer to the puzzle of the immortal but incompetent nation state is

effective co-operation between those states for all the purposes that lie beyond the reach of any one of them.[13]

The earliest rules of international law can, I think, be attributed to the self-interest of states, the need to do as one would be done by (I have in mind rules such as those governing the duty to comply with treaty obligations, the equality and immunity of sovereigns, or the immunity of diplomatic representatives) and recognition that there are some mischiefs which can only be effectively addressed if addressed by more states than one (such as piracy). But the passage of time has highlighted the number of situations in which a problem cannot be effectively regulated on a national basis. The international regulation of telecommunications, dating back to 1865, and mail services, dating back to 1874, are two examples. The international carriage of goods by sea provides another: shipowners, charterers, shippers and consignees must, to the greatest extent possible, enjoy the same rights and be subject to the same obligations at the port of loading, the port of discharge and any intermediate port of call, not rights and obligations peculiar to the national law of the port in question. Hence the Hague Rules of 1924, as amended by the Brussels Protocol of 1968. Hence too the Warsaw Convention 1929 on carriage by air, amended at The Hague in 1955 and further amended at Montreal in 1999. Hence also the CMR Convention on the Contract for International Carriage of Goods by Road made at Geneva in 1956 and now, no doubt, applying to the juggernauts from eastern Europe which familiarly thunder up and down the motorways of western Europe.

These are far from unimportant examples. They give effect to Lord Mansfield's insight (quoted in Chapter 3) that if commerce is to prosper investors and businessmen must know where they stand, not only in the UK but abroad. Important as they are, however, such examples scarcely scratch the surface of the current need for international co-operation in tackling problems which are national, in the sense that they afflict single states, but also international, in the sense that they afflict more states than one and can only be tackled jointly. I can make no more than cursory reference to some of these.

It is a matter of history that at the Bretton Woods conference, held in 1944 as the Second World War was approaching its end, the Great

Powers sought to lay the foundations of international economic stability in the aftermath of war, a movement which led to establishment of the International Monetary Fund and the World Bank and, less directly, to the General Agreement on Tariffs and Trade. Here were serious, effective and strictly controlled international schemes to promote development, relieve poverty and raise living standards, reinforced by establishment of the International Centre for the Settlement of Investment Disputes and the Multilateral Investment Guarantee Agency. Regional international groups such as the European Union and the Caribbean Commercial Community have many of the same objects. It is hard to suppose that the traumatic market experience which followed the collapse of the American sub-prime mortgage market in 2007–2009 will not strengthen the hands of those who wish to stiffen such international controls as now exist of the conduct and lending practices of international institutions.

The propensity of criminals who have committed a crime in one jurisdiction to fly to another where they hope to escape apprehension is in no way novel. Nor is the making of bilateral treaties for the extradition of such criminals (usually, with some unfortunate exceptions, on a reciprocal basis). But the need to apprehend and try serious criminals has been greatly strengthened by a number of causes: among them are the increased ease, with modern methods of business and means of communication, of committing a crime in one state of which the effects are felt in another; the utter abhorrence now felt for those who commit the most serious of crimes such as genocide, torture and war crimes; and the international activity of that special brand of criminals whom we stigmatize as terrorists, whose acts of violence are not constrained by national boundaries. These cross-border problems call for cross-border solutions, which can only be provided by a coherent body of enforceable international rules. So it is not surprising, for example, to find the member states of the European Union devising a streamlined means (the European arrest warrant) of procuring the surrender of criminals by and to each other, with much less formality and much less scope for delay than was formerly the norm, a system described as providing for the free movement of judgments.[14] It is not surprising that agreement is reached to extend the jurisdiction of national courts to try the most serious offences, such as genocide,

torture and war crimes, wherever the crimes were committed. It is not surprising to find the United Nations establishing an International Criminal Court to try the most serious crimes which will not be tried elsewhere, and ad hoc tribunals to try serious crimes committed in the former Yugoslavia and in Rwanda. It is not surprising to find the United Nations urgently calling on member states to take measures to combat the scourge of terrorism.

If international co-operation is the key to successful action against cross-border criminal activity, it is also essential to secure effective protection of the environment. That is so whether one considers the conservation of a scarce natural resource such as fish, or the activity of one state which causes pollution in another or, pre-eminently, the emission of carbon into the atmosphere. In areas such as these the interests of different states are, in one sense, inherently antithetical. All states want to maintain prosperous fishing fleets, free to catch what they can. All wish to encourage profitable activity without restrictive environmental controls. All wish to maintain, and preferably enhance, their prosperity and the living standards of their people. But of course they know that if fish stocks are depleted beyond a certain point, all lose; freedom to pollute may mean liability to be polluted; and each state knows (or ought to know) that other states will not take the stringent steps necessary to control climate change if it does not. None, I think, can doubt that if effective measures are not taken, on an international basis, to combat climate change, new meaning will be given to Keynes's aphorism that in the long run we are all dead.

Even a cursory and incomplete sketch such as this cannot ignore the international protection of human rights. Such international protection is significant, I suggest, for at least five reasons. First, it is founded on values which, if not universally shared, command very wide acceptance throughout most of the world. No other field of law, perhaps, rests so directly on a moral foundation, the belief that every human being, simply by virtue of his or her existence, is entitled to certain very basic, and in some instances unqualified, rights and freedoms.

Secondly, such international protection is relatively new, essentially a post-Second World War phenomenon inspired by the Universal Declaration on Human Rights of 1948 and followed by the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights of 1966, a string of later Conventions such as those on the Elimination of All Forms of Racial Discrimination (1966), the Elimination of All Forms of Discrimination against Women (1979) and that on the Rights of the Child (1989), quite apart from regional instruments such as the European and American Conventions and the African and Arab Charters. Such protection as existed before 1945 was largely extended on a national basis.

Thirdly, the closeness of the relationship between the international protection of human rights and the rule of law has been increasingly recognized. Not until 1996 did the Security Council make express reference to the rule of law in the operative paragraph of a resolution;[15] but it has done so very frequently since. By contrast, the European Court of Human Rights first referred to the rule of law in 1975,[16] and has done so with great consistency since. In 2007 twenty-eight judgments of the Court referred to the rule of law, in January and February 2008 alone no fewer than ten.[17] In a judgment of 22 November 2007, the Court declared that 'the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention'.[18] After a slow start, the European Court of Justice referred in an obiter dictum in 1969 to 'the fundamental human rights enshrined in the general principles of Community law and protected by the Court'.[19] Very soon the European Convention acquired a special and central role as a source for identifying fundamental rights,[20] and a judge of the European Court of Justice (Antonio Tizzano) has written of 'the defining characteristics of a Community that is first of all a community of principles and values at the heart of which are fundamental rights, constitutionalism, democracy and the rule of law'.[21]

Fourthly, the international protection of human rights is important to the rule of law internationally because of the extent to which national courts are drawn into the process of determining questions of international law. And, lastly, it is important because this is a field in which individual claimants feature very prominently, giving the lie to the old belief that the purview of international law is confined to the regulation of inter-state relations.

The notion that there is a great gulf fixed between national and international law is contradicted both by the osmotic absorption of customary international law into national law, as strikingly illustrated by the

Court of Appeal's decision in *Trendtex Trading Corporation v Central Bank of Nigeria*,[22] upheld by the House of Lords in *I Congreso del Partido*[23] (General Pinochet's first appearance on the English forensic scene), but also and even more prominently by the involvement of the national courts, here and elsewhere, in deciding questions of international law. In his very interesting Michael Kirby Lecture in International Law delivered in Canberra in June 2008,[24] Professor James Crawford SC reviewed and compared the activity of the House of Lords and the High Court of Australia in this field over the period 1996–2008, almost the whole span of Justice Kirby's membership of the High Court. His survey showed that over that period the House of Lords had given judgment on questions of international law in forty-nine cases. The breakdown, on his analysis, of the aspects involved was as follows:

- Relation between treaty law and national law 7
- Relation between customary international law and national law 1
- Treaty interpretation 5
- State immunity 4
- Refugee Convention obligations 8
- Other international human rights 12
- Extradition 6
- Extra-territorial jurisdiction 3
- Miscellaneous 3

His last (miscellaneous) heading embraced compensation of the armed forces for injuries sustained abroad, challenge to an arbitral award and inconsistency between decisions of the European Court of Human Rights and domestic case law. The total would have been significantly higher had decisions pertaining to European Community law been included.

For purposes of his comparison, Professor Crawford reviewed the response of the two courts to four problems which both courts addressed. The upshot of the comparison is not important for present purposes, but the problems addressed are, I think, of interest as showing the range of international law problems arising for decision in national courts. One turned on the meaning of 'a particular social group' as a ground of persecution under Article 1A(2) of the 1951 Refugee Convention. On this point the House made what in my opinion (I was not a party to it) was a bold but correct decision in *R v Immigration Appeal Tribunal, ex p. Shah*,[25] followed more recently in *Fornah v Secretary of State for the Home Department*.[26] The first of these cases related to the treatment of married women suspected of adultery in Pakistan, the second to female genital mutilation in Sierra Leone. Those affected were held to be members of a 'particular social group'. A second question discussed by Professor Crawford, also arising under the Refugee Convention, was the applicability of the Convention where the persecution complained of is not by agents of the state. On that issue of interpretation of the Convention the House again ruled.[27] A third issue addressed by Professor Crawford was indefinite executive detention, on which the British courts made decisions relating both to derogation from the European Convention under Article 15 and compatibility with Article 5 ('the *Belmarsh* case')[28] and the justification under Security Council Resolution 1546 and article 103 of the United Nations Charter for detaining an Iraqi/UK national in Iraq (*Al-Jedda*).[29] The fourth of the Professor's examples examined the question, canvassed in both the High Court and the House of Lords, of whether unincorporated treaties could give rise to legitimate expectations of a kind which could constrain official action, an issue on which an initial divergence of view between the two jurisdictions appears to have narrowed.[30] The cases chosen by Professor Crawford for purposes of comparison were, of course, a very small sample. The breadth of the field is made clear in Shaheed Fatima's interesting recent book, *Using International Law in Domestic Courts*,[31] in which the author lists the main practice areas where issues of international law may arise in national courts: they are aviation law, commercial and intellectual property law, criminal law, employment and industrial relations law, environmental law, European treaties, family and child law, human rights law, immigration and asylum law, immunities and privileges, international organizations, jurisdiction, law of the sea, treaties and, finally, warfare and weapons law. In recent years the British courts have ruled on questions arising in most of these areas. The interrelationship of national law and international law, substantively and procedurally, is such that the rule of law cannot plausibly be regarded as applicable on one plane but not on the other.

War

The last of Shaheed Fatima's headings points to what many, encouraged by Grotius, would reasonably regard as the most fundamental preoccupation of international law: the resort to war, the conduct of war and the rights and duties of an occupying power after a war is over (or, in the legal vernacular, the ius ad bellum, the ius in bello and the ius post bellum). In these areas above all, scrupulous observance of the rule of law may be seen to serve the common interest of mankind.

As Professor Sir Michael Howard has observed, 'war, armed conflict between organized political groups, has been the universal norm in human history'.[32] He quotes Sir Henry Maine, who in 1888 wrote that 'War appears to be as old as mankind, but peace is a modern invention.' Sir Henry spoke too soon. The Hague Conferences of 1899 and 1907, while seeking to humanize the conduct of war, recognized the use of force as an available option. The Covenant of the League of Nations discouraged resort to force, but did not prohibit it. Not until the Kellogg–Briand Pact of 1928 (ratified by Germany, the United States, Belgium, France, Britain and its overseas Dominions, Italy, Japan, Poland, Czechoslovakia and Ireland) was there any renunciation of warfare as an option open to states as an instrument of national policy. But the making of the pact did not, over the coming decades, deter Japan from invading Manchuria, Italy from invading Abyssinia, Russia from invading Finland, Germany from invading most of Europe or Japan from invading large swaths of south-east Asia. Clearly it was necessary for the states of the world to make a further attempt to outlaw a practice whose evil results had been so amply demonstrated.

The Charter of the United Nations, adopted in 1945, to which 192 independent states have acceded, did just that. Having enjoined member states to settle their international disputes by peaceful means, it required them in Article 2(4) to 'refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'. Primary responsibility for taking prompt and effective action for the maintenance of international peace and security was conferred on the Security Council,

which was authorized to act on behalf of member states.[33] Chapter VII of the Charter, covering threats to and breaches of the peace, provides in Article 39 that 'The Security Council shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.' Article 41 is directed to measures decided on by the Security Council which do not involve the use of armed force. Article 42 is directed to military measures and provides: 'Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security . . .'. By Article 51 the right of a state to defend itself was recognized: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security . . .'. This provision has been interpreted in a way very similar to the right of personal self-defence in domestic law: there must be an armed attack on the state or a threat of imminent attack; the use of force must be necessary and other means of meeting or averting the attack unavailable; the response must be proportionate and strictly limited to defence against the attack or threatened attack. There is controversy whether force may exceptionally be used to avert an overwhelming humanitarian catastrophe, but otherwise the law under the Charter is clear: save in self-defence, force may be used if authorized by the Security Council but not otherwise. Unilateral resort to war is replaced by collective decision-making in the Security Council on behalf of all member states.

Despite this apparently clear and unambiguous regime, an American academic author writing in 2005 recorded that in the past twenty-five years the United States had been involved in some forty military actions, including wars in Iraq, Afghanistan and Yugoslavia; regime-changing invasions in Grenada, Panama and Haiti; military assistance to rebel groups in Angola, El Salvador and Nicaragua; and missile attacks in Lebanon, Libya, Yemen and Sudan.[34] Of these, by far the most contentious was the US-led invasion of Iraq in 2003.

It is not at all clear to me what, if any, legal justification of its action the US Government relied on. Prominent figures in the administration made clear their ambition to remove Saddam Hussein and replace his governmental regime,[35] and British officials gave assurances of the UK's support for regime change.[36] But the British Attorney General, Lord Goldsmith QC, was consistent in his advice that while regime change might be a result of disarming Saddam Hussein, it could not in itself be a lawful objective of military action.[37]

Sir Michael Wood, formerly the senior Legal Adviser to the Foreign and Commonwealth Office but now speaking in a purely personal capacity, has said that the British intervention in Iraq raised no great issue of principle: 'The legality of the use of force in March 2003 turned solely on whether or not it had been authorized by the Council. No one disputes that the Council can authorize the use of force. The question was simply whether it had done so. That turned on the interpretation of a series of Security Council resolutions.'[38] This was the approach taken by the Attorney General in his full written advice of 7 March 2003 to the Prime Minister (not made public at the time) and in his more summary statement published on 17 March 2003, a few days before fighting began.

In the earlier opinion the Attorney General addressed in some detail the interrelationship between three Security Council resolutions, respectively numbered 678, 687 and 1441. Resolution 678 was passed in 1991; it built on earlier resolutions calling for the withdrawal of Iraq from Kuwait following its invasion of that country and authorized the use of force to eject Iraq from Kuwait and restore peace and security in the area. This was the authorization of Operation Desert Storm, which drove the Iraqis out of Kuwait. Resolution 687 (1991) brought military operations to an end, imposing conditions on Iraq with regard to weapons of mass destruction and inspection. It suspended but did not revoke resolution 678. Resolution 1441 was adopted unanimously in November 2002. It recorded that Iraq had been and remained in material breach of its obligations under relevant resolutions, including 687. It offered Iraq a final opportunity to comply with its disarmament obligations. It established a stricter inspection regime and provided that further breaches would be reported to the

Security Council for it 'to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security'. In his earlier opinion the Attorney General considered that resolution 1441 could in principle revive the authority to use force, but only if the Security Council determined that there was a violation of the conditions of the ceasefire sufficiently serious to destroy the basis of it. The Attorney General reviewed the competing arguments: on the one hand, that there was authority to use force if the Council discussed the matter, even if it did not reach a conclusion; on the other, that nothing short of a further Council decision would provide a legitimate basis for using force. He saw force in both arguments, but concluded that resolution 1441 left the position unclear and that the safest legal course would be to secure the adoption of a further resolution to authorize the use of force. A reasonable case could be made that resolution 1441 was capable in principle of reviving the authorization in resolution 678, but the argument could only be sustainable if there were 'strong factual grounds' for concluding that Iraq had failed to take the final opportunity. There would need to be 'hard evidence'.

In his summary statement of 17 March the Attorney General stated that a material breach of resolution 687 revived the authority to use force under resolution 678; that in resolution 1441 the Security Council had determined that Iraq had been and was in material breach of resolution 687; that resolution 1441 had given Iraq a final opportunity to comply with its disarmament obligations and had warned it of serious consequences if it did not comply; that the Council had also decided in resolution 1441 that any failure to co-operate in implementing resolution 1441 would be a further material breach; that it was 'plain' that Iraq had failed to comply and therefore was at the time of resolution 1441 and continued to be in material breach; and that accordingly the authority to use force under resolution 678 had revived and continued to that date. He ended: 'Resolution 1441 would in terms have provided that a further decision of the Security Council to sanction force was required if that had been intended. Thus, all that Resolution 1441 requires is reporting to and discussion by the Security Council of Iraq's failures, but not an express further decision to authorise force.'

This statement was, I think, flawed in two fundamental respects. First, it was not plain that Iraq had failed to comply in a manner justifying resort to force and there were no strong factual grounds or hard evidence to show that it had: Hans Blix and his team of weapons inspectors had found no weapons of mass destruction, were making progress and expected to complete their task in a matter of months. Secondly, it cannot be accepted that a determination whether Iraq had failed to avail itself of its final opportunity was intended to be taken otherwise than collectively by the Security Council. The revival argument itself has been ill-received. Lord Alexander of Weedon QC in his brilliant Tom Sargant memorial annual lecture for JUSTICE of 14 October 2003 (without access to the Attorney General's earlier advice) described it as 'unconvincing'.[39] Professor Sands QC has called it 'a bad argument'.[40] Professor Lowe has described the argument as 'fatuous': 'The whole point of the UN system is that when the Security Council is seised of a problem it is the Council, and not individual Member States, that has the right to control matters. If the Security Council had intended that the United States, the United Kingdom and others should invade Iraq in 2003 with its blessing and its mandate, it would have said so. It did not.'[41]

If I am right that the invasion of Iraq by the US, the UK and some other states was unauthorized by the Security Council there was, of course, a serious violation of international law and of the rule of law. For the effect of acting unilaterally was to undermine the foundation on which the post-1945 consensus had been constructed: the prohibition of force (save in self-defence, or, perhaps, to avert an impending humanitarian catastrophe) unless formally authorized by the nations of the world empowered to make collective decisions in the Security Council under Chapter VII of the UN Charter. The moment that a state treats the rules of international law as binding on others but not on itself, the compact on which the law rests is broken. 'It is', as has been said, 'the difference between the role of world policeman and world vigilante.'[42]

I should make it plain that Mr Jack Straw, Foreign Secretary in March 2003, and Lord Goldsmith, Attorney General at the time, strongly challenge the conclusions I have expressed,[43] and others may also do so.

Lord Goldsmith has emphasized that he believed the advice which he gave at the time to be correct – which I have not challenged – and remains of that view. On the issue of legality he has stressed three points in particular. First, the use of force in 2003 was (he has said) authorized by the United Nations because of the original authorization, which remained in force. He has pointed out that the revival argument had been relied on before, had been consistently supported by British Law Officers and had been endorsed by the Secretary-General of the UN in 1993 and by the then Legal Advisor to the UN. Resolution 678 was not tied to expelling Iraq from Kuwait.

His second point is that the Security Council did set the conditions for the permission to use force to revive. Resolution 1441 made a finding of material breach and gave Iraq a final opportunity to comply. This did not require the Security Council to decide that there had been a further material breach. The negotiating history made this clear.

His third point is that the UK was justified in concluding that the final opportunity had not been taken. He had advised the Prime Minister that he had to be sure. Resolution 1441 was not about weapons of mass destruction. Under resolution 1441 Iraq had to co-operate fully and the British government judged that it had not done so.

Mr Straw has agreed with what Lord Goldsmith has said. The negotiating history and wording of resolution 1441 show, he has said, that it was not the intention of the Security Council, nor was it so expressed, that a decision on material breach had to be decided by the Security Council. This might be surprising, he comments, but it is true.

The question, then, is one of authority. This suggests three questions calling for an answer. First, who was authorized? Resolution 678 authorized 'the Member States cooperating with the Government of Kuwait'. That expression had a very clear meaning in 1991. But it could scarcely be read as a reference to a shrunken core of two of the former coalition partners, shorn of most of their former partners and against the strong vocal opposition of several of them. The multilateral application of resolution 678 was an important feature of it.

The second question is: what did resolution 678 give authority to do? The answer is clear. It gave authority to expel Iraq from Kuwait and 'restore peace and security in the area'. It is difficult to read this as authority to launch a full-scale invasion of Iraq in 2003 with the

obvious intention of deposing its government and occupying its territory, the foreseeable consequence of causing widespread loss of life, and the potential to destabilize the area.

The third question is: when was authority given to invade? It cannot be plausibly suggested that authority was given by resolution 1441, for that gave the Iraqi government a final opportunity to co-operate. Clearly, therefore, an invasion could not have been launched the next day. But if not then, when? As soon as any member state of the UN decided that the Iraqi government had had sufficient time to co-operate and had not done so? This, as I have already suggested, would subvert the collective decision-making process of the Security Council which lies at the heart of the Chapter VII regime. A decision as massive and far-reaching as one to invade and occupy a foreign sovereign state must be based on something very much more solid than a good arguable case. The inescapable truth is that the British government wished and tried to obtain a further Security Council resolution authorizing the use of force, but was unable to do so in the face of international opposition and went ahead without.

The legal duties of belligerents while hostilities are in progress and after they have ended are very largely governed by the regulations annexed to the 1907 Hague Convention and by the four 1949 Geneva Conventions as extended by Protocols adopted in 1977. These give effect to a wide international consensus that there are some methods of making war which are impermissible (such as killing or wounding an enemy who is already wounded or has surrendered, and the destruction of property without military necessity); that prisoners of war should be protected, and treated with humanity and decency; and that civilians, non-combatants, the sick and the wounded should be so far as possible protected from the military activity. When hostilities are over, an occupying power 'shall take all measures in [its] power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'.[44] Property and life must be respected.[45] The occupying power has no mandate to transform the law and institutions of the defeated state, a somewhat anomalous rule given that the two most successful post-1945 occupations, those of West Germany and Japan, comprehensively transformed the laws and institutions of those countries.[46]

The record of the British as an occupying power in Iraq has, as we know, been sullied by a number of incidents, most notably the shameful beating to death of Mr Baha Mousa in Basra.[47] But such breaches of the law were not a result of deliberate government policy, and the rights of the victims have been recognized. This contrasts with the unilateral decisions of the US government that the Geneva Conventions did not apply to the detention conditions in Guantanamo Bay, Cuba, or to trial of Al-Qaeda or Taleban prisoners by military commissions,[48] that Al-Qaeda suspects should be denied the rights of both prisoners of war and criminal suspects, and that torture should be redefined, contrary to the Torture Convention and the consensus of international opinion, to connote pain, where physical, 'of an intensity akin to that which accompanies serious physical injury such as death or organ failure'.[49] This is what underlay the abuses indelibly associated in the mind of the world with the photographs of Abu Ghraib but occurring elsewhere also, described in horrifying detail in reports of the International Committee of the Red Cross (February 2004 and February 2007),[50] General Taguba (March 2004),[51] Generals Fay and Jones (August 2004 and February 2007)[52] and the American Bar Association (August 2004).[53] Particularly disturbing to proponents of the rule of law is the cynical lack of concern for international legality among some top officials in the Bush administration. Thus in one memorandum the Deputy Assistant Attorney General (John Yoo), writing to the Counsel to the President, advised:

> Thus we conclude that the Bush administration's understanding created a valid and effective reservation to the Torture Convention. Even if it were otherwise, there is no international court to review the conduct of the United States under the Convention. In an additional reservation, the United States refused to accept the jurisdiction of the [International Court of Justice] (which, in any event, could hear only a case brought by another state, not by an individual) to adjudicate cases under the Convention. Although the Convention creates a Committee to monitor compliance, it can only conduct studies and has no enforcement powers.[54]

The British government did not adopt practices such as these, of which a number of prominent British ministers (including the Attorney General) were openly critical.

As I stressed at the outset, most transactions governed by international law proceed smoothly and routinely on the strength of known and accepted rules. I have perhaps dwelt disproportionately on the non-compliant tip of the iceberg, illustrated by events in Iraq and elsewhere. But those events highlight what seem to me to be the two most serious deficiencies of the rule of law in the international order. The first is the willingness of some states in some circumstances to rewrite the rules to meet the perceived exigencies of the political situation, as the UK did in relation to the Suez crisis of 1956. The second is the consensual basis of the jurisdiction of the International Court of Justice (ICJ). Cases come before the Court only if the parties agree. While 65 of the 192 member states of the United Nations have chosen to accept the compulsory jurisdiction of the ICJ, a majority do not, and it is a lamentable fact that, of the five permanent members of the Security Council, only one, the UK, now does so, Russia and China never having done so and France and the United States having withdrawn earlier acceptances. As HE Judge Rosalyn Higgins, then the President of the ICJ, said in a lecture at the British Institute of International and Comparative Law in October 2007, 'the absence of a compulsory recourse to the Court falls short of a recognisable "rule of law" model'.[55] The suggestion that the rule of law requires, in this day and age, a routine and obligatory recourse to the Court in matters connected to the UN Charter and related issues is obviously, she suggested, still a step too far. But it is, I think, a step which must be taken if the rule of law is to become truly effective in this area.

If events in Iraq and elsewhere highlight some of the deficiencies of international law, they may nonetheless yield a public benefit in the longer term. For while the lawfulness of earlier military interventions has attracted academic analysis (as, notably, by Geoffrey Marston on the Suez crisis[56]), I do not think the public at large has been much interested in whether the interventions were lawful or not. In the case of Iraq, perhaps because of widespread doubt in this country about the wisdom and necessity of going to war, the issue of legality has loomed larger than, I think, ever before. This has enhanced the importance of international law in the public mind, and Chapter VII of the UN Charter has come to be more widely recognized not only as a constraint on unauthorized military action but also as a guarantee

that such action is necessary to maintain or restore peace and proportionate, traditional conditions of a just war. While prophecy is always perilous, it is perhaps unlikely that states chastened by their experience in Iraq will be eager to repeat it. They have not been hauled before the ICJ or any other tribunal to answer for their actions, but they have been arraigned at the bar of world opinion, and judged unfavourably, with resulting damage to their standing and influence. If the daunting challenges now facing the world are to be overcome, it must be in important part through the medium of rules, internationally agreed, internationally implemented and, if necessary, internationally enforced. That is what the rule of law requires in the international order.[57]

CHAPTER 9. A FAIR TRIAL

1. See, for example, *Engel v The Netherlands (No. 1)* (1976) 1 EHRR 647, para. 91.
2. T. Goriely, 'The Development of Criminal Legal Aid in England and Wales', in R. Young and D. Wall (eds.), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press, 1996), p. 29.
3. (1904), vol. 1, chap. IV, p. 34.
4. See Tom Bingham, 'Lecture at Toynbee Hall on the Centenary of its Legal Advice Centre', in *The Business of Judging* (Oxford University Press, 2000), pp. 394–95.
5. See Lord Hewart of Bury, *The New Despotism* (Ernest Benn, 1929), p. 119.
6. Ibid., p. 124.
7. Tom Bingham, 'Judicial Ethics', in *The Business of Judging*, p. 77; D. Edwards, 'Judicial Misconduct and Politics in the Federal System: A Proposal for Revising the Judicial Councils Act)', (1987) 75 Calif LR.
8. Philip Ayres, *Owen Dixon* (The Miegunyah Press, Melbourne, 2003), pp. 235–8, 249–50, 258–9; and see 121 LQR (2005), p. 158, quoting the Solicitor General for New South Wales in the *Sydney Morning Herald*, 21 June 2003.
9. Anthony Lewis, reviewing *The Nine: Inside the Secret World of the Supreme Court* by Jeffrey Toobin in *New York Review of Books*, 20 December 2007, p. 61.
10. *Brown v Board of Education of Topeka et al.* 347 US 483 (1954).
11. Stephen Ambrose, *Eisenhower the President* (Allen and Unwin, 1984), p. 190.
12. Ibid.
13. *Davidson v Scottish Ministers* [2005] SC (HL) 7.
14. *R v Bentley, decd.* [2001] 1 Cr App R 307, 334.
15. *R v Horseferry Road Magistrates' Court, ex p. Bennett* [1994] 1 AC 42, 68, repeated in *Attorney General's Reference (No. 2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72, 85, para. 13.
16. *Brown v Stott* [2003] 1 AC 681, 719.
17. Article 6(3) of the European Convention.
18. *R v Hayward* [2001] EWCA Crim 168, [2001] QB 862; *R v Jones (Anthony)* [2002] UKHL 5, [2003] 1 AC 1.
19. *Guardian*, 8 September 2008, p. 16.
20. This summary is based on the decision of the House of Lords in *R v H* [2004] UKHL 3, [2004] 2 AC 134.
21. *R v Davis* [2008] UKHL 36, [2008] AC 1128.
22. This, broadly, is the effect of Part 31.6 of the Civil Procedure Rules.
23. *Ventouris v Mountain* [1991] 3 All ER 472, 475.
24. The current procedure is well summarized by Paul Matthews and Hodge Malek QC in *Disclosure* (3rd edn., Sweet & Maxwell, 2007), pp. 327–45.
25. *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171.
26. *R (Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738.
27. *In re K (Infants)* [1965] AC 201, 237.
28. *In re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593, 603.
29. See *Roberts*, above (n. 26), paras. 16–17.
30. Ibid., para. 19.
31. Ibid., para. 70.
32. Ibid., para. 78.
33. Ibid., para. 88.
34. Ibid., para. 97.
35. Ibid., paras. 19, 76–8, 83, 112, 144.
36. Ibid., para. 144.
37. Prevention of Terrorism Act 2005.
38. *Secretary of State for the Home Department v MB* [2006] HRLR 878, [2007] QB 415, [2007] UKHL 46, [2008] 1 AC 440.
39. *Secretary of State for the Home Department v AF* [2007] EWHC 651 (Admin), [2007] UKHL 46, [2008] 1 AC 440.
40. *M v Secretary of State for the Home Department* [2004] EWCA Civ 324, [2004] 2 All ER 863; *MB* and *AF*, above (nn. 38, 39).
41. *R v H*, above (n. 20), para. 22.
42. *M v Secretary of State for the Home Department*, above (n. 40), para. 13; *Roberts*, above (n. 26), para. 60.
43. *Secretary of State for the Home Department (Respondent) v AF (Appellant) and another (Appellant) and one other action (No. 3)* [2009] UKHL 28.
44. I have based this chapter in part on a lecture ('A Fair Trial') given to the Constitutional and Administrative Bar Association on 4 November 2008.

CHAPTER 10. THE RULE OF LAW IN THE INTERNATIONAL LEGAL ORDER

1. Ministerial Code, July 2007, para. 1.2.
2. S/2004/16, 23 August 2004, para. 6.
3. W. Bishop, 'The International Rule of Law', *Michigan Law Review*, 59 (1961), p. 553.
4. Charles Rhyner, Opening Statement before Boston Conference on World Peace through Law, 27 March 1959.

5. Simon Chesterman, 'An International Rule of Law?', *American Journal of Comparative Law*, 56/2 (2008), pp. 331–61 at p. 355.
6. Millennium Declaration, GA Res 55/2, UN Doc A/RES/55(2) (2000).
7. I have followed the formulation in Article 38 of the Statute of the International Court of Justice (1945).
8. *International Law* (Oxford University Press, 2007), p. 18.
9. Ibid., p. 20.
10. Ibid., p. 19.
11. Ibid.
12. Ibid., pp. 21–2.
13. Douglas Hurd, *The Search for Peace* (Warner Books, 1997), p. 6.
14. See *King's Prosecutor, Brussels, Office of the v Cando Armas* [2005] UKHL 67, [2006] 2 AC 1; *Dabas v High Court of Justice in Madrid, Spain* [2007] UKHL 6, [2007] 2 AC 31; *Pilecki v Circuit Court of Legnica, Poland* [2008] UKHL 7, [2008] 1 WLR 325; *Caldarelli v Judge for Preliminary Investigations of the Court of Naples, Italy* [2008] UKHL 51, [2008] 1 WLR 1724.
15. Chesterman, 'An International Rule of Law?', p. 348.
16. In *Golder v United Kingdom* (1975) 1 EHRR 524, para. 54.
17. Judge Mark Villiger, in a paper based on his oral contribution at the first International Law in Domestic Courts colloquium, held in The Hague on 28 March 2008, paras. 2(a) and (b).
18. *Ukraine-Tyumen v Ukraine*, 22 November 2007, para. 49.
19. *Erich Stauder v City of Ulm-Sozialamt* [1969] ECR 419, para. 7.
20. Antonio Tizzano, 'The Rule of the ECJ in the Protection of Fundamental Rights', in A. Arnull, P. Eeckhout and T. Tridimas (eds.), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford University Press, 2008), 126–38, at p. 138.
21. Ibid., p. 138.
22. [1977] QB 529.
23. [1983] AC 244.
24. 'International Law in the House of Lords and the High Court of Australia 1996–2008: A Comparison', The First Michael Kirby Lecture in International Law, Canberra, 27 June 2008.
25. [1999] 2 AC 629.
26. [2006] UKHL 46, [2007] 1 AC 412.
27. *Adan v Secretary of State for the Home Department* [1999] 1 AC 293; *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489.
28. *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.
29. *R (Al-Jedda) v Secretary of State for Defence (JUSTICE intervening)* [2007] UKHL 58, [2008] 1 AC 332.

30. *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (UNHCR intervening)* [2004] UKHL 55, [2005] 2 AC 1; *R v Asfaw (UNHCR intervening)* [2008] UKHL 31, [2008] AC 1061; *Re Minister for Immigration and Multicultural Affairs, ex p. Lam* (2003) 214 CLR 1.
31. (Hart Publishing, 2005), chap. 1, pp. 3–26.
32. *The Invention of Peace & the Reinvention of War* (Profile Books, 2002), p. 1.
33. Article 24(1).
34. R. Peerenboom, 'Human Rights and the Rule of Law: What's the Relationship?', *Georgetown Journal of International Law*, 36 (2004–5), pp. 809–945, at pp. 936–7.
35. Philippe Sands, *Lawless World* (Allen Lane, 2005), p. 182.
36. Mark Danner, *The Secret Way to War* (New York Review of Books, 2006), pp. 129, 134.
37. Ibid., p. 91; Advice to the Prime Minister, 'Iraq: Resolution 1441', 7 March 2003.
38. Sir Michael Wood KCMG, Hersch Lauterpacht Memorial Lecture 2006, Third Lecture, 'The Security Council and the Use of Force', 9 November 2006, para. 9.
39. 'The pax Americana and the Law', first published in the JUSTICE journal in 2004, republished in extended form in 2007. In his oral presentation he used the word 'risible', which he later changed.
40. Sands, *Lawless World*, p. 189.
41. Lowe, *International Law*, p. 273.
42. Vaughan Lowe, 'Is the Nature of the International Legal System Changing? – A Response', *Austrian Review of International and European Law*, 8 (2003), pp. 69–73, at p. 72.
43. In communications to the author.
44. Article 43 of the 1907 Hague Regulations.
45. Ibid., Art. 46.
46. This subject is valuably discussed by Professor Sir Adam Roberts in 'Transformative Military Occupation: Applying the Laws of War and Human Rights', *American Journal of International Law*, 100/3 (July 2006), pp. 580–622.
47. See *R (Al-Skeini and others) v Secretary of State for Defence (The Redress Trust and others intervening)* [2007] UKHL 26, [2008] 1 AC 153, para. 6, case 6.
48. Memorandum by John Yoo and Robert Delabunty to William Haynes of 9 January 2002; Memorandum by Jay Bybee to Alberto Gonzales and William Haynes of 22 January 2002; Memorandum by Alberto Gonzales to President George W. Bush of 25 January 2002; Memorandum by the President

to the Vice-President and others of 7 February 2002: see Karen Greenberg and Joshua Dratel (eds.), *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005), pp. 38–79, 81–117, 118–21, 134–5. The development of the administration's policy on 'enhanced interrogation techniques' is traced by Professor Philippe Sands, *Torture Team: Deception, Cruelty and the Compromise of Law* (Allen Lane, 2008).

49. Memorandum by Jay Bybee (largely drafted by John Yoo) to Alberto Gonzales of 1 August 2002; see Greenberg and Dratel (eds.), *Torture Papers*, pp. 172–217, at pp. 213–14; see also Jane Mayer, *The Dark Side* (Doubleday, 2008), pp. 151–2, 224, 231.

50. Greenberg and Dratel (eds.), *Torture Papers*, pp. 383–404; *ICRC Report on the Treatment of Fourteen 'High Value Detainees' in CIA Custody*, www.nybooks.com.

51. Greenberg and Dratel (eds.), *Torture Papers*, pp. 405–556.

52. Ibid., pp. 987–1131.

53. Ibid., pp. 1132–64.

54. Memorandum by John Yoo to Alberto Gonzales of 1 August 2002, quoted ibid., at pp. 220–21.

55. 'The Rule of Law: Some Sceptical Thoughts', 16 October 2007, pp. 6–7.

56. 'Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice Tendered to the British Government', (1988) 37 ICLQ 773.

57. This chapter closely follows the text of a Grotius lecture ('The Rule of Law in the International Order') given on 17 November 2008 to mark the fiftieth anniversary of the establishment of the British Institute of International and Comparative Law.

CHAPTER 11. TERRORISM AND THE RULE OF LAW

1. William J. Brennan, Jr., 'The Quest to Develop a Jurisprudence in Times of Security Crises', *Israel Yearbook of Human Rights*, 18 (1988), 11, at 11.

2. *Ireland v United Kingdom* (1978) 2 EHRR 25.

3. Speech to the Council on Foreign Relations, 10 February 2003.

4. *Bell v Maryland* 378 US 226, 346 (1964), (Black J, dissenting).

5. Arthur Chaskalson, 'The Widening Gyre: Counter-Terrorism, Human Rights and the Rule of Law', *Cambridge Law Journal*, 67 (2008), pp. 69–91, at p. 74, footnotes omitted.

6. See K. J. Greenberg, 'Secrets and Lies', *Nation*, 26 December 2005, p. 39, at p. 40.

7. John F. Murphy, *The United States and the Rule of Law in International Affairs* (Cambridge University Press, 2004), p. 192.

8. David Bonner, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?* (Ashgate, 2007), pp. 4, 352.

9. 'Blair: Shackled in War on Terror', *Sunday Times*, 27 May 2007.

10. See, for instance, Phillip Bobbitt, *Terror and Consent: The Wars for the Twenty-First Century* (Allen Lane, 2008).

11. John Selden, *Table Talk* (1892), p. 131; see John Gray, *Lawyer's Latin* (Hale, 2002), p. 125.

12. Quoted by A. C. Grayling, *Towards the Light* (Bloomsbury, 2007), p. 6.

13. Conor Gearty, 'Human Rights in an Age of Counter-Terrorism', Oxford Amnesty Lecture, 23 February 2006.

14. *New York Review of Books*, 12 June 2008, pp. 68–71.

15. US PMO entitled 'Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism', White House Press Release, 13 November 2001.

16. See Intelligence and Security Committee Report on *Rendition* (Cm. 7171, July 2007), para. 53.

17. *R v Horseferry Road Magistrates' Court, ex p. Bennett* [1994] 1 AC 42.

18. *R v Mullen* [2000] QB 520.

19. See *United States v Alvarez-Machain* 504 US 655 (1992)

20. ISC Committee Report, above (n. 16), para. 35.

21. Presidential Decision Directive 39, 'Counterterrorism Policy', 21 June 1995.

22. ISC Committee Report, above (n. 16), para. 35.

23. See Chaskalson, 'The Widening Gyre', pp. 83–4; David Cole and Jules Lobel, *Less Safe, Less Free: Why America is Losing the War on Terror* (The New Press, New York, 2007), p. 25; Craig Barlow, 'The Constitutional Tree: Rendering the Branches', *Amicus Curiae*, 70 (Summer 2007), pp. 17–21; David Cole, 'The Man Behind the Torture', *New York Review of Books*, 6 December 2007, pp. 38–43, at p. 38; Stephen Grey, *Ghost Plane* (Hurst & Co., 2006), chap. 4; *El Masri v Tenet* 437 F Supp 2d 530 (E. D. Va 2006), 2007 US App LEXIS 4796 (4th Cir. 2 March 2007).

24. Cole and Lobel, *Less Safe, Less Free*, p. 25.

25. See Irwin Cotler, 'Lessons of History', 2007 Raoul Wallenberg International Human Rights Symposium: Conference Proceedings, pp. 9–14; Chaskalson, 'The Widening Gyre', pp. 84–5; Cole and Lobel, *Less Safe, Less Free*, pp. 23–4; Grey, *Ghost Plane*, chap. 3.

26. Cm. 7171, paras. 65–6, 111–47; Grey, *Ghost Plane*, pp. 210–71.

27. *R (Al-Rawi and others) v Secretary of State for Foreign and Commonwealth Affairs and another (United Nations High Commissioner for Refugees intervening)* [2006] EWCA Civ 1279, [2008] QB 289.

28. Cm. 7171, p. 49, conclusion Y.

A Very British Deceit

Philippe Sands

A year ago British Prime Minister Gordon Brown announced a long-awaited inquiry into Britain's involvement in the 2003 Iraq war, to coincide with the departure of British troops from the country. The Iraq inquiry would be chaired by a retired senior civil servant, Sir John Chilcot—a "safe pair of hands," the *Guardian* called him—and would work behind closed doors under arrangements designed to minimize public disclosure of the underlying documents, many of which were classified as "Secret." Sir John has summarized the inquiry's mandate as considering "the UK's involvement in Iraq, including the way decisions were made and actions taken, to establish, as accurately as possible, what happened and to identify the lessons that can be learned."

At its launch on July 30, 2009, expectations of the inquiry were—to put it generously—low. The carefully chosen composition of the five-member panel did not lead to a quickening of public interest. One member, the historian Sir Martin Gilbert, had previously suggested that Tony Blair and George W. Bush might eventually bear comparison with Winston Churchill and FDR. Another, the academic Sir Lawrence Freedman, contributed to the preparation of the 1999 Chicago speech in which Tony Blair first expressed the emotional and ahistorical interventionist instincts that later led directly to the Iraq debacle. None of the five has any legal background or qualification, as the examination of witnesses—think Gilbert and Sullivan rather than Old Bailey—has shown. The only member to demonstrate forensic ability is Sir Roderic Lyne, a retired diplomat. Most of the key witnesses, particularly the lawyers, politicians, and diplomats, have been adept at swatting away troublesome questions. More significantly, the inquiry has been undermined by its inability to [illegible]

information, filling out if not completing a picture the broad lines of which were well known before it commenced. The general conclusions are inevitable and unsurprising: Blair gave Bush an early commitment of support without extracting anything much in return or developing a basis for leverage; he needed to justify his desire to remove Saddam by overstating the very limited and not probative evidence of Saddam's alleged activity concerning WMDs, and then manipulated its public presentation; he persuaded Bush to go down the UN route, but in so doing he badly undermined his own position by agreeing to a Security Council resolution that his own attorney general told him was an inadequate basis for war; and then he failed to live up to his own expectations of his ability to persuade the Security Council to vote for a second resolution.

Nick Danziger/Contact Press Images

George W. Bush and Tony Blair after a joint press conference in the early days of the Iraq war, April 8, 2003

As all this was proceeding, and after His 337 words of reasoning (an advocacy document for which Lord Goldsmith required the assistance of no fewer than nine lawyers and senior civil servants) have the great merit of simplicity: Security Council Resolution 678 authorized the 1990 Iraq intervention and was "revived" as a result of Saddam's "material breach" of the terms of the subsequent cease-fire. At the heart of the argument is Resolution 1441, adopted unanimously by the Security Council in November 2002. According to Goldsmith, Resolution 1441 gave Iraq "a final opportunity to comply with its disarmament obligations" and determined that a failure to so comply and cooperate would constitute a further material breach of those obligations. "It is plain," wrote Lord Goldsmith, "that Iraq has failed so to comply," thus giving rise to a material breach and the revival of the original authority to use force.

their willingness to mislead. Nor was the Cabinet aware of the decisive role played by senior Bush administration lawyers in contributing to Goldsmith's change of mind. "We had trouble with your attorney," the legal adviser to Condoleezza Rice—John Bellinger—later told a visiting British official, "we got him there eventually." Nor did the Cabinet learn of the terms of the resignation letter of the deputy legal adviser at the Foreign Office, Elizabeth Wilmshurst, that elegantly referred to Lord Goldsmith's late change of mind without revealing the details.

Lawyers are of course entitled to change their minds, and frequently do. New facts emerge, or new legal arguments come to the fore. Between March 7 and March 17, 2003, there were, however, no new facts and no new legal arguments on which Lord Goldsmith could rely. In the intervening seven years he has not been able to provide a convincing explanation for his change of position to rebut the obvious inference that he succumbed to the political pressures that plainly abounded. When Lord Goldsmith appeared before the Chilcot inquiry on January 27, 2010, he was under pressure to explain. His silky performance did not dispel the doubts. He confirmed that his change of mind was largely due to the persuasive arguments of senior Bush administration lawyers, with whom he had met in early February 2003. Tantalizingly, new information did emerge about the views he had expressed in writing before March 7, 2003. This suggested that the inquiry had before it other documents not publicly available. Without being able to refer to the documents, his inquisitors were barely able to lay a glove on the former attorney general.

Then, in May 2010, the Labour Party

yers, politicians, and diplomats, have been adept at swatting away troublesome questions. More significantly, the inquiry has been undermined by its inability to refer publicly to documents that it has seen and that contradict or undermine witness testimony. It did not seem that its final report, not expected before the end of the year, would be revelatory or forceful.

Nevertheless, public and media interest and political pressures have combined to force greater openness than Brown intended. Many—but not all—of the hearings have been public and broadcast on TV and the Internet, and for some appearances—Blair's and Brown's in particular—there has been widespread media attention. In recent weeks a growing number of classified documents have been made public by the inquiry, including a damning one-page minute dated January 30, 2003, from Attorney General Lord Peter Goldsmith to Tony Blair. Ending with the words "I have not copied this minute further," the document is revelatory of the prime minister's modus operandi, of the tragic weakness of his attorney general, and of the extent to which the British Parliament, Cabinet, and people were misled by these two men. The document, reproduced here on page 56, includes brief, handwritten reactions that are particularly telling. Nothing beats raw material in black and white.

In spite of its limitations, the inquiry has succeeded in teasing out some new expectations of his ability to persuade the Security Council to vote for a second resolution.

As all this was proceeding, and after the invasion took place, he failed to intervene in order to remedy the badly conceived and managed post-conflict situation. Against this background, Blair's refusal during his public appearance at the inquiry to express any regret whatever for his actions defined a memorable moment. So surprised was Sir John Chilcot that at the end of the session he twice offered Blair an opportunity to express some regret. To the allegations of incompetence, deception, and criminality there are now added the charges of hubris and bad form.

A question that runs through the narrative concerns the legality of a war that was not (and could not be) justified on the grounds of self-defense. The issue won't go away, and in the British media the conflict is often referred to as "the illegal Iraq war." Blair justified the war on the grounds that it was authorized by the Security Council. On March 17, 2003, the attorney general, Lord Goldsmith, answered a parliamentary question on the legal authority for war, which was already by then a lively public issue. Without any hint of ambiguity, Goldsmith apparently indicated to the British Cabinet and then to the House of Lords that military force was unambiguously lawful.

Goldsmith, "that Iraq has failed so to comply," thus giving rise to a material breach and the revival of the original authority to use force.

Goldsmith's parliamentary answer simply skated over the key question: Who decides whether Iraq is in material breach, the Security Council or one or more individual members such as the US or the UK? It is virtually impossible to find any seasoned international lawyer in Britain who agrees with Goldsmith's conclusion, as expressed in the statement of March 17, 2003, that the Security Council did not have to make this decision in the form of a new resolution. It is now clear that until shortly before he put his name to the 337-word statement, he didn't agree with it either.

Well before the Chilcot inquiry it was known that the attorney general had changed his mind just days before the war. On March 7, 2003, Lord Goldsmith gave the prime minister a secret, thirteen-page memo that essentially concluded that although a "revival" argument could be made, it would probably not be successful if it were to reach a court of law. In other words, the better view was that the war was unlawful.

The full memo was not put before the Cabinet, which, like Parliament, had no inkling about the attorney general's serious doubts. The inquiry has teased out that Foreign Secretary Jack Straw talked Goldsmith out of sharing his doubts with the Cabinet, reflecting both men's lack of backbone and being able to refer to the documents, his inquisitors were barely able to lay a glove on the former attorney general.

Then, in May 2010, the Labour Party lost the general election and a new Conservative/Liberal Democrat coalition came to power. This appears to have contributed to a decision to declassify documents for which the inquiry, as the Cabinet secretary put it, had waited for "some time." On June 25, around its first anniversary, the inquiry quietly published a set of documents that laid bare the clear and consistent legal advice that Lord Goldsmith gave to Tony Blair at key moments, from July 2002 right up to February 12, 2003. The documents paint a devastating picture, principally (but not only) emphasizing the attorney general's sudden, late, and total change of direction. Following a year of consistent advice, he made a 180-degree turn in the space of a month.

The documents laid an unhappy trail. On July 30, 2002, Lord Goldsmith wrote the prime minister that self-defense and humanitarian intervention were not admissible, and that military action without explicit Security Council authorization would be "highly debatable." On October 18, 2002, he told Straw that the draft of Security Council Resolution 1441 "did not provide legal authorisation for the use of force," and that the British government must not "promise the US government that it can do things which the Attorney considers to be unlawful." On November 11, 2002, immediately

after Resolution 1441 was adopted, he told Jonathan Powell (Blair's chief of staff) that "he was not at all optimistic" that there would be "a sound legal basis for the use of force against Iraq." At a Downing Street meeting on December 19, 2002, Goldsmith declined to tell those present that they would have a green light for war without a further resolution. On January 14, 2003, he wrote a draft memo that concluded unambiguously that "resolution 1441 does not revive the authorisation to use of force contained in resolution 678 in the absence of a further decision of the Security Council." These words directly contradict what he would later tell the Cabinet and Parliament.

Which brings us to the most devastating document, Goldsmith's January 30, 2003, one-pager to Blair, written the day before Blair's meeting with President Bush at the White House. Lord Goldsmith explained that "I thought you might wish to know where I stand on the question of whether a further decision of the Security Council is legally required in order to authorise the use of force against Iraq." His conclusion? "I remain of the view that the correct legal interpretation of resolution 1441 is that it does not authorise the use of military force without a further determination by the Security Council." Clear, unambiguous, and without caveat. The published version of this message, reproduced on this page, includes the gloriously graphic handwritten reactions of three key players.

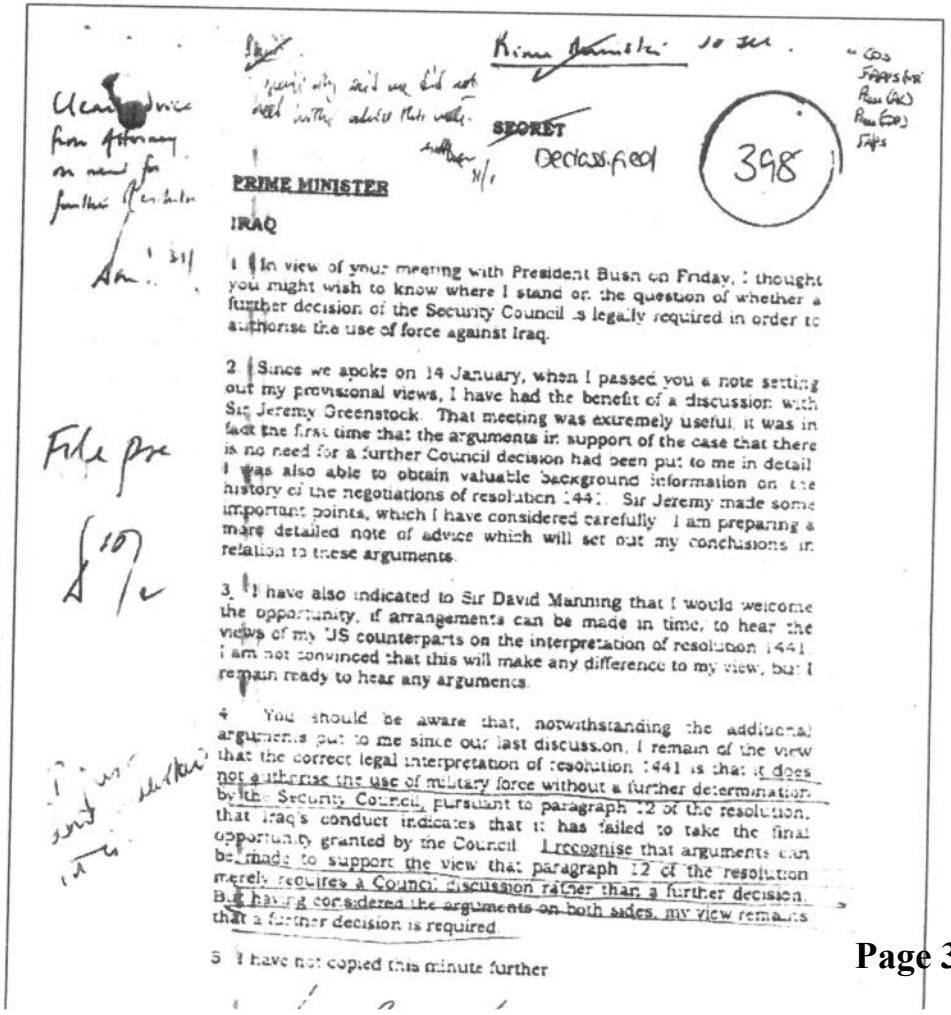
In the top left-hand corner, Sir David Manning, Blair's principal foreign policy adviser, notes: "Clear advice from Attorney on need for further Resolution." Alongside, Matthew Rycroft, who served as Blair's private secretary, sounds irritated: "Specifically said we did not need further advice this week" (apparently confirming allegations that Blair did not want a paper trail of early, unhelpful advice). And on the left-hand side of the minute

strategy had to be arranged around the military planning."

Sir David then records Blair's response, stating that he was "solidly" with the President and ready to do whatever it took to disarm Saddam. He wants a second resolution "if we could possibly get one," because it would make it much easier politically to deal with Saddam, and as an insurance policy "against the unexpected." According to the memo, the prime minister completely ignores the views of his attorney general, who has told him only the previous day that a further resolution is necessary to act lawfully, not merely desirable.

accommodating the desires of the prime minister.

The Chilcot inquiry has given us all we need on this dismal story: the evasive testimonies and the few but damning documents provide an incontrovertible account. The proceedings of the inquiry decisively expose the lamentable and dysfunctional processes that brought Britain into such disrepute, even if its mandate and its members' lack of formal legal qualifications necessarily mean that it has no particular authority to express a view on the legality of the war. (In January 2010 a parallel Dutch inquiry chaired by a retired Supreme Court judge and



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PRIME MINISTER

IRAQ

1 In view of your meeting with President Bush on Friday, I thought you might wish to know where I stand on the question of whether a further decision of the Security Council is legally required in order to authorise the use of force against Iraq.

2 Since we spoke on 14 January, when I passed you a note setting out my provisional views, I have had the benefit of a discussion with Sir Jeremy Greenstock. That meeting was extremely useful. It was in fact the first time that the arguments in support of the case that there is no need for a further Council decision had been put to me in detail. I was also able to obtain valuable background information on the history of the negotiations of resolution 1441. Sir Jeremy made some important points, which I have considered carefully. I am preparing a more detailed note of advice which will set out my conclusions in relation to these arguments.

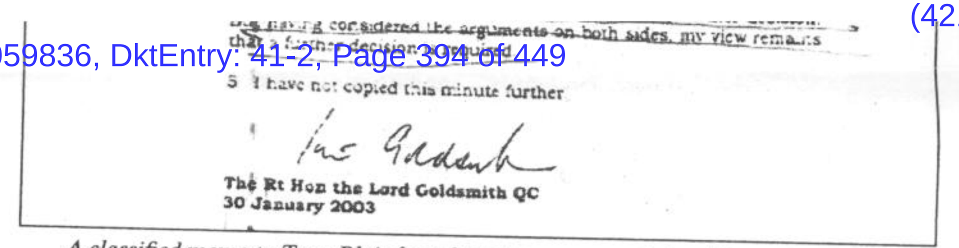
3 I have also indicated to Sir David Manning that I would welcome the opportunity, if arrangements can be made in time, to hear the views of my US counterparts on the interpretation of resolution 1441. I am not convinced that this will make any difference to my view, but I remain ready to hear any arguments.

4 You should be aware that, notwithstanding the additional arguments put to me since our last discussion, I remain of the view that the correct legal interpretation of resolution 1441 is that it does not authorise the use of military force without a further determination by the Security Council, pursuant to paragraph 12 of the resolution, that Iraq's conduct indicates that it has failed to take the final opportunity granted by the Council. I recognise that arguments can be made to support the view that paragraph 12 of the resolution merely requires a Council discussion rather than a further decision. But having considered the arguments on both sides, my view remains that a further decision is required.

5 I have not copied this minute further

week" (apparently confirming allegations that Blair did not want a paper trail of early, unhelpful advice). And on the left-hand side of the minute, with Goldsmith's damning conclusions underlined by the same hand, these scrawled words: "I just don't understand this." The handwriting is Blair's, and it is difficult to see quite what he might have had trouble understanding. Lord Goldsmith's words—consistent with every view he had expressed over the previous six months—admit of no doubt, adopting the views taken by the UK since 1990, by the Foreign Office legal advisers, and by virtually every international lawyer in Britain (if not the world, outside of the US). What Blair seems to be saying is that he doesn't understand why this wretchedly unhelpful view was reduced to writing at that key moment.

The timing could not have been worse. The next day, on January 31, 2003, Blair met Bush, accompanied by Sir David Manning and Matthew Rycroft. Sir David wrote up a widely reported five-page note of the meeting that is before the inquiry but has not yet been made public in full. Sir David records the President telling Blair that the US would put its full weight behind efforts to get another Security Council resolution but if that failed, "military action would follow anyway"; that the "start date for the military campaign was now pencilled in for 10 March," which was "when the bombing would begin"; and that the "diplomatic


...having considered the arguments on both sides, my view remains that a further decision is required
5 I have not copied this minute further
The Rt Hon the Lord Goldsmith QC
30 January 2003

A classified memo to Tony Blair from his attorney general, Lord Peter Goldsmith, that was recently made public by the UK's Iraq inquiry. The contents of the memo and the handwritten notes are discussed by Philippe Sands in this article.

It is against this background that the attorney general's sharp change of mind will surely haunt him. After Blair's meeting with Bush, the attorney general went to the US to meet the Bush administration lawyers (he made no similar trip to any other country, whose lawyers would no doubt have held rather different opinions). He told the Chilcot inquiry that it was their views that caused him to abandon his long-held position. Yet many of the Bush administration's lawyers with whom he engaged were among the officials who failed to prevent the Bush administration's descent into serial illegalities in 2001 and 2002: ditching the Geneva Conventions, imprisoning suspects at Guantánamo without granting them minimum rights, and embracing waterboarding and other acts of obvious torture. Goldsmith has spoken out against all these measures. Just why he would find the US lawyers' views on the use of force any more convincing is a question that seems to admit of only one answer. Many have concluded that he was largely composed of lawyers concluded that the war was illegal, contributing to the downfall of the Dutch government.)

In late July, Deputy Prime Minister Nick Clegg, standing in for Prime Minister David Cameron at the Dispatch Box in Parliament, described the war as "illegal." When asked for clarification about whether this was now British government policy, the official spokesman conspicuously failed to back Blair and Goldsmith and to defend the war as lawful, indicating instead that the new government would prefer to await the outcome of the Chilcot inquiry. A spokesman for the inquiry was then reported as saying that Sir John would not make a conclusion on whether the war was legal. In British parlance, this is what's called a dog's breakfast. In any event, the British have come to be deeply skeptical about such inquiries. In the court of public opinion, for this one in particular, the process and its revelations may be more significant and lasting in their effects than any final report that eventually emerges. □

—*August 31, 2010*

IRAQ INQUIRY: SUBMISSIONS OF PROFESSOR MAURICE MENDELSON QC ON THE UK'S LEGAL BASIS FOR MILITARY ACTION IN IRAQ.

1. I am Emeritus Professor of International Law in the University of London and a Queen's Counsel at Blackstone Chambers London. As well as teaching public international law since 1968, I have practised it as a barrister since 1970. My full curriculum vitae can be found at www.blackstonechambers.com, but I **attach** a copy for ease of reference. I am responding to the Iraq Inquiry's invitation to international lawyers for submissions on the UK's legal basis for military action in Iraq. I comment only on the legal basis for the UK's action in resorting to force in March 2003, not on previous action in Iraq (except incidentally to the main discussion), nor on subsequent conduct.

2. By way of introduction, I wish to state that I agree with the view expressed in the then Attorney-General's Advice of 30 July 2002, paras. 2-6 that the grounds of self-defence and humanitarian intervention were not available as justifications for the use of force in this case. In the circumstances, the only available potential justification was authorisation by the Security Council under Chapter VII of the United Nations Charter.

3. Security Council Resolutions ("SCR"s) are not treaties. However, they are made under a treaty - the UN Charter; and more broadly, they are, like treaties, communications between and by States and are to be construed in accordance with the same general principles. This entails, in particular, that they are to be

interpreted in good faith, in accordance with the ordinary meaning of the words used (unless it is established that those who promulgated the resolution intended a special meaning to be given to the term), in their context and in the light of the resolution's object and purpose. The background to the resolution and what was stated by members of the SC before and after its adoption publicly (but not privately, since the SC is an organ of a wider body, the UN membership as a whole, as well as of the international community in a wider sense) may be relevant if the meaning is unclear.

4. In my opinion, taking these matters into consideration, there was no authority for the use of force by the Coalition without a resolution, subsequent to SCR 1441, specifically or (perhaps) by implication authorising the use of force, which further resolution was not of course forthcoming.[1]

5. My reasons are essentially the same as those set out in the AG's draft advice of 14 January 2003, and for the sake of brevity there is no need to repeat them or elaborate on them at length here. Essentially, SCR 1441 held that Iraq was already in continuing material breach of its obligations under SCR 687 in particular (operative paragraph - "OP" - 1); gave Iraq a final opportunity to comply with its obligations (OP 2), and *warned* of the serious consequences (not excluding the possible use of force) of non-compliance with existing obligations and the further reporting obligations (OP 2, 4, 12 & 13); *but* (a) made it sufficiently clear that the SC retained the authority to decide whether there had been a further material breach and what action to take in relation

[1] It is unnecessary to consider whether a statement made by the President of the SC on its behalf would have been sufficient, because none was made.

thereto and (b) did not formally commit itself to authorising or re-authorising the use of force should it find that Iraq had committed a further material breach (OP 2; 4 - esp. the final clause; 12 - "in order to consider ..." and "the need for full compliance" ; 13 - "serious consequences" not specified; and 14). I do not think that a good faith analysis of these provisions leads to sufficient ambiguity to justify recourse to the drafting history of this resolution.[2] But if recourse were had to the drafting history, it seems clear that there was far from being general agreement amongst the members of the SC that there would be an automatic revival of the authority to use force even if the SC failed to adopt a further resolution. That being so, and bearing in mind also that the general objective of the Charter is to give the SC a monopoly over the use of force (leaving aside questions of self-defence), it would be contrary to principle for alleged ambiguities to be resolved in favour of unilateral action by particular member States.

6. I do not consider that the authorisation in SCR 678 to use force survived the adoption of SCR 1441. The fact that a "revival argument" was relied on after the adoption of SCR 687 on two occasions by the UK Government does not prove that the authority did survive: many other States and qualified commentators disputed it. But in any event, in my submission the terms of SCR 1441 make it sufficiently clear that the SC was retaining (or taking back, if the 678 authority had indeed survived until 2002) its authority to determine whether force could be used. The fact that Iraq was being given a "final

[2] Still less to a result that would be manifestly absurd: cf. Vienna Convention on the Law of Treaties 1969, Art. 32.

opportunity" to mend its ways shows this, as does the overall structure of the resolution and in particular the paragraphs I have cited above.

7. However, following his curious change of opinion, the AG essentially took the view that the previous authorisation for the use of force could revive if the SC merely "considered" the implications of a further or continuing breach by Iraq, even if it did not actually decide to authorise the use of force, contrary to the correct view he had previously taken of such an argument.[3] Apart from the fact that, as submitted above, this view flies in the face of the plain meaning of SCR 1441, I would like to point out that a somewhat analogous argument was considered and decisively rejected by the International Court of Justice in 1950, in its Advisory Opinion on *Competence of the General Assembly for the Admission of a State to the United Nations.*[4] Article 4(2) of the UN Charter provides that "The admission of [candidates for] membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council". At the time, the admission of a significant number of candidates had been blocked, mainly by Soviet vetos. The General Assembly was persuaded to ask the ICJ for its opinion on whether it was permissible for the GA to vote in favour of admission without an SCR. In the course of decisively rejecting such a proposition,[5] the ICJ said: "The Court cannot accept the suggestion made in one of the written statements submitted to the Court, that the General Assembly, in order to try to meet the requirement of Article 4, paragraph 2, could treat the absence of a recommendation as equivalent to what is described in that statement as an

[3] See his Written Answer in the House of Lords on 17 March 2003, para. 9.
[4] *ICJ Reports* 1950, p.4.
[5] By 12 votes to 2.

'unfavourable recommendation' upon which the General Assembly could base a decision to admit a State to membership."[6] Although the Court was not dealing with the point presently under consideration, I submit that the analogy is telling. To suggest that mere consideration by the SC, without its having come to a decision to authorise the use of force, would have been sufficient authority would be a formalistic interpretation inconsistent the language of SCR 1441 in its context and in the light of its object and purpose. Although it is usually possible to concoct an argument *of some sort* to justify action that one wishes to take for political reasons, there is a world of difference between something that is "arguable" in the literal sense, and something that is reasonably arguable in good faith. It grieves me to say that in my opinion, the legal justification ultimately proffered by HMG did not fall into the second category.

8. I do not consider it necessary, or indeed possible within the 3,000 words allocated for submissions to this Inquiry, to engage in a detailed further refutation of the arguments of the AG in his Written Answer or in his Advice to the Prime Minister of 7 March 2003. I wish only to make the following further points.

9. References to previous resolutions in SCR 1441, and in particular to SCR 678, is not sufficient to revive the authority given by the latter resolution. It is standard practice for SCRs to allude to their predecessors on the same subject. Furthermore, references in SCR 1441 to Iraq's being in "material breach" of

[6] At p. 9.

SCR 687 (the cease-fire resolution) in particular do not logically or necessarily indicate that the SC had thereby turned the clock back, so to speak, to the position following the adoption of SCR 678. As I have stated, the clear implication of SCR 1441 is that the SC was itself taking control, not handing it back or giving *carte blanche* to the 1990 coalition. Furthermore, although the potential "serious consequences" of continuing or adding to the "material breach" certainly *included* the potential use of force, the language was clearly devised to leave the SC's options open as to what action should be taken - which further weaken's the AG's arguments.

10. Whatever value my own opinion on the illegality of the coalition action in 2003 may or may not have, I think it is important to note that the UN Secretary-General also took the same view. His opinion is not, of course, binding on the Member States. However, it is significant that the S-G does not usually take a public position on the compatibility of the action of permanent members of the SC with the Charter and SCRs; and it is also of course the case that he was in a very good position to interpret "UN speak" and to know what the resolution meant.

11. Furthermore, since 2002, I have had the opportunity (though without seeking it out) to discuss the question with many international lawyers of repute from around the world. I can report that the overwhelming view was and is that it was illegal; and this even extends to most international lawyers in the UK and

the USA.[7] Of course, sheer weight of numbers does not of itself make an opinion right; but it is in my submission a fact worth noting.

12. I also note that the statements and evidence given to the Inquiry by the then Legal Adviser of the FCO, Michael Wood, and his former Deputy Elizabeth Wilmshurst, shows that both firmly advised that the action contemplated would be illegal, substantially for the reasons I have indicated above. Given the function that they performed, let alone their personal reputations, those views deserve to be taken very seriously indeed in now assessing the legality of the action taken. There is also a further aspect of this to which I wish to draw attention because of its legal and constitutional importance.

13. Under our constitution, the convention is that legal advice to the Government is given, if the importance of the subject requires it, by the Law Officers. However, AGs (and Solicitors-General) are not normally expert in public international law, which is why senior FCO lawyers are regularly seconded or attached to the AG's department. Leaving aside any wider controversy about the role of the AG in general, I submit that it is undesirable that, in a matter concerning essentially public international law and matters of war and peace, an AG (a political appointee) should be able to tender advice to the Government, and specifically the Cabinet, contrary to that of the official international law advisers of the Government, without at least making it clear to the Cabinet (a) that the opinion of the FCO Legal Adviser is different and (b) why the AG disagrees with that advice. I am not suggesting that failing to

[7] A fact confirmed, at the time, by the then President of the American Society of International Law, so far as concerned US lawyers.

make such a disclosure was a breach of the existing convention in that case: I am suggesting that there should be a new convention for the future.[8] [9]

14. Amongst other things, a convention of the sort I propose would obviate the wholly unsatisfactory way in which legal advice appears to have been tendered to the Cabinet. Though I am aware that there are many occasions when what the client requires is a lawyer's conclusions, not his/her reasoning, I do not believe that a responsible lawyer should (or normally would) give advice to a client, be it a private client or the Government, in which a bald conclusion is stated without a caveat that the opposite is strongly arguable, if such be the case. This is particularly so if grave consequences for the client would follow if the advice turns out to be wrong. The AG himself recognised that grave consequences could follow if he was wrong; and he could hardly argue that the opposite of his eventual conclusions was not strongly arguable, bearing in mind the advice that he had received from the specialist officials and indeed his own previously expressed views. It would not be a sufficient answer to this to observe that the Prime Minister, the Foreign Secretary and a

[8] Constitutional conventions do not, of course, need to emerge gradually: they can be deliberately changed, as several instances show.

[9] Whilst on the subject of constitutional conventions, I feel that it is important to dispel a misleading impression that was conveyed by Ministers and other Government apologists before and after the coalition action of 2003 and following, to the effect that the advice of the Law Officers is *never* disclosed. Sir Gus O'Donnell's letter of 25 June 2010 to Sir John Chilcot, says: "It is a long-standing convention, referenced in section 2.13 of the Ministerial Code, that neither the advice of the Law Officers nor the fact that they have been consulted is disclosed outside Government." He goes on to say that this is part of the wider legal professional privilege that legal advice is not disclosed *without the consent of the client.* But where the Government is the client, that consent has on occasion been forthcoming. For instance, in 1971 the Attorney-General presented to Parliament a White Paper (Cmnd. 4589) setting out the views of the Law Officers of England and Wales concerning the legal obligations of HMG arising out of the Simonstown Agreements with South Africa. Accordingly, the correct version of the convention is that the advice is not disclosed *unless the Government consents,* and not that the advice can *never* be disclosed. Without entering into a wider argument about the pros and cons of a more open system of government, and whilst fully aware of the arguments in favour of treating advice given to the Government as confidential, it does seem to me important that the convention is not misrepresented.

few others already know of the contrary arguments and views; what he communicated to the Cabinet was profoundly misleading because of the absence of any qualification, whether or not it was intended to mislead. If the whole Cabinet (and not just a few selected members) is asked to approve so serious a decision as going to war, it is important that the legal advice given to it is not tendentious or misleading, in particular by downplaying serious counter-arguments and the consequences if those counter-arguments are correct.

15. I hope that these submissions will be of some assistance.

Professor Maurice Mendelson QC

Temple, EC4. 13 July 2010.

IRAQ: THE PAX AMERICANA AND THE LAW

Lord Alexander of Weedon QC*

Introduction

In March this year the United States and our own country invaded the sovereign state of Iraq to secure regime change with the aim of eliminating weapons of mass destruction.[1] This novel action had been preceded by a notable political debate, despite the official opposition giving full support to the government. But the legal debate played a much lesser part. The Attorney-General gave his view, which chimed in with that of the Foreign Office, that the invasion was legal.[2] The great majority of those public international lawyers who expressed a view did not agree.[3] But the wider debate largely turned on conflicting views of the morality and wisdom of waging war. International law, if not exactly a sideshow, was pushed into the background. Nor has any court passed judgement on the legality of the war.[4] Courts in the U.S. and the U.K. have declined applications to date. In

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* The author would like to thank Ms Rosemary Davidson B.A. Hons (Oxon), Zertifikat Jura (University of Munich) for her assistance with the research and preparation of this article.

[1] "Saddam Hussein and his sons must leave Iraq within 48 hours. Their refusal to do so will result in military conflict commenced at a time of our choosing." President George W. Bush, Address to the Nation, 17 March 2003.

[2] The Attorney General Lord Goldsmith QC's Parliamentary written answer to Baroness Ramsay of Cartvale, H.L. Deb. 17 March 2003 cWA1. Foreign Office legal advice published to the Foreign Affairs Committee, 17 March 2003.

[3] Prof. Ulf Bernitz, Dr. Nicolas Espejo-Yaksic, Agnes Hurwitz, Prof. Vaughan Lowe, Dr. Ben Saul, Dr. Katja Ziegler (University of Oxford), Prof. James Crawford, Dr. Susan Marks, Dr. Roger O'Keefe (University of Cambridge), Prof. Christine Chinkin, Dr. Gerry Simpson, Deborah Cass (London School of Economics), Dr. Matthew Craven (School of Oriental and African Studies), Prof. Philippe Sands, Ralph Wilde (University College London), Prof. Pierre-Marie Dupuy (University of Paris), The Guardian, 7 March 2003. Leading academics who supported the war included Prof. Christopher Greenwood QC (London School of Economics), The Guardian, 28 March 2003, and Dr. Ruth Wedgewood (Yale Law School), Financial Times, 13 March 2003.

[4] In *R (CND) v. Prime Minister and Secretaries of State* [2002] EWHC 2759 the Campaign for Nuclear Disarmament (CND) brought an application in the High Court for an advisory declaration as to whether the U.K. Government would be acting in breach of international law if it went to war with Iraq on the basis of Resolution 1441 alone. The applicants argued that an advisory declaration was necessary to ensure that the defendants had not misdirected themselves in law on the question as to whether a further resolution was necessary. They reasoned that the prohibition on the use of force was a peremptory norm of customary international law and, as such, also a part of U.K. law and therefore within the common law jurisdiction of the court. They argued that, as the case raised a pure question of law and did not require a consideration of policy by the court, the matter was justiciable. The High Court expressly declined to adjudicate the matter. In the U.S. case of *Doe v.* Bush No 03-1266 (1st Cir. March 13 2003) a group of Plaintiffs, including four anonymous U.S. soldiers and six members of the House of Representatives, challenged the authority of the President and the Defence Secretary to

the United States the issue falls firmly within the "political question" exception to what is traditionally justiciable.[5] In this country the courts have also historically deferred to the government in its conduct under its prerogative powers of foreign policy.[6] Nor could there be any challenge to this act of war in the International Court of Justice.[7] Yet there has surely been no more important or far-reaching issue of law for many years.

The very importance of the issue makes the topic especially daunting. All the more so as I, as a common lawyer, do not pretend to any specialist expertise in international law. The issue is also clouded by the various and often shifting justifications which have been given for the armed invasion. This means that the legal analysis has to range widely, if it is to confront all the variously stated reasons for going to war.

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wage war on Iraq, absent a clear declaration of war by the United States Congress. The court dismissed the suit under the doctrine of ripeness, holding that it was too soon to consider the issue as the war had not yet commenced.

[5] *Colegrove v. Green* 66 S. Ct. 1198. Under the "political question doctrine" courts will not decide questions that have either been constitutionally committed to another branch of government, or that are inherently incapable of judicial resolution. Matters of foreign policy are almost always non-justiciable under this doctrine (*Baker v. Carr* 32 S. Ct. 691). However, the political question doctrine is notoriously difficult and courts have not always taken the same approach on the justiciability of war powers. Compare *Berk v. Laird*, 429 F.2d 302, 306 (2d Cir. 1970) and *Dellums v. Bush*, 752 F. Supp. at 1150 with *Holtzman v. Schlesinger*, 484 F.2d 1307, 1309-11 (2nd Cir. 1973) and *Ange v. Bush*, 752 F. Supp. at 512.

[6] *Council of Civil Service Unions and Others v. Minister for Civil Service* [1985] AC 374. There are some traditionally non-justiciable areas that are now considered by the courts. These include the power to issue a passport (*R v. Secretary of State for Foreign and Commonwealth Affairs ex parte Everett* [1989] 1 QB 811) and the prerogative of mercy (*R v. Secretary of States for the Home Department ex parte Bentley* [1994] QB 349). Furthermore, the development of the public law doctrine of legitimate expectations now permits a limited consideration of the exercise of a discretion to exercise a prerogative power, such as the provision of diplomatic and consular assistance to British nationals abroad (*R (Abbassi) v. Secretary of State for Foreign and Commonwealth Affairs* [2003] UKHRR 76). However, the extent to which courts will consider matters of national security continues to be very limited and great weight is given to the views of the executive (*Home Office v. Rehman* [2001] 3 WLR 877, per Lord Steyn at 889). Foreign policy matters and the deployment of the armed forces are not justiciable at all (*R (Abbassi) v. Secretary of State for Foreign and Commonwealth Affairs*; *R (CND) v. Prime Minister and Secretaries of State*, *supra*, note 4).

[7] As the I.C.J. can only adjudicate cases in which the parties have a sufficient legal interest (Ethiopia and Liberia v. South Africa (*South West Africa Case*), Second Phase, (1966) ICJ Reports 6), Iraq is the only state with *locus standi* to bring such a case. Iraq never signed the optional clause acceding to the compulsory jurisdiction of the I.C.J. and in any case has no independent government with sufficient standing to bring a case. Furthermore, the U.S. revoked their signature to the optional clause in 1986. The U.K. is the only relevant state which is a current signatory to the optional clause.

The principles underlying international law are not recognisably different to those which exist in all civilised legal systems. They seek to foster liberty, promote equality of participation, and to set boundaries to the pursuit of self-interest. As with any system of law there are restraints and sanctions to protect the community, including the use of force as a last resort.

In achieving these objectives in international law it is obviously necessary in particular to restrain the actions of the most powerful nations. The founding fathers of the United States knew, and indeed relied upon, their reading of Emer de Vattel, writing in the middle of the eighteenth century, that in international law:

> "Strength or weakness, in this case, counts for nothing. A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom".[8]

Thus it is not surprising that the underlying purposes of international law are to ensure equal treatment and, where appropriate, to protect the weak against the strong just as our own national systems of law seek to do domestically. This was particularly significant in the case of the United Nations Charter which was negotiated against a background of the ruthless and unjustified invasion of smaller states by Germany, Japan and the Soviet Union. Not surprisingly respect for sovereignty and constraints on the unilateral use of armed force were uppermost in the minds of the founders.

May I just briefly touch on a threshold argument that some who describe themselves as practical realists would advance. What, they would say, is the point of traversing old ground? The war in Iraq, so bravely and searingly chronicled by brave journalists and able political commentators, now lies in the past. It may have inflicted heart-rending casualties but at least it was short. The Iraqis should

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[8] Emer de Vattel, *Le Droit des Gens* (Leiden, 1758) translated in *The Law of Nations* (Washington, Carnegie Institution Washington, 1916), p.7, as quoted in Gerald Stourzh *Alexander Hamilton and the Idea of Republican Government* (Stanford, Stanford University Press, 1970), p.134.

think themselves fortunate that the indisputably vile regime of Saddam Hussein was at last driven from power. In time there will be an Iraqi government to replace the outgoing regime and to introduce democracy to that country; the country may be unstable now, but we have to see it through. So what is the point of raking over the embers?

Such appeals to so-called reality command in my view a swift and simple riposte. International law, like the common law, is founded upon precedent. A bad precedent should not be allowed to stand. This U.S. led action was aimed at nullifying a rogue state. But the United States have identified other rogue states as being part of what they regard as "the axis of evil". These states were identified as North Korea and Iran by President Bush in his "State of the Union" speech in 2002.[9] Moreover, the United States has since identified Syria, Cuba and Libya as being a threat.[10] So it becomes especially important to weigh up now whether the precedent is sound. In turn this engages the larger geo-political question of the extent to which the United Nations and other international institutions such as the European Union can act as a check on the hegemony of the Unites States.

The U.S. and Multilateralism

I do not use the word "hegemony", or as a former French Foreign Secretary would say "hyper-puissance", in a perjorative sense.[11] We all owe a remarkable debt, which it is right in time of widespread criticism of the United States we should acknowledge, to the commitment of that remarkable country to a pursuit of world order and peace. This is particularly so since the end of the Second World War.

In marked contrast to the isolationism which followed the First World War, the United States played a visionary role in creating the institutions forged at the end

[9] "States like these, and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world." President George W. Bush, State of the Union speech before Congress, 29 January 2002.
[10] "In addition to Libya and Syria, there is a threat coming… [from] Cuba." U.S. Under Secretary of State John Bolton, *"Beyond the Axis of Evil: Additional Threats from Weapons of Mass Destruction"*, Remarks to the Heritage Foundation, Washington DC, 6 May 2002.

of the Second World War. Let us recall some of their greatest contributions. The Bretton-Woods agreement with the creation of the International Monetary Fund and the World Bank, and above all the commitment of President Roosevelt to the creation of the United Nations. The drive with which his widow, Eleanor, as the first U.S. ambassador to the United Nations, shaped the Declaration of Human Rights, which in turn was the inspiration for our own great European Convention of Human Rights. The vision of General Marshall in financing the reconstruction of a Europe broken and bankrupted by war, so creating the framework from which far-sighted leaders of France and Germany could seek a historic reconciliation through binding economic ties. The preservation through NATO of the security of Europe against the ambitions of the former Soviet Union. Far flung conflicts to restrain perceived aggression, such as in Korea or, more misguidedly, in Vietnam. The retaking of Kuwait from the invasion by Saddam just over a decade ago.

In all this the United States was obviously acting out of enlightened self-interest, but laced with a strong element of idealism. Some of its views and actions were not always palatable to our country. It encouraged the dismantling of our remaining empire, and undermined our unlawful and disreputable Suez adventure. In all these actions it was, generally, a standard-bearer for democracy and the rule of law. These ideals have prevailed in countries as distant from each other as Spain, Portugal and the former Soviet Union and its satellites. Thomas Jefferson's "Empire of Liberty" stretches more widely than ever before.

It is perhaps no accident that in these sixty years of remarkable achievement the United States was committed to the principles of multilateralism. During the Cold War the concept of the preservation of "the West" against the Soviet Union demanded a close-knit engagement with Europe. But there were always currents of thought in the U.S. which instinctively shied away from an institutional approach and believed that the United States should pursue more closely defined

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[11] Robert Kagan, *Paradise and Power: America and Europe in the New World Order* (London, Atlantic, 2003), p.43.

national interest.[12] The end of the Cold War, and with it much of the justification for multilateralism, gave impetus to these views. The refusal to ratify the Kyoto Convention on the environment, or to participate in the International Criminal Court, and indeed the withdrawal from the Anti-Ballistic Missile Treaty are all illustrations.[13] The U.S. now feels freer of constraint to act in what it considers to be its own best interests regardless of the views of other countries. It sees itself, too, and rightly so, having in many ways wider responsibilities than any other countries for upholding order whether in Asia or in the Middle East. These are not responsibilities which Europe can fulfil. The U.S. has continued to commit more than 3% of its GDP to defence notwithstanding the end of the Cold War, whereas Europe in pursuing the peace dividend has allowed its defence spending to fall below 2%. The U.S. military budget is about double that of the other NATO countries put together.[14] On this basis the disparity of power will grow.

All this is brilliantly brought out in a short and remarkable book by Robert Kagan called “Paradise and Power”.[15] He points out cogently that the differing perspectives of Europe and the United States reflect the military weakness of Europe as compared with the power of the United States. For the weaker Europe negotiation, diplomacy and international law are the only ways in which their aims can be achieved. As he puts it: “For Europeans the U.N. Security Council is a substitute for the power they lack”.[16] By contrast for the United States it is a potential restraint on its clear ability to act alone to preserve its national interest.

This dichotomy, which the events leading up to the Iraq war so graphically highlighted, means that some wring their hands and ask whether anything can be done to build checks and restraints on the United States. But this seems far from

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[12] For example: “The U.N. has become a trap. Let's go it alone." U.S. Senator Robert Taft, quoted by Rep. James B. Utt, *Congressional Record House,* 15 January 1962.
[13] The United States is a signatory to the Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997) but has never ratified it. The U.S. signature to the Rome Statute of the International Criminal Court (1998) was formally renounced on 6 May 2002, and the United States formally withdrew from the Anti-Ballistic Missile Treaty (1972) on 13 December 2001.
[14] “[The U.S.] spends 3% of its GDP on its armed forces, France and Britain around 2.5%, Germany just 1.6%.” *“Undermining NATO?”* The Economist, 1 May 2003.
[15] Kagan, *supra*, n.11.
[16] *Ibid*, at p.40.

easy. The Economist has recently pointed out that the American population is growing faster and getting younger whilst the European population declines and steadily ages.[17] The economic consequences of this obviously favour the United States. The Economist has summarised it in these terms: "The long-term logic of demography seems likely to entrench America's power and to widen existing transatlantic rifts", providing a gloomy "contrast between youthful, exuberant, multi-coloured America and ageing, decrepit, inward-looking Europe". All of which means that we have to rely on the acceptability of evolving international law together with the underlying liberal democratic values of the United States for a check on neo-conservative, supremacist tendencies. There is, too, a growing realisation within the U.S. that they cannot, and do not want to, undertake the task of policing the world alone. In practical terms, the difficulties inherent in the long-term occupation of a country highlights the need to engage other states and multilateral institutions. The cost of war is much higher if pursued unilaterally, as are the costs of reconstruction.[18] The need for wider participation in peace-keeping and the value of United Nations involvement is now belatedly being realised.

The Basis for the Invasion of Iraq

How do the rival arguments for the invasion of Iraq stand up? This demands particularly close analysis. In part, as I have already mentioned, this is because different arguments were advanced at different times for the waging of war. At one time it appeared that reliance was placed on an imminent threat of the use of weapons of mass destruction by Saddam Hussein on the U.S. or its allies. Indeed, the now notorious government dossier of 24 September asserted: "his military planning allows for some of the W.M.D. to be ready within 45 minutes of an order to use them… Unless we face up to the threat…we place at risk the lives

[17] *"Half a billion Americans?"* The Economist, 22 August 2002.
[18] The overall military cost of Iraq, on the assumption of a four-year occupation, has been estimated at $150 billion. Reconstruction costs are more uncertain but could rise to the same figure. This cost would be more greatly shared if there were wider international support. In 1999 the coalition to liberate Kuwait orchestrated by President Bush funded 80% of the overall costs. See Leal Brainard and Michael O'Hanlon, Financial Times, 6 August 2003.

and prosperity of our own people."[19] Later emphasis was placed on the importance of bringing humanitarian relief against dictatorship to the people of Iraq.[20] Jack Straw stated: "For over two decades, Saddam Hussein has caused a humanitarian crisis in Iraq and one which at least equals Milosevic's worst excesses… Saddam has waged a war, but a hidden one, against the Iraqi people."[21] Yet later, the focus became the desirability of liberating that country and giving it the opportunity of democratic government.[22] In a joint statement in April George Bush and Tony Blair stated: "After years of dictatorship, Iraq will soon be liberated. For the first time in decades, Iraqis will soon choose their own representative government… We will create an environment where Iraqis can determine their own fate democratically and peacefully."[23]

What became totally clear was that the United Nations would not approve the invasion of Iraq, at any rate until the weapons inspectors had been given a significantly greater time to find out whether Iraq currently possessed such weapons of mass destruction. So in March the United States and its allies withdrew their proposed resolution seeking approval for the use of force, because they knew the majority of the Council would reject it, including Russia, Germany and France. They had to find some other way of justifying their action in

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[19] *Iraq's Weapons of Mass Destruction: The Assessment of the British Government* (London, The Stationary Office Ltd, 2002), p.7: "The policy of the United Kingdom Government … is related to the threat which the Saddam Hussein regime poses to the rest of the world. And that threat comes from its unlawful, unauthorised, wilful possession and development of weapons of mass destruction." Jack Straw, interview on B.B.C. Radio 4, 13 September 2002.

[20] This was never wholly explicitly put forward as a legal justification. "The nature of Saddam's regime is relevant… because Saddam has shown his willingness to use [weapons of mass destruction]… let us.… not forget the 4 million Iraqi exiles, and the thousands of children who die needlessly every year due to Saddam's impoverishment of his country… [and the] tens of thousands imprisoned, tortured or executed by his barbarity every year." Tony Blair, H.C. Deb. 25 February 2003 c130; "[This] is a war against Saddam because of the weapons of mass destruction that he has, and it is a war against Saddam because of what he has done to the Iraqi people." Tony Blair, interview with the B.B.C. World Service, 4 April 2003.

[21] Jack Straw, Newspaper Society Annual Conference Speech, 1 April 2003.

[22] This was also not put forward explicitly as a legal justification. "We know that most Iraqis want to see political change in their country… The U.K. wants to help Iraq to achieve this. If we are obliged to take military action, our first objective will be to secure Iraq's disarmament. But our next priority will be to work with the United Nations to help Iraqi people recover from years of oppression and tyranny, and allow their country to move towards one that is ruled by law, respects international obligations and provides effective and representative government." Jack Straw, International Institute of Strategic Studies Speech, 11 February 2003.

[23] Tony Blair and George W. Bush, joint statement on Iraq, 8 April 2003.

international law. So they fell back on the 12-year-old Resolution 678 of 1990 passed for the purpose of authorising the expulsion of Saddam Hussein from Kuwait and the restoration of peace in the Middle East.[24] An old resolution passed for a more limited purpose was ingeniously used as a cloak for the very action which the United Nations would not currently countenance. To a common lawyer, taking such a tortuous route to avoid the clear, current wish of the United Nations seems, as Professor Robert Skidelsky has put it, "straining at a gnat".[25] But it was seriously advanced and needs consideration in a little detail.

The Facts

What are the facts on which the government relied? I shall not spend time on the so-called "dodgy" dossier of February 2003. It seems to have been conceived in desperation, based on an old PhD research paper generated from the Internet. It richly warranted Jack Straw's frank admission that it was "Horlicks". What I shall focus on is the government dossier of 24 September 2002 and the assessment by the two very experienced U.N. weapons inspectors, Dr. Hans Blix and Dr. Mohamed El Baradei. The dossier contained the 45 minutes claim. There is no doubt that this led to the widespread impression that our country could be attacked on 45 minutes notice.[26] We now know that this was simply wrong. The claim should have applied only to the deployment of battlefield munitions. Yet the government did nothing to dampen down the concern they created. Perhaps one

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[24] *Supra*, note 2. It was also suggested by the United States that they were acting under their inherent right to self-defence in international law. "Whereas Iraq's demonstrated capability and willingness to use weapons of mass destruction, the risk that the current Iraqi regime will either employ those weapons to launch a surprise attack against the United States or its Armed Forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its citizens from such an attack, combine to justify action by the United States to defend itself." Preamble to the Authorisation for Use of Military Force Against Iraq Resolution of 2002 (H.J. Res. 114).

[25] Robert Skidelsky, *"The American Contract"*, Prospect Magazine, July 2003.

[26] "The dossier was for public consumption and not for experienced readers of intelligence material. The 45 minutes claim, included four times, was always likely to attract attention because it was arresting detail that the public had not seen before…The fact that it was assessed to refer to battlefield chemical and biological munitions and their movement on the battlefield and not to any other form of chemical or biological attack, should have been highlighted in the dossier. The omission of the context and assessment allowed speculation as to its exact meaning. This was unhelpful to understanding the issue." Report of the Intelligence and Security Committee, *"Iraqi Weapons of Mass Destruction"*, September 2003, p.27.

day we will be told why they allowed it to start. In as far as the Parliamentary Intelligence and Security Committee has said: "Saddam Hussein was not considered a current or imminent threat to mainland U.K."[27]

The whole thrust and purpose of the dossier at the time was to persuade us that Saddam Hussein's continuous breaches of U.N. resolutions called for further action by the international community. It acknowledged the success of weapons inspections between 1991 and 1998 in identifying and destroying very large quantities of chemical weapons and associated production facilities. It claimed that there had been an increase in capabilities to produce such weapons since 1998, but also acknowledged that these facilities are capable of dual use for petrochemical and biotech industries. It did not suggest that a nuclear threat is less than a minimum of one or two years away.

What the dossier does not contend is also of some importance. It does not suggest that Iraq has current links with Al Qaeda nor with the terrible assault on the U.S. of the 11 September 2001. Nor does it suggest that Saddam has any present motive for launching an attack on any of his neighbours or any current intent to do so. It fails to tell us that the Joint Intelligence Committee had advised that an invasion of Iraq might increase the threat from Al Qaeda.

The dossier concludes with an account of the tyrannical behaviour, in breach of all human rights, of Saddam to his own people and highlights some of the grisly Stalinesque details. It is sickening reading but no suggestion is made that we have not known about this for years, nor any explanation offered as to why action was not taken before. So the dossier may make out a case for a new U.N. resolution such as 1441, but it nowhere argues that in the absence of such international action there are reasons for the U.S. and the U.K. to go it alone.

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[27] *Ibid*, p.31.

Nor did the information change between September and the fateful week in March when the inspectors were recalled and we launched the invasion. On the contrary the authoritative reports of the weapons inspectors confirmed the prior assessment. In February 2003 Dr. Hans Blix reported to the U.N. that there were now more than 250 inspectors in Iraq and that although Iraqi cooperation had been less than full, access to sites had been promptly given on demand. No weapons had yet been found and there was as yet no firm evidence that they did or did not exist. He in no way suggested that there was a continuing build up. He clearly saw his task in searching for chemical and biological weapons as unfinished.[28] On the same day Dr. Mohammad El Baradei repeated that by December 1998 the I.A.E.A. had neutralised Iraq's past nuclear programme and had to date found no evidence of ongoing prohibited nuclear or nuclear related activities in Iraq.[29]

In summary the dossier and the later reports of the inspectors made out a convincing case that the U.N. should insist on continuing with inspections. But none of these facts made any case for the dramatic breaking off of inspections, disregarding the United Nations and invading another sovereign state with all the loss of life, civilian as well as military, destruction of infrastructure and internal occupation which followed. No wonder Kofi Annan said ahead of such action that it could not be in conformity with the U.N. Charter.[30] Which brings us to the Charter itself.

The Charter

The opening line of the preamble of the Charter, "[w]e the peoples of the United Nations, determined to save succeeding generations from the scourge of war…", reflects a central purpose of the treaty: to ensure international peace and security

[28] Hans Blix, Report to the Security Council, 14 February 2003.
[29] Mohammad El Baradei, Report to the Security Council, 14 February 2003.
[30] "[If] action is taken without the authority of the Council, then the legitimacy and support for that action will be seriously impaired." Kofi Annan, Secretary-General's press conference, Brussels, 17 February 2003.

through collective action. The Charter seeks to achieve this by outlawing the unilateral use of force except in self-defence, resolving international disputes by peaceful means, promoting cooperation in solving international economic, social, cultural and humanitarian problems, and promoting respect for human rights.

The lynchpin of the Charter is Article 2(4) which prohibits the use or threat of force in international relations in the following terms: “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations Charter.” The Charter permits only two exceptions to the prohibition. The first is collective action authorised by, and only by, the Security Council acting under Chapter VII. The second is the inherent right to individual or collective self-defence as enshrined in Article 51 of the Charter. This strong protection against the invasion of one country by another reflects the understandable reaction against the horrors inflicted before, and during, the Second World War.

Thus Articles 41 and 42 in Chapter VII lay down both the non-forceful and, as a last resort, forceful measures that the Security Council may take to counter threats to international peace and security. If the Security Council decides that non-forceful measures under Article 41 are inadequate, Article 42 states that it may take “such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security”. Article 51 contains the sole, and limited provision, for one country or group of countries to go it alone without prior Security Council backing. It states that “Nothing in the … Charter shall impair the inherent right to individual or collective self-defence if an armed attack occurs against a Member of the United Nations.”

I suspect that there are a comparatively large number of people who are unclear as to the exact legal justification ultimately advanced by the government for invading Iraq. So it is worth stressing that when it came to the point the U.K. government based its case on, and only on, United Nations Resolution 678

passed as long ago as 1990, in conjunction with Resolution 1441 of 2002. There were other potential legal arguments which would have seemed to be more in harmony with the various political reasons advanced. In the end none of them would have stood up in law. But they are worth looking at to show why the government was driven to scrape the bottom of the legal barrel. These arguments, which merit brief consideration, are fivefold: self-defence, humanitarian intervention, implied authorisation, the unreasonable use of a Security Council veto, and a breach of Resolution 1441.

Self-Defence

There was a suggestion during the run up to war that we were going to invoke our right to self-defence.[31] This was the impression created by the 45 minutes claim. The right to self-defence is protected by Article 51 of the Charter.[32] The use of the word "inherent" in that Article indicates that it is the customary international law right of self-defence that is preserved.[33] That doctrine was formulated in the

[31] "It is right [to go to war] because weapons of mass destruction - the proliferation of chemical, biological, nuclear weapons and ballistic missile technology along with it - are a real threat to the security of the world and this country." Tony Blair, H.C. Deb. 15 January 2003 c682; "This resolution [1441] does not constrain any member state from acting to defend itself against the threat posed by Iraq, or to enforce relevant U.N. resolutions and protect world peace and security." Ambassador Negroponte, statement to Security Council, 8 November 2002; Preamble to the Authorisation for Use of Military Force Against Iraq Resolution of 2002 (H.J. Res. 114), quoted *supra*, n.24. However, arguments of self-defence were not in the end seriously advanced in the U.K. Although much time has been spent scrutinising the quality of the government dossiers on Iraq, this is not an issue required to be analysed here. It seems to be common ground that parts of the second dossier, published 3 February 2003, were plagiarised from a PhD thesis. This implies that the government only presented information to the public that they thought would justify the course of action they had chosen to take. "[T]he significance of intelligence lies not only in the information, be it empiric or uncorroborated conjecture, which it is thought fit to put into this or that document, but more importantly what interpretation is placed upon it… on the basis of the way in which whatever was said or written was presented, the British people obtained the distinct impression that the threat from Iraq was more massive and imminent than has since proved to be the case, or indeed may ever have been. There were other tenable reasons which could have been used to justify military force, but none which would have satisfied Parliament and the country as regards the necessity and legality of such action." Field Marshall Lord Bramall, letter to The Times, 1 July 2003.

[32] Article 51, Charter of the United Nations 1945. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

[33] *Nicaragua v. United States of America* ICJ Reports 1986 4, 94.

seminal case of *The Caroline* in 1841 when American Secretary of State Daniel Webster wrote that there must be a "necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation".[34] The element of necessity is to be determined by the claiming state. But once force has been initiated its legality must be assessed by an impartial body and not by the parties to the conflict.[35] The use of force in self-defence must always be proportionate, that is, in the words of Webster, involving "nothing unreasonable or excessive, since the act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it."[36]

Article 51 refers to the use of self-defence in the event of an "armed attack". This raises the question of when, if ever, a state may legally use self-defence in advance of an attack. There is a school of academic thought that considers that the wording of Article 51 precludes action in anticipation of an armed attack, or "anticipatory self-defence" as it is known.[37] Anticipatory self-defence was an accepted part of customary international law. But it maintained the high standard of necessity enunciated in *The Caroline.* It required a threat to be imminent before a defensive attack could be undertaken in anticipation of it.[38] So the question at

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[34] 29 BFSP 1137-38. During a Canadian rebellion against British rule in 1837 insurgents used an American ship to transport their supplies. In retaliation the British government sent a detachment of troops to capture the ship. The troops burned the ship and set it adrift causing the death of one man. It was during an exchange of conciliatory letters between the American Secretary of State Daniel Webster and Lord Ashburton in 1841 that the principles of self-defence were formulated.

[35] Myres McDougal and Florentino Feliciano, *Law and Minimum World Public Order* (London, New Haven Press, 1961), p.230; Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford, Clarendon Press, 1933), pp. 177-182; DW Bowett, *Self Defence in International Law* (Manchester, Manchester University Press, 1958), p.193; Judgement of the International Military Tribunal at Nuremberg, 1946, 1 TRIAL OF GERMAN MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 208 (1947).

[36] *Supra*, n.33.

[37] Hans Kelsen, *The Law of the United Nations* (London, Stevens, 1950), pp.269, 787-789; Ian Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1961), p.275; Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford, Oxford University Press, 1994), p.676. For the opposite view see Bowett, *Self-Defence in International Law*, *supra*, n.34, pp.187-193; Stephen Schwebel *"Aggression, Intervention and Self-Defence in Modern International Law"* (1972-II) 136 Hague Rec 411, 479; MacDougal and Feliciano, *supra*, n.34, p.231-241.

[38] The *Caroline Case*, *supra*, n.33, was itself an example of anticipatory self-defence. The International Military Tribunal for the Far East (1948) 994 found that the declaration of war on Japan by the Netherlands in 1941 was a legitimate act of self-defence in response to an imminent Japanese attack on the Dutch East Indies.

the heart of the debate is whether Article 51 qualifies or restricts the wide scope of the customary law doctrine of self-defence.[39]

Those who argue for a restrictive interpretation point out that anticipatory self-defence is contrary to the wording of Article 51 as well as to the objects and purposes of the Charter. The imminence of an attack cannot usually be easily assessed on objective criteria. So the decision whether to undertake such an attack would be left to the individual state's discretion and this contains a manifest risk of abuse.[40] Those who take the contrary view point out cogently that the relinquishment or restriction of a right in international law should not be presumed. So the mention of “armed attack” in Article 51 does not necessarily mean a state cannot act to forestall an imminent attack upon it.[41] The French text, too, may be slightly wider when its speaks of “agression armée”.

The capacity of modern weaponry equips many states with the capability to strike almost without warning and with devastating consequences. So the better, and more realistic, view is that the Charter does not prohibit the use of anticipatory self-defence in all circumstances.[42] The requirements of necessity and proportionality in these cases are obviously even more stringent than when an attack has actually been launched.

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[39] The customary law doctrine of self-defence is very wide, arguably including more controversial rights such as the protection of nationals abroad, and the protection of certain vital economic interests. Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford, Oxford University Press, 2002), p.790.

[40] This interpretation of the effect of Article 51 was also adopted by the International Court of Justice in *Nicaragua v. United States of America*, *supra*, n.32, 103: "in the case of individual self-defence, the exercise of this right is subject to the state concerned having been the victim of an armed attack. Reliance on collective self defence of course does not remove the need for this."

[41] Schwebel, *supra*, n.36.

[42] Jennings and Watts (eds) *Oppenheim's International Law*, 9th ed, (Harlow, Longman, 1992), pp.421-2. See also Schwebel, *supra*, n.36, 481: "Perhaps the most compelling argument against reading Article 51 to debar anticipatory self-defence whatever the circumstances is that, in an age of missiles and nuclear weapons, it is an interpretation that does not comport with reality." Although this pragmatic approach is necessary in today’s world, its dangers should not be forgotten. The Brezhnev doctrine was a derivative of self-defence and resulted in the annexations of Czechoslovakia in 1968 and Afghanistan in 1979. It is crucial that the boundaries of self-defence are fiercely drawn or there is an unacceptable potential for abuse.

A newer, and much more controversial, development in international law is the doctrine of pre-emptive self-defence, advocated by the Bush administration in their "National Security Strategy of the United States" in 2002.[43] This doctrine is broader than anticipatory self-defence and seeks to adapt the concept of "imminent threat" in order to counteract the dangers posed by rogue states and international terrorists.[44] This is a development that troubles many international lawyers as the removal of the "imminent threat" criterion lowers the threshold for the use of unilateral military action and may lead to the escalation of violence in already volatile situations.[45] In some circumstances regime change is a corollary of pre-emptive self-defence, and obtaining a new regime in Iraq has been an official part of U.S. foreign policy since 1998.[46] Most states strongly oppose these developments believing rightly that such policies pose too great a threat to state sovereignty. With such great international opposition the policy of one state is not sufficient to create a valid rule of international law. Neither regime change nor pre-emptive self-defence can provide a legal justification for the use of military force in Iraq. Nor, as I understand it, was it suggested in the end that it could.

Humanitarian Intervention

The idea of humanitarian intervention has strong, understandable and emotional support. Humanitarian intervention has been a notoriously controversial doctrine

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[43] *National Security Strategy of the United States* (Washington DC, The White House, 2002).
[44] "We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries", *ibid*, p.19. This is because "the nature of what [terrorists] do makes it difficult to apply the imminent threat criterion" meaning that for sake of security past practice and knowledge of a threat will suffice. (James Steinberg, quoted in The Washington Lawyer, January 2003).
[45] Rogue states, unlike terrorists, can be deterred from unwanted behaviour by other means, including economic and diplomatic pressure. The Washington Lawyer, January 2003, p.26.
[46] Iraq Liberation Act (Public Law 105-338, 1998); Authorization for the Use of Military Force Against Iraq (Public Law 107-243, 2002). W. Michael Reisman, *"Assessing Claims to Revise the Laws of War"* 97 AJIL 82. However, regime change has never been part of British foreign policy, nor was it submitted by the British government as a valid legal justification for war: "is the focus of this international coalition which we hope to put together regime change? Is that the objective of the United Nations Security Council resolution? No. The whole focus is on the disarmament of Saddam Hussein's weapons of mass destruction." Jack Straw, interview on B.B.C. Radio 4, 12 October 2002; "I have never put the justification for action as regime change. We have to act within the terms set out in resolution 1441 - that is our legal base." Tony Blair, statement to the House of Commons, 18 March 2003.

since it was first advocated by Grotius in the seventeenth century.[47] But the prohibition on the use of force in Article 2(4) makes it very unlikely that any customary international law right of unilateral humanitarian intervention survived the Charter.[48] By contrast under the auspices of the United Nations there have been several instances of multilateral intervention on humanitarian grounds. These operations were authorised by the Security Council exercising their powers under Chapter VII to counter threats to international peace and security. The relief of famine in Somalia in 1992, the intervention in the Rwandan genocide in 1994, and humanitarian operations in East Timor in 1999 are all examples of this.[49] Outside of the United Nations state practice reveals few clear-cut examples of humanitarian intervention before 1990. India's intervention in East Pakistan in 1971, Vietnam's overthrow of the Khmer Rouge in Kampuchea and Tanzania's ousting of the regime of Idi Amin in Uganda in 1979 all resulted, in fact, in humanitarian relief. All three states however, preferred to justify their action in terms of self-defence.[50] Likewise U.S. led interventions in Grenada in 1983 and in Panama in 1989 cited humanitarian concerns as reasons for action, although it was not suggested that these concerns were sufficient legal justifications.[51] Since 1990 there have been three occasions on which states have considered humanitarian considerations to be a justification for the use of force. These were the intervention of ECOWAS in the civil war in Liberia in 1990, the imposition of safe havens and no-fly zones by the U.S., the U.K. and France to protect Iraq's ethnic minorities in the aftermath of the first Gulf war; and NATO's bombing

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[47] Hugo Grotius, quoted in M.D.A. Freeman *Lloyd's Introduction to Jurisprudence* (London, Sweet & Maxwell, 1994), 6th ed, p.99.

[48] Brownlie, *supra*, n.36, pp.338-342; Natalino Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity* (Boston, Hingham, 1985), p.108; Lori Fisler Damrosch in Damrosch and Scheffer (eds), *Law and Force in the New International Order* (Oxford, Westview, 1991). Examples cited in academic works of a pre-Charter practice of humanitarian intervention include France, Russia and the U.K.'s intervention in the Ottoman Empire to protect the Greeks in 1827 and to protect the Christians in Lebanon in 1860. See Istvan Pogany (1986) 35 ICLQ 182.

[49] S/RES/794 (1992) (Somalia); S/RES/918 (1994) (Rwanda); S/RES/1264 (1999) (East Timor).

[50] India justified its action on the basis of self-defence following border incidents with East Pakistan and a massive influx of refugees. It also cited humanitarian reasons and the right to self-determination. Vietnam based its action on a tenuous argument of self-defence on the basis of border incidents. It also cited humanitarian intervention as a justification. Tanzania based its action on self-defence alone and did not use humanitarian justifications. Ronzitti, *supra*, n.47; Tom Farer, *"An Inquiry into the Legitimacy of Humanitarian Intervention"* in Damrosch and Scheffer (eds) *supra*, n.47.

campaign in Serbia in 1999 to bring a halt to ethnic cleansing in Kosovo.[52] The international response to such initiatives has been mixed. Liberia's intervention was retrospectively approved of by the Security Council in Resolution 788 of 1992. The Coalition in Iraq received little outright condemnation, but there was also little international support for the legality of the action. NATO's action was hotly contested by several states, and caused the International Court of Justice to express concern.[53] In the United Kingdom, the Foreign Affairs Committee concluded that: "NATO's military action, if of dubious legality in the current state of international law, was justified on moral grounds."[54]

This examination of state practice reflects an evolving human rights culture in international law. This is reflected in the proliferation of treaties and international judicial forums designed to protect and enforce those rights. Some states, including the United Kingdom, are taking a more expansionist and interventionist

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[51] Ruth Wedgewood, *"Unilateral Action in a Multilateral World"* in Forman and Patrick (eds) *Multilateralism and U.S. Foreign Policy: Ambivalent Engagement* (London, Lynne Rienner, 2002).

[52] ECOWAS cited four justifications for their actions: (i) the need to stop the large-scale killing of civilians; (ii) the need to protect foreign nationals; (iii) the need for a regional organisation to protect international peace and security in the region; (iv) the need to restore a measure of order to an anarchic state. Final Communique of the ECOWAS Standing Committee and the Committee of Five, paras 6-9, quoted in David Wippman, in Damrosch (ed) *Enforcing Restraint: Collective Intervention in Internal Conflicts* (New York, Council of Foreign Relations Press, 1993). The coalition in Iraq justified its action in part on S/RES/688 (1991) condemning Iraqi repression of its civilian population, and also by reference to humanitarian considerations. "We operate under international law… International law recognises extreme humanitarian need… We are on strong legal as well as humanitarian ground in setting up this 'no-fly zone'". Foreign Secretary Douglas Hurd, B.B.C. Radio 4's *Today* programme, 19 August 1991. NATO expressly cited humanitarian intervention as a justification for its action. "Our legal justification rests upon the accepted principle that force may be used in extreme circumstances to avert a humanitarian catastrophe." Defence Secretary George Robertson, H.C. Deb. 25 March 1999 c616-617; "Belgium in particular, felt obliged to intervene to forestall an ongoing humanitarian catastrophe… The purpose of NATO's intervention is to rescue a people in peril, in deep distress." *Serbia and Montenegro v. Belgium*, Belgian Oral Pleading, Verbatim Record, 10 May 1999.

[53] Russia, China, The FRY, Namibia, Brazil, Cuba, Belarus, Ukraine, India and Mexico expressed their disapproval of NATO action in Kosovo as being unlawful. Furthermore, Slovenia, Malaysia, Argentina, Bahrain, Gabon, Gambia, Costa Rica, Iran and Albania emphasised the central role of the Security Council in authorising the use of force. 4011th Security Council Meeting, 10 June 1999. The International Court of Justice stated that: "the Court is profoundly concerned with the use of force in Yugoslavia… the Court deems it necessary to emphasise that all parties appearing before it must act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law." *Serbia and Montenegro v. Belgium*, Request for Indication of Provisional Measures, Order of 2 June 1999, paras.17, 19.

[54] Fourth Report from the Foreign Affairs Committee, *Kosovo*, Session 1999-2000, para.138. The Government responded that it: "is… satisfied that it [the war in Kosovo] was legally justified." Fourth Report from the Foreign Affairs Committee, Session 1999-2000, *Kosovo*, Response of the Secretary of State for Foreign and Commonwealth Affairs, August 2000, p.8.

approach to international law.[55] The F.C.O. has lain down guidelines in the hope of building an international consensus as to when a state should intervene in the affairs of another sovereign state on humanitarian grounds. One of these principles is that:

> "When faced with an immediate and overwhelming humanitarian catastrophe and a government that has demonstrated itself unwilling or unable to prevent it, the international community should take action."[56]

These developments suggest that a doctrine of humanitarian intervention may be developing. It is however clear that any such legal doctrine is still evolving. The growing sympathy for such a right should surely shape the actions of the U.N. rather than leaving individual states to apply their own judgement of when they should intervene.

The humanitarian situation in Iraq in March 2003, grim though it was for the Iraqis, was not claimed by the government to amount to an "overwhelming humanitarian catastrophe" as required by the F.C.O. criteria. Even if a right to humanitarian intervention had developed in international law, it would not have applied to Iraq any more than to any of the arbitrary tyrannies which sadly still exist. There are many who consider that, when it comes to removing Saddam Hussein, the end justified the means, indeed, would justify almost any means. This instinct is all too understandable. But surely it would be a most dangerous path to embark on. Careful criteria would need to be established to ensure that the oppressed are liberated in all cases of need, regardless of whether their state is rich in oil or diamonds. We must be careful when celebrating the demise of Saddam Hussein not to create a dangerous precedent in which any unilateral military action may be

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[55] Tony Blair, *"Doctrine of the International Community"*, Economic Club, Chicago, 24 April 1999: "We are all internationalists now, whether we like it or not… We cannot turn our backs on conflicts and the violation of human rights within other countries if we want still to be secure… We are witnessing the beginnings of a new doctrine of international community… the principle of non-interference must be qualified in important respects."

[56] *Human Rights*, F.C.O. Annual Report 2001, (London, The Stationary Office Ltd, 2001), p.138.

condoned when one of its consequences happens to be humanitarian relief.[57] It is United Nations decisions and their implementation which should be the rock on which the international community sets its feet when it intervenes on humanitarian grounds.

Implied Authorisation

It is sometimes argued that the existence of Security Council approval to use force can be implied from prior Security Council decisions without having to obtain explicit permission. Advocates of this approach argue that it is politically convenient because it enables states to act at times when minimum world order requires that action be taken, but there are geopolitical factors in play which prevent express Security Council authorisation.[58]

In practice, there have been several instances when states have relied on arguments of this kind. These include: India's seizure of Goa from Portugal in 1961;[59] the U.S. interdiction of ships on route to Cuba in 1962;[60] the protection of safe-havens and enforcement of no-fly zones by the U.S. led coalition in Iraq in 1991;[61] and most recently, NATO's campaign in Kosovo in 1999. [62] Most of these

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[57] Furthermore, as Lord Wright notes in his letter to The Times: "There is no doubt that these discoveries [of mass graves] apparently of Iraqis slaughtered by Saddam Hussein's regime shortly after the 1991 Gulf War, add further confirmation, if confirmation were needed, of the appalling nature of Saddam Hussein's tyranny, and might well be argued to be justification for taking action against Iraq at that time. But they do not, in my view, affect the repeated claims of the British Government that the sole aim of the present coalition against Iraq was to remove Iraq's weapons of mass destruction – none of which have been found." Patrick Wright, Head of HM Diplomatic Service 1986-1991, House of Lords.

[58] "There is a subtle interplay of politics that renders any demand for 'unambiguous authorisation' unrealistic." Anthony D'Amato, *"Israel's Airstrike on the Iraqi Nuclear Reactor"* 77 AJIL 584, 586.

[59] India argued that it was enforcing U.N. resolutions against colonialism. A draft resolution complaining of Indian aggression and demanding Indian withdrawal was vetoed by the Soviet Union, and another rejecting the Portuguese complaint failed to pass. "In these circumstances, Council silence suggests implied disapproval and not authorisation." Quincy Wright, *"The Goa Incident"* 56 AJIL 617, 629.

[60] The U.S. argued that it had implied Security Council authorisation to interdict ships on route to Cuba on the basis that the Council had not voted on a Soviet resolution disapproving the U.S. action and had encouraged a negotiated settlement. However, the Security Council also refrained from acting on a U.S. draft resolution that would have expressed approval of U.S. action.

[61] This action was based on S/RES/688 (1991), not passed under Chapter VII, calling on Iraq to end its repression of its civilian population. It was passed 10 votes to 3 (Cuba, Yemen, Zimbabwe) with 2 abstentions (China, India). The Secretary General criticised the coalition's action saying that Iraq's

instances have been strongly contested by other States.[63] The practice does not amount to a "constant and uniform usage practiced by the states in question" required to establish a customary norm in international law.[64]

A short examination of the implied authorisation argument reveals its fallacy. Firstly, it is inconsistent with the principles and purposes of the United Nations Charter. From reading Article 1 it is clear that the basic premise of the collective security system is that force should only be undertaken jointly and in the interests of the international community as a whole. A system that allows states to unilaterally decide when a use of force is or is not in the interests of the international community is dangerously vulnerable to abuse. The only way to ensure that military action is truly collective is if it is expressly authorised by the Security Council. But implicit authorisation would entail the interpretation of the words and actions of members of the Security Council said and done in a highly political context.[65] This is at best ambiguous, at worst a fig-leaf giving the powerful states *carte blanche* to act as they wish, justified by the creative interpretation of past Security Council practice.[66]

Secondly the Charter requires the Security Council to consider whether non-forceful measures would be an appropriate solution to the problem before authorising the use of force.[67] For force is a last resort. This requirement is

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consent was necessary for such consent to be legal (*Keesing's Record of World Events*, (1991), p.38126).

[62] This action was based the following resolutions, all taken under Chapter VII. S/RES/1160 (1998) noting a threat to international peace and security; S/RES/1199 (1998) expressing alarm "at the impending humanitarian catastrophe"; S/RES/1203 (1998) finding a threat to international peace and security arising from the situation in Kosovo. A draft resolution condemning NATO action was rejected 12 votes to 3 (Russian Federation, FRY, Namibia). Belgium stated before the International Court of Justice that: "as regards the intervention… Belgium takes the view that the Security Council's resolutions … provide an unchallengeable basis for the armed intervention." *Serbia and Montenegro v. Belgium*, Request for Provisional Measures, Oral Pleadings, 2 June 1999.

[63] Jules Lobel and Micheal Ratner, *"Bypassing the Security Council: Ambiguous Authorisations to Use Force: Cease-fires and the Iraqi Inspection Regime"*, 93 AJIL 124, 133.

[64] *Columbia v. Peru (Asylum Case)* (1950) ICJ Reports 266, 276-7.

[65] Lobel and Ratner, *supra*, n.62.

[66] Furthermore, as Christine Gray points out: "there is a serious risk that the Security Council will become reluctant to pass resolutions under Chapter VII condemning state action if there is a possibility that such resolutions might be claimed as implied justification for some regional or unilateral use of force." *International Law and the Use of Force* (Oxford, Oxford University Press, 2000), p.195.

[67] Articles 33, 41, 42 Charter of the United Nations (1945).

devalued, if not completely ignored, under the doctrine of implied authorisation. Some advocates of implied authorisation suggest that the failure of the Security Council to condemn an action is a tacit approval of it.[68] This is a similar argument to that advanced by the Attorney General that Resolution 1441 would have expressly stated if a further resolution was necessary for force to be authorised.[69] Given the veto power of the permanent five members this line of argument is unconvincing. It is also conceptually misconceived. It suggests that the Security Council must denounce an action in order to render it illegitimate. But this argument is an attempt to stand on its head the clear prohibition in Article 2(4) on the unilateral invasion of sovereignty.

Unreasonable Security Council Veto

In the debates before the war the Prime Minister several times suggested that an unreasonable use of the veto in the Security Council would somehow allow members of the United Nations to act unilaterally without express authorisation.[70] This is a variation of a theory, expressed in academic literature, that the inability of the Security Council to fulfil its collective security role restores the right of each member state to act unilaterally.[71] This concept has no basis in international law.[72] The use of the veto is a legitimate exercise of Security Council procedure under

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[68] For example the U.S. used this argument to justify their blockade on Cuba. Abram Chayes, *"Law and the Quarantine of Cuba"*, 41 Foreign Affairs 550, 556. D'Amato takes the argument further and argues that implicit support can even be derived from a Security Council resolution condemning an action so long as it does not impose sanctions: "It is often politically expedient for the community to condemn a forceful initiative in explicit terms, yet approve of it in fact by stopping short of reprisals against the initiator." Anthony D'Amato, *International Law: Process and Prospect* (New York, Transnational Publishers, 1987), p.78.

[69] *Supra*, n.2.

[70] "Of course we want a second resolution and there is only one set of circumstances in which I've said that we would move without one… that is the circumstances where the U.N. inspectors say he's not cooperating and he's in breach of the resolution that was passed in November but the U.N., because someone, say, unreasonably exercises their veto and blocks a new resolution [sic]." Tony Blair, B.B.C. Breakfast with Frost, 26 January 2003.

[71] Julius Stone, *Aggression and World Order* (London, Stevens, 1958), p.96: "any implied prohibition on Members to use force seems conditioned on the assumption that effective collective measures can be taken under the Charter to bring about adjustment or settlement "in conformity with the principles of justice and international law." It is certainly not self-evident what obligations (if any) are imported where *no* such effective collective measures are available for the remedy of just grievances." For the opposite view, see Ian Brownlie, *"Thoughts on Kind-Hearted Gunmen"* in Lillich (ed) *Humanitarian Intervention and the United Nations* (Charlottesville, University Press of Virginia, 1973), p.139, 145.

Chapter V of the Charter. The United Kingdom has itself used its veto 32 times since 1945.[73] A doctrine that enables one member to bypass the requirement of Security Council authorisation by unilaterally deeming a use of the veto to be unreasonable is dangerously subjective, and poses an unacceptable risk that the Security Council's monopoly on the authorisation of the use of force will be undermined.

Breach of Resolution 1441

Resolution 1441 was the freshest, and most immediate resolution in force at the time of the invasion. Yet there has been no suggestion that Resolution 1441 justified the invasion. Why? Because Resolution 1441 did not expressly authorise force.[74] The collective security system requires that the authority to use force, which is the most serious and deadly means of enforcement, can only be conferred by unambiguous means.[75] The graver the consequences, the clearer must be the words providing for them. No one has suggested that Resolution 1441 contains such clear language. Indeed a draft resolution containing the phrase "all necessary means", the diplomatic code for the authorisation of force, was rejected by members of the Security Council in early October 2002.[76] The parties to 1441 all recognised that there was no "automaticity" of consequences and that the issue would have to come back to the Council which was "to remain seized of the matter".[77] It was later suggested somewhat faintly that the "further consideration" mentioned in 1441 meant that there would simply be a report and a debate without the Security Council determining what the serious consequences should be. If that was so it is far from clear why the United States and our

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[72] "The Prime Minister's assertion that in certain circumstances a veto becomes "unreasonable" and may be disregarded has no basis in International Law." Bernitz *et al*, *supra*, n.3.
[73] Rabinder Singh, Legal Briefing Given to MPs, 12 March 2003.
[74] The Security Council diplomatic convention is to authorise force using one of the following phrases: "all necessary means" S/RES/678 (1990), S/RES/794 (1992), S/RES/940 (1994), S/RES/929 (1994); "all measures necessary" S/RES/770 (1993); and "all necessary measures" S/RES/1264 (1999).
[75] Lobel and Ratner, *supra*, n.62.
[76] U.S./U.K. Draft Security Council Resolution, leaked to the Financial Times, 2 October 2002. It was circulated to other Security Council permanent members but was never formally tabled.
[77] Ambassador John Negroponte, statement to Security Council, 8 November 2002; Ambassador Sir Jeremy Greenstock, statement to the Security Council, 8 November 2002; Joint statement by China, Russia and France, 8 November 2002.

government worked so hard to sponsor a second resolution to spell out the consequences of Iraq's failure to comply. It was only the realisation that a second resolution would not get through which led the U.S. and the U.K. to change tack and to look for some other basis in international law which allowed them to invade Iraq. They alighted upon Resolution 678. It was their only lifeline. For it is recognised that nothing short of a statement of the right to use "all necessary means" or "all necessary force" would be sufficiently unambiguous as to allow the extreme step of engaging in armed hostilities or invasion.[78] None of the subsequent resolutions, including 1441, gave such a mandate.

Does Resolution 678 Justify the Invasion of Iraq in 2003?

There has been a long-standing tradition that our government rarely, if ever, discloses the advice of the Attorney-General or indeed, whether he has advised at all.[79] But on this occasion, in a Parliamentary Answer, Lord Goldsmith Q.C. published his advice in summary form. Because of its importance and its brevity it is convenient to set it out in full:

> "Authority to use force against Iraq exists from the combined effect of Resolutions 678, 687 and 1441. All of these resolutions were adopted under Chapter VII of the U.N. Charter which allows the use of force for the express purpose of restoring international peace and security:
> 1. In Resolution 678 the Security Council authorised force against Iraq, to eject it from Kuwait and to restore peace and security in the area.
> 2. In Resolution 687, which set out the ceasefire conditions after Operation Desert Storm, the Security Council imposed continuing obligations on Iraq to eliminate its weapons of mass destruction in order to restore

[78] *Supra*, n.73.
[79] Whether or not to disclose the opinions of the Law Officers is a matter of discretion on the part of the Government. There is no obligation to divulge such advice as to do so might inhibit the frankness and candour with which the advice was given, or cause a Law of Officer to be criticised for a policy for which the Minister is rightly responsible (see John Ll. J. Edwards, *The Law Officers of the Crown: a study of the offices of the Attorney General and the Solicitor General, with an account of the office of the Director of Public Prosecutions in England* (London, Sweet & Maxwell, 1964).

international peace and security in the area. Resolution 687 suspended but did not terminate the authority to use force under Resolution 678.

3. A material breach of Resolution 687 revives the authority to use force under Resolution 678.

4. In Resolution 1441 the Security Council determined that Iraq has been and remains in material breach of Resolution 687, because it has not fully complied with its obligations to disarm under that resolution.

5. The Security Council in Resolution 1441 gave Iraq 'a final opportunity to comply with its disarmament obligations' and warned Iraq of the 'serious consequences' if it did not.

6. The Security Council also decided in Resolution 1441 that, if Iraq failed at any time to comply with and cooperate fully in the implementation of Resolution 1441, that would constitute a further material breach.

7. It is plain that Iraq has failed so to comply and therefore Iraq was at the time of Resolution 1441 and continues to be in material breach.

8. Thus, the authority to use force under Resolution 678 has revived and so continues today.

9. Resolution 1441 would in terms have provided that a further decision of the Security Council to sanction force was required if that had been intended. Thus, all that Resolution 1441 requires is reporting to and discussion by the Security Council of Iraq's failures, but not an express further decision to authorise force."[80]

The Foreign Secretary also provided to many parliamentarians a longer F.C.O. advice which was to the same effect.

What is not known is whether the Attorney General had given any fuller advice. In response to my request that he should disclose his full advice he retreated behind the arras and claimed that his Parliamentary Answer was an exception to the usual convention and so we were not entitled even to know whether he had

[80] *Supra*, n.2.

advised more fully or, if so, in what terms.[81] This leaves us in doubt as to the extent to which he considered at all the cogent arguments which had been advanced against his view. Did he examine how, since there is no doctrine of implied authorisation, the quaint concept of the "revival" of Resolution 678 was possible? Did he deal with the issues of necessity and proportionality, given that the inspectors had reported nothing concrete and were asking for more time? Did he grapple with the persuasive arguments advanced against the war by the majority of distinguished international lawyers who expressed a view? Did he explain how the U.S. and this country could act on their own because of Iraq's breach of resolutions rather than, as is normal, the U.N. authorising the appropriate action? Perhaps even more fundamentally, what were the facts he assumed for the purpose of his advice?

What does appear to be clear is that neither the F.C.O. opinion nor the Parliamentary answer set Resolution 678 in its context. This was the invasion in August 1990 of Kuwait by Iraq. The United Nations responded by passing Resolution 660 the very same day. This determined "that there exists a breach of international peace and security as regards the Iraqi invasion of Kuwait" and demanded the immediate and unconditional withdrawal of Iraqi forces. The nature of the issue was defined at the outset and was to be the expulsion of the Iraqi invaders from Kuwait. Four days later on the 6th August Resolution 661 stressed the determination "to bring the invasion and occupation of Kuwait by Iraq to an end" and affirmed the inherent right of individual or collective self-defence under Article 51 of the Charter. Sanctions were imposed on Iraq to achieve this clear but limited objective. This was reinforced by a decision "to keep this item on its agenda and to continue its efforts to put an early end to the invasion by Iraq".

This was the background for Resolution 678 almost four months later on 29th November. This resolution authorised member states, unless Iraq withdrew by 15th January 1991, fully to implement those resolutions and "to use all necessary

[81] Letter to the author from the Attorney General Lord Goldsmith QC, 21 May 2001.

means to uphold and implement Resolution 660 and all subsequent relevant resolutions, and to restore international peace and security in the area". So Resolution 678 was always firmly anchored to implementing Resolution 660 and so to driving Iraq from Kuwait.

By 2nd March the military action to end the invasion had been successful. Resolution 686 then confirmed all the previous resolutions on the issue and demanded essentially that Iraq should implement its withdrawal, provide appropriate compensation and return Kuwaiti property. There are two other interesting points which arise from this resolution. The first is that it affirms the commitment "of all member states to the independence, sovereignty and territorial integrity of Iraq and Kuwait." Resolution 686 also referred to the fact that allied forces were "present temporarily in some areas of Iraq". The resolution also recognised that "during the period required for Iraq to comply… the provisions of paragraph 2 of Resolution 678 remain valid". In other words it was a temporary provisional cease-fire. This resolution is a cogent further indication of the limited purpose of Resolution 678. I do not believe that any of the political leaders at that time contemplated that Resolution 678 would justify waging wholesale war on Iraq in order to secure a regime change. Indeed, the leading actors in that drama said so clearly. George Bush senior has written that: "Going in and occupying Iraq, thus unilaterally exceeding the United Nations' mandate, would have destroyed the precedent of international response to aggression that we hoped to establish".[82] General de la Billiere, Commander of the British Forces during the first Gulf War, wrote "We did not have a mandate to invade Iraq or take the country over…",[83] and John Major has said: "Our mandate from the United Nations was to expel the Iraqis from Kuwait, not to bring down the Iraqi regime".[84] Nothing could be plainer or more statesmanlike.

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[82] George Bush (Senior) and Lieutenant General Brent Snowcroft, *A World Transformed*, (New York, Knopf, 1998).
[83] General Sir Peter De La Billiere, *Storm Command* (London, Harper Collins, 1995), p.304.
[84] "Our mandate from the United Nations was to expel the Iraqis from Kuwait, not to bring down the Iraqi regime… We had gone to war to uphold international law. To go further than our mandate would have been, arguably, to break international law." John Major, speaking at Texas A&M University 10th Anniversary celebrations of the liberation of Kuwait, 23 February 2001. See also the testimony of Assistant Secretary of State John Kelley and Assistant Secretary of Defence Henry Rowen before the

So we come to Resolution 687 on 3rd April 1991. Again this resolution also affirms the "sovereignty, territorial integrity and political independence of… Iraq". It also widens the obligations on Iraq because it requires Iraq in effect to accept the "destruction, removal or rendering harmless" of chemical and biological weapons and ballistic missiles with a range greater than 150 kilometres. It set up a regime for the provision of information and inspection. It provided for a formal or permanent cease-fire and that the United Nations could "take such further steps as may be required to implement the present resolution and to secure peace and security in the area." There was the specific provision enabling "all necessary measures" which clearly would have included force, to guarantee the inviolability of the boundary between Kuwait and Iraq. But in sharp contrast there was no provision at all in this resolution for the use of force to enforce the disarmament obligations. Nor has there been any subsequent resolution that provided for the use of force against Iraq. Hence the government desperately trawled way back to Resolution 678 to find a flag of convenience, a flag disowned by Kofi Annan.[85] But the flag simply cannot fly.

The language of 660 was restrictive, clearly designed to achieve the end of the Iraqi invasion of Kuwait. Resolution 678 was backing this resolution by the potential use of force. Resolution 660 was complied with. Resolution 678 was contemplated as only remaining in force until the consequences of the Iraqi invasion of Kuwait had been dealt with. Resolution 687 introduced the wider and distinct issue of weapons of mass destruction. It gave no comfort to the use of force to achieve this aim and specifically contemplated that the United Nations,

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Europe and Middle East Sub-Committee of the House Comm. on Foreign Affairs, Federal News Service, June 26 1991, at 151, available in LEXIS news library, Fednew File, cited in Lobel and Ratner, *supra*, n.62, at n.61. This proposition has also been recognised by the current Foreign Secretary: "the reason the United States did not continue on to Baghdad was because the United States and the other coalition allies felt they did not have a legal mandate for this; the legal mandate they had was to free Kuwait and then to deal with WMD, not to take over the state of Iraq." Jack Straw, evidence to the Foreign Affairs Committee, 4 March 2003.

[85] *Supra*, n.29. It is hard to see how a resolution passed 12 years ago can validate military action that was actively opposed and would have been vetoed by at least one, probably three, members of the permanent five in the Security Council, and whose legitimacy has been questioned by the Secretary General.

and not any member countries acting unilaterally, would remain in charge of the issue, as was cogently argued by Rabinder Singh QC and Charlotte Kilroy in one of their impressive opinions on the conflict. The suggestion that the authority to use force "revives" like spring flowers in the desert after rain, to be invoked by the U.S. and the U.K. contrary to the wishes of the Security Council, is risible.[86] Nor does it find any support in international law.

The suggestion that the violation of a ceasefire agreement authorises the other party to use force appears to be based on pre-charter customary law. Under the Hague Regulations 1907 a party was released from his obligations under an armistice agreement when the terms were violated by the other party.[87] "Ceasefires", the term being relatively modern, are not dealt with under these rules but are generally treated as being synonymous with armistices.[88] These rules are almost one hundred years old and have certainly been modified, if not completely supplanted, by the United Nations Charter. For it remains the case that all non-defensive uses of force must be authorised by the Security Council, even if the use of force is a reprisal for the violation of the terms of a ceasefire.[89] In 1948, in response to violations by both sides of the Israel/Egypt armistice, the Security Council passed a resolution stating that: "no party is permitted to violate the truce on the ground that it is undertaking reprisals or retaliations against the other party."[90] In 1955 and 1956 South Korea argued at the United Nations that North Korean and Chinese violations of the North Korea Armistice Agreement

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[86] "[The Security Council] decides to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area", S/RES/687 (1991). Rabinder Singh and Charlotte Kilroy, *In the Matter of the Potential Use of Armed Force by the U.K. Against Iraq*, Further Opinion for the Campaign for Nuclear Disarmament, 23 January 2003.

[87] Hague Regulations 1907, Article 40. "Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately."

[88] Ceasefire is a term used by the United Nations. It is used interchangeably with armistice. Sydney D Bailey, *How Wars End*, Vol. 1 (Oxford, Clarendon Press, 1982); Yoram Dinstein, *War, Aggression and Self Defence*, (Cambridge, Grotius, 1988), p.48.

[89] Richard R. Baxter, *"Armistices and Other Forms of Suspension of Hostilities"*, Rec. des Cours, 149 (1976-I0) 355, 382; David Morris, *"From War to Peace: A Study of Ceasefire Agreements and the Evolving Role of the United Nations"* 36 VJIL 802, 822-3 (1996); Christine Gray, *"After the Ceasefire: Iraq, the Security Council and the Use of Force"*, 65 BYIL 135, 143; Lobel and Ratner, *supra*, n.62, 142.

[90] S/RES 56 (1948).

(1953) warranted a termination of the armistice and the resumption of hostilities. This was a position that no other state adopted.[91] Once a ceasefire is in place it is the Security Council alone that must determine whether its terms have been complied with and, if they have not, whether the use of force is an appropriate response.[92] This chimes in with the underlying purpose of the Charter that force must be used in the interests of the community as a whole and with U.N. authority. The unreality of the reliance on Resolution 678 was summed up by Michael P. Scharf, the former Attorney Advisor for the United Nations Affairs at the U.S. Department of State: "It is … significant that the administration of Bush the elder did not view Resolution 678 as a broad enough grant of authority to invade Baghdad and topple Saddam Hussein. It is ironic… that the current Bush administration would now argue that this Resolution could be used ten years later to justify a forcible regime change."[93]

Conclusion

The last time this country waged a war of aggression was almost fifty years ago during the brief Suez adventure. It was my first term as an undergraduate. Sir Anthony Eden, as is the case with Tony Blair, was not by temperament a war-monger. He had only shortly before refused the request of John Foster Dulles, the U.S. secretary of state, that our countries should together intervene militarily in Indo-China and instead had brought that dispute to a temporary settlement at Geneva. In the first months of the Suez crisis he sought to act through the United Nations and with wide international support. Similarly Tony Blair insisted for months that we should act through the United Nations, subject only to the novel suggestion that we could ignore an "unreasonable" veto.

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[91] Unified Command Report on the Neutral Nations Supervisory Commission in Korea, U.N. Doc. A/3167 (1956) UNYB 129, 130.

[92] It seems self-evident that a ceasefire that is negotiated, drafted and signed under the aegis of the United Nations will also be policed and enforced by the United Nations. This is consistent with the clear and consistent philosophy of the U.N. Charter that only the Security Council may authorise non-defence uses of force.

[93] International Bar News, March 2003.

Then in 1956, just as in the build up to Iraq, there was a dramatic change of gear. We invaded Egypt with the nation, including undergraduates who like me were naïve enough to trust our government, blissfully unaware of the infamous Sèvres agreement providing secretly that Israel should invade and France and we should then intervene to stop them. In the case of Iraq I shall never forget being in the U.S. in March this year and watching with dismay as events unfolded. We learnt that the proposed further resolution was to be withdrawn because of lack of support. The inspectors had their work in Iraq summarily terminated. The leaders of the U.S. and the U.K. travelled to the bizarre location of the Azores and delivered their ultimatum for regime change, and three days later launched the invasion. All this change of approach in a single week. We can only speculate why they did so in so much haste. The most probable reason is that the troops were there and were to be deployed before the summer heat of the Middle East. We will not know for a very long time whether there was any substance in Clare Short's assertion that the Prime Minister had committed himself way back last year to supporting the U.S. even if the U.N. declined its backing. If so, there would be another deeply dark parallel with Suez.

There is undoubtedly one more parallel. The strength of the U.S. was in each case decisive. At Suez, influenced by presidential electoral considerations, the U.S. declined their support and we had to withdraw. In Iraq it was the U.S. who similarly called the shots, but this time as the promoters of war.

What are the lessons for the future? The first is positive. Our government apparently accept that they must act in accordance with international law, even although their arguments were flawed and most experts doubt the lawfulness of what they did in our name. The second too is positive. The U.S. is, for the future, the only world power which can act unilaterally and their values and commitment to democracy make them the least undesirable supreme power. But while we are thankful for this, we should also be wary. The bi-polar world, in which the Soviet Union had an effective veto on U.S. action when it threatened the balance of world power, has collapsed. To create a new multilateralism is not easy. It would,

or so it seems to me, not require change to the U.N. Charter to allow U.N. sanctioned intervention to prevent genocide and humanitarian disaster. Nor would it require any change to allow the U.N. to act to prevent the proliferation of weapons of mass destruction.

For this country I would only offer two suggestions. The first is practical, which is that we should seek to influence the U.S. through Europe, which was at all times supportive of Resolution 1441. It seems to me that the Prime Minister followed the long-standing Atlanticist view succinctly expressed by Sir Winston Churchill in the last week of his premiership: "We must never get out of step with the Americans – never!"[94] With our wider role in Europe this seems no longer wise. After all it was Eden himself who fifty years ago during his quest for peace in Indo-China wrote: "Americans may think the time past when they need consider the feelings or difficulties of their allies".[95]

There should be time now for reflection. Our government has a massive job to rebuild trust before they could again lead us into war. And to rebuild resources before again fighting a war of choice as Admiral Sir Michael Boyce stressed on retirement this summer.

The second suggestion more directly relates to the part the law should play. As we have seen it played a markedly subordinate role in the debate. I have for some time been unconvinced by the argument that the Attorney General's advice is not normally disclosed.[96] It is given for the public good and the public should generally be entitled to know what is the government's view of the law, just as we receive the opinion of ministers on whether bills presented to Parliament conform with the Human Rights Act. While it was welcome that the Attorney General allowed a peep though the curtains in his Parliamentary Answer I find it almost

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[94] D.R. Thorpe, Eden: The Life and Times of Anthony Eden First Earl of Avon 1897-1977 (London, Chatto & Windus, 2003), p.541.
[95] *Ibid*, p.402. Echoes of this sentiment can be heard in the words of Peter Riddell: "Yes, Britain should be a candid friend of America. But candour should not require the suppression of British interests when, occasionally, these clash with American interests." The Times, 24 April 2003.
[96] See the author's Denning Society Lecture 2001.

incomprehensible that he then declined even to tell us whether he has given any advice apart from the published summary. The result is, and the F.C.O. advice is but a fuller version of the same Answer, that the government's view of the law was never exposed to the spot-light of reasoned argument or scholarship. How can this be avoided, as I think it should, in the future?

I believe the time has arrived when the courts should not be so diffident where an important aspect of the legality of foreign policy is challenged. There can clearly be no challenge to the policy itself. This is obviously for the government to decide. But it is well recognised that international law is part of our domestic law. As Lord Philips MR has said: "[The] court… is free to express a view in relation to what it conceives to be a clear breach of international law, particularly in the context of human rights."[97] Where public law has evolved so far and now considers on a daily basis wide-ranging issues of varying importance, it seems strange for the courts not to be able to give rulings on the legality of an act as fundamental as the invasion of another sovereign state by an act of war. The knowledge that the courts might be willing to do so would surely promote greater responsibility and thoroughness in the giving of advice. Law cannot just be the handmaiden of real politik. The outcome of a legal decision would, I believe, be the firm conclusion that, except in self defence against actual or imminent attack, we can only use force to invade another country under the authority of a current U.N. resolution passed to cover the specific situation. And that would seem to mean an end to Suez or Iraqi adventures.

Finally, it seems to me that the most important lesson to be learnt is the one that sadly has so often been ignored since time immemorial. In the words of General Sherman, and he was victorious: "War is hell". We abandoned diplomacy too fast in March. With it we abandoned the fragile international consensus on the way in which to handle the issue of the weapons in Iraq. The emphasis of the Charter is right. And that is because those who crafted it knew at first hand that the one reason that force is a last resort is that the human cost of war is too high for it to

be used for any other reason. Nations need to respect the international institutions rather than to give effect to their own beliefs as to how the law should be applied. It was President Dwight Eisenhower, who was also seared by war, who stated in his farewell address to the nation: "The weakest must come to the conference table with the same confidence as do we, protected as we are by our moral, economic, and military strength. That table, though scarred by many past frustrations, cannot be abandoned for the certain agony of the battlefield."[98] A timeless, eloquent statement and one which I hope may once again come to underpin the long-term policies of a nation whose passionate commitment to freedom and self-determination has given the world so much.

[97] R(Abbasi) v. SSFCA, *supra*, n.6 at 97.
[98] President Dwight Eisenhower, Farewell Address to the Nation, 17 January 1961.

A submission to the Iraq Inquiry from Kent Law School concerning Article 2(4) of the UN Charter and its implications for the interpretation of UN Security Council resolutions

1. The *jus cogens* nature of Article 2(4) of the UN Charter[1] (i.e. its status as a peremptory norm of general international law)[2] has important implications for the interpretation of UN Security Council resolutions. In the legal advice which he gave to the Prime Minister on 7 March 2003,[3] the Attorney General explored possible legal bases for the use of force against Iraq without considering the fundamental legal status of Article 2(4). In our view, this was a serious omission which led to a flawed understanding of the legal position and compromised the advice given.

2. It is well established in international law that an exception to a rule must be interpreted narrowly.[4] *A fortiori* if the rule is not an ordinary rule of international law but *jus cogens*.[5] By their very nature, 'peremptory norms of general international law generate strong interpretative principles'.[6] Accordingly, when interpreting a Security Council resolution

[1] Article 2(4) provides: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.'

[2] *Militarv and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America).*Merits, Judgment. ICJ Reports 1986, p 14, para 190. In its commentary on Article 50 of the Draft Articles on the Law of Treaties, the International Law Commission observed that 'the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*': Yearbook of the International Law Commission, 1966, Vol II, p 247, para 1.

[3] http://image.guardian.co.uk/sys-files/Guardian/documents/2005/04/28/legal.pdf.

[4] Expressed in the maxim *exceptio est strictissimae applicationis.* See e.g. *Interpretation of Article 79 of the 1947 Peace Treaty*, UN Reports of International Arbitral Awards, Vol XIII, p 397.

[5] Article 53 of the Vienna Convention on the Law of Treaties 1969 illustrates the superior legal status of *jus cogens*. Recognising that there are some rules of international law which States cannot of their own free will contract out of, it provides: 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

[6] James Crawford, The International Law Commission's Articles on State Responsibility (Cambridge University Press, 2002), p 187.

there is a very strong presumption against construing it as authorising military action. That presumption can be rebutted, but only by the use of specific, unambiguous wording that makes it clear beyond any doubt that military action is authorised.

3. The content and character of Article 2(4) of the UN Charter, coupled with the requirement in Article 2(3) to settle international disputes peacefully, means that Security Council resolutions which are said to authorise military action by States must not be regarded as doing so unless it is clear beyond doubt that they do.

4. This is reinforced by the fact that Article 24(2) of the UN Charter provides that, in discharging the duties outlined in Article 24(1), 'the Security Council shall act in accordance with the Purposes and Principles of the United Nations'.

5. The Purposes of the United Nations include respect for human rights, and for the dignity and worth of the human person.[7] Respect for the right to life is paramount; for example, it is not subject to derogation in time of national emergency.[8] As the International Court of Justice has declared, 'In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities'.[9]

6. The Principles of the United Nations include the duty to settle disputes peacefully and the prohibition of the threat or use of force in international relations.[10]

7. The Purposes and Principles of the United Nations thus constitute 'a circumscribing boundary of norms or principles within which the

[7] Article 1 of the UN Charter read with the Preamble.

[8] Articles 4(2) and 6 of the International Covenant on Civil and Political Rights 1966.

[9] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, ICJ. Reports 1996, p 226, para 25.

[10] Articles 2(3) and 2(4) of the UN Charter.

Security Council's responsibilities are to be discharged... The duty is imperative and the limits are categorically stated'.[11]

8. The Purposes and Principles of the United Nations must also, therefore, constrain the interpretation of Security Council resolutions. In the face of those Purposes and Principles, and given that military action tends to cause death and destruction , only the clearest, most specific wording in the text of a resolution can suffice to evince the Security Council's intention to authorise military action.

9. Against this background, we consider that there was and is no basis in international law for the 'revival' argument employed by the UK Government to justify the invasion of Iraq and subsequent regime change.

10. On 7 March 2003 the Attorney General advised the Prime Minister that 'a reasonable case can be made that resolution 1441 is capable in principle of reviving the authorisation in 678 without a further resolution'.[12]

11. The Attorney General reiterated the revival argument without caveat or qualification on 17 March 2003.[13] After advising, *inter alia*, that a material breach of resolution 687[14] (which set out the ceasefire conditions after Operation Desert Storm) had revived the authority to use force under resolution 678,[15] that in resolution 1441[16] the Security Council had determined that Iraq had been and remained in material breach of resolution 687, and that the Security Council in resolution 1441 had given

[11] From Judge Weeramantry's dissenting opinion in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom),* Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, p 3, at p 61.

[12] Above, note 3, para 28.

[13] Hansard, HL, 17 March 2003: Columns WA2 and 3, http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030317/text/30317w01.htm.

[14] Adopted on 3 April 1991.

[15] Adopted on 29 November 1990.

[16] Adopted on 8 November 2002.

Iraq 'a final opportunity to comply with its disarmament obligations' and warned Iraq of the 'serious consequences' if it did not, he concluded:

'7. It is plain that Iraq has failed so to comply and therefore Iraq was at the time of Resolution 1441 and continues to be in material breach.

8. Thus, the authority to use force under Resolution 678 has revived and so continues today.'

12. However, the authority to use military force contained in resolution 678 had been granted more than 12 years earlier to particular States for the specific purpose of ejecting Iraq from Kuwait and restoring international peace and security in the area.[17] In the context of Iraq's occupation of Kuwait, that purpose had been achieved.

13. The peremptory nature of Article 2(4) of the UN Charter demanded a very much narrower interpretation of resolution 678. The authority which the Security Council had granted to certain States for a particular purpose in November 1990 could not be used to justify the invasion of Iraq in March 2003 and the subsequent removal of Saddam Hussein.

14. A second Security Council resolution specifically and unambiguously authorising military action was required.[18] The vague warning of 'serious consequences' in resolution 1441 did not suffice, and to interpret resolution 678 as granting the necessary authority was not 'good faith' interpretation as required by international law.[19]

15. Without such a resolution, the invasion of Iraq constituted an act of aggression, contrary to Article 2(4) of the UN Charter.

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[17] Operative paragraph 2 of resolution 678 authorised 'Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area'.

[18] Like the authorisation 'to use all necessary means' in resolution 678.

[19] Cf Article 31(1) of the Vienna Convention on the Law of Treaties 1969.

16. According to the International Court of Justice, obligations *erga omnes* (i.e. obligations towards the international community as a whole) derive from the prohibition of aggression.[20] This means that the prohibition is the concern of all States, and that all States have a legal interest in its observance.[21] Indeed, this is the logical corollary of the prohibition's character as a peremptory norm.

17. The *erga omnes* nature of the prohibition of aggression is another reason why the military action against Iraq in March 2003 needed specific and unambiguous authorisation by the Security Council on behalf of the international community.

18. The Attorney General conspicuously failed to consider the implications of *jus c ogens* and obligations *erga omnes* in his legal advice to the Prime Minister. We consider that, in consequence, his advice was seriously flawed.

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[20] *Barcelona Traction, Light and Power Company Limited*, Judgment, ICJ Reports 1970, p 3, paras 33-34.

[21] *Ibid*, para 33.

IRAQ INQUIRY

Submission to the Inquiry on the UK's Legal Justification for the Iraq War and Lord Goldsmith's Legal Advice

by

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6 August 2010

Introduction

1. We would like to take this opportunity to respond to the Inquiry's call for submissions from public international lawyers regarding various matters raised during the Inquiry's proceedings. In this submission, we focus on two issues: (i) the validity of the so-called revival argument as a justification for the use of force in Iraq; and (ii) on the justification that Lord Goldsmith gave to the Inquiry for his change of heart in his legal advice to the Government in the advent of the Iraq War. As the Inquiry is well aware, Lord Goldsmith initially advised that United Nations Security Council Resolution (UNSCR) 1441 was insufficient to revive the UNSCR 678 authorization to use force, only to argue the opposite in his final advice immediately before the invasion. Our submission will deal with the legal and logical consistency of Lord Goldsmith's own argument, as given in his testimony before the Inquiry and in his memoranda to the Government.

2. According to Lord Goldsmith, his change of position was the result of his combined discussions with Sir Jeremy Greenstock, Jack Straw, and US legal advisors in Washington, who were all intimately involved in the drafting of UNSCR 1441. Their account of the drafting history, which he took into consideration, was that the United States officials who took part in the drafting of the resolution had a so-called 'red line:' because the US already thought that it had implied UNSC authorization to act and did not need UNSCR 1441 for that purpose, it would have never allowed the adoption of this resolution if its terms held or implied that a further UNSC decision would be needed for the invasion to take place. Because the American negotiators were far too skilled to have allowed such a limitation to be inserted into the resolution, it would have been highly improbable that this would have happened. Hence, Lord Goldsmith now thought that the better view was that the Resolution did not require a further decision, implicitly or otherwise, and that the revival of the prior authorization could properly take place.

3. Several objections to this line of argument immediately become apparent. In his questioning of Lord Goldsmith at the Inquiry, Sir Roderick Lyne rightly pointed out that this argument presumes that the American negotiators could not have failed in their endeavours and that other parties did not have their own 'red lines.' Likewise, as Sir Michael Wood testified before the Inquiry, it is inappropriate to rely so much on essentially private accounts of the drafting history, rather than on the officially recorded public statements made by various state representatives in Council after the adoption of UNSCR 1441. These are all valid criticisms – but in our view there is also a more subtle *non sequitur* here.

The two varieties of the revival argument

4. We fully understand that the Inquiry is not interested in other countries' justification for their use of force. Nonetheless, as we will show, Lord Goldsmith's argument is structured precisely in such a way that a comparison between the UK and the US justifications is logically inevitable. Assessing the consistency of Lord Goldsmith's argument, however, requires nothing more than acknowledging the difference between the US and the UK positions, and accepting his own view that it is the UK, rather than the US position which is the correct statement of the law.

5. To see how Lord Goldsmith's argument is inconsistent we first need to elaborate on the two basic varieties of the so-called revival argument. First, there is the US version: UNSCR 678 authorized the use of force; UNSCR 687 suspended it by a cease-fire, but did not terminate

it. If Iraq is in material breach of the obligations imposed on it by UNSCR 687, UNSCR 678 can be reactivated. Crucially, the US position is that the existence of a material breach is an objective fact: the determination of whether a material breach exists or not, and what the consequences of such a breach should be, is a matter for individual states, and is not exclusive to the Security Council. The United States could determine that Iraq was in material breach, and could engage in hostilities without any further ado.[1]

6. The US argument is highly problematic. It ignores the basic idea of the UN system, which is one of collective security, not one of unilateral decision-making. It relegates the Security Council to nothing more than a passive spectator once it has authorized the use of force, even though more than ten years have passed after that authorization and the war that it brought about ended.

7. The UK variation of the revival argument tries to address some of these concerns by being a bit less blunt. Rather than saying that the existence of a material breach is a question of objective fact capable of determination by any individual state, the UK position was that this determination must be made collectively by the Security Council.[2] However, according to the UK, the Council need not do anything other than that for the authorization to use force to be revived – the finding of a breach is enough, and no explicit reauthorization is necessary.

8. These are thus the two varieties of the revival argument – the extreme US one, and the more moderate, 'revival plus', of the UK. Though they are similar, the differences between them are quite significant. Crucially, bearing this in mind, *it was the UK*, not the US, which needed UNSCR 1441 in order for the Council to determine a material breach and for the prior authorization to be revived. Within the framework of its own legal position, all the US needed in the negotiations was for the Council *not* to say that further action, subject to a veto, would be needed before force could be used against Iraq. Of course, explicit authorization would have been preferable, but the US did not consider it necessary.

The invalidity of the revival argument

9. The preliminary and most fundamental question is of course whether either the stronger US or the weaker UK revival argument has any validity in international law. It is obviously the UK version which is more acceptable since it takes into at least some account the foundations of the UN regime of collective security. But even the UK version is objectionable since the decision to use force against a sovereign state is so monumental and can lead to such grave consequences for human lives, security and property that it can only be taken explicitly by the Security Council, whose members would thereby assume political responsibility for their actions. Indeed, Lord Goldsmith acknowledged as much, stating that the 'revival argument is controversial, and was not widely accepted among academic commentators.'[3] With regard to revival under UNSCR 1441 in particular, he thought that

[1] See, in that regard, the following two memoranda produced by the Office of Legal Counsel (OLC) within the US Department of Justice, which serves a similar role of the official government legal advisor in the US as the Attorney-General and the Law Officers do in the UK: *Authority of the President under Domestic and International Law to Use Military Force Against Iraq*, 23 October 2002, available at http://www.justice.gov/olc/2002/iraq-opinion-final.pdf; *Effect of a Recent United Nations Security Council Resolution on the Authority of the President under International Law to Use Military Force Against Iraq*, 8 November 2002, available at http://www.justice.gov/olc/2002/iraq-unscr-final.pdf.
[2] See, e.g., Lord Goldsmith's memorandum to the Prime Minister on UNSCR 1441, 7 March 2003, para. 9.
[3] Ibid., para. 10.

though a 'reasonable case' could be made for it, this 'does not mean that if the matter ever came before a court I would be confident that the court would agree with this view.'[4]

10. The revival argument is unacceptable because it assumes that a prior authorization to use force may be used many years after it was given for purposes which were never contemplated at the time when that authorization was given. Moreover, it would be for individual States to determine that a use of force was appropriate to achieve those purposes, even if unrelated to the purposes for which authorization was originally given. Such an interpretation of the UN Charter departs from the object and purposes of that treaty. The purposes of the UN are stated in Article 1 of the Charter where it is made clear that Organization in maintaining international peace and security will "take effective *collective* measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace." The revival argument undermines this collective security system by suggesting that not only may measures be taken on an individual basis, but the measures and their goal can also be individually determined, as long as are somehow related to a prior authorization given by the Council in completely different circumstances.

11. Furthermore, the revival argument is based on an outdated, pre UN Charter, view of the law of armed conflict: the view that a ceasefire or armistice only suspends, but does not terminate, hostilities and that a serious breach of the agreement could lead to resumption of hostilities by the other side. As has been noted by Christopher Greenwood (now Judge at the International Court of Justice):

> "The changes in the law regarding resort to force brought about by the adoption of the UN Charter have had a particular effect on the right of the parties to resume hostilities after the conclusion of an armistice or ceasefire of indefinite duration. Whereas the law once admitted there was a general right to resume hostilities (Article 36 Hague Reg), today it would be a violation of Article 2(4) for a state to resume hostilities unless the behaviour of the other party to the armistice or ceasefire amounted to an armed attack or the threat of an armed attack."[5]

In any event, treating UNSCR 687 as a temporary cessation of hostilities as opposed to a definitive termination is erroneous since that resolution bears all the hallmarks of a general conclusion of a peace and it was UNSCR 686 that was the temporary ceasefire which looked forward to definitive termination achieved in UNSCR 687.

12. Since the revival argument is flawed, even in its weaker variant, the invasion of Iraq would have been unlawful no matter what UNSCR 1441 says when properly interpreted, because it does not on any account provide for an explicit authorization.

How does UNSCR 1441 fit in with the UK's revival argument?

13. However, even if the UK's version of the revival argument were valid, UNSCR 1441 would not have provided a basis for the invasion of Iraq. For the purposes of the analysis to follow, we accept *arguendo* the UK's weaker version of the revival argument as the correct statement of the *jus ad bellum* and then ask whether the terms of UNSCR 1441 satisfy it.

14. If all the resolution did was to say that Iraq was in material breach, and that serious consequences will follow from that, as it did in op. paras. 1 & 13 , then the resolution would

[4] Ibid., para. 30.
[5] Chapter 2, in Fleck (ed.), *The Handbook of International Humanitarian Law*, (2nd ed., 2008), p. 68.

indeed satisfy the logic of the UK's revival argument. But this of course is *not* all that UNSCR 1441 said, since op. para. 2 gave Iraq 'one final opportunity' to comply; op. para 4 stated that Iraq's further material breaches 'will be reported to the Council for assessment;' while in op. para. 12 the Council decided 'to convene immediately upon receipt of a report in accordance with paragraphs 4 or 11 above, in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security.'

15. What is to be made of these provisions, particularly op. paras. 2, 4 and 12, and the official statements by several Council members that the Resolution allows for 'no automaticity'?[6] Lord Goldsmith himself acknowledged that the Council created a two-stage process – UNSCR 1441 would not have revived the prior authorization immediately, but only once Iraq failed to take advantage of the final opportunity given to it for compliance. The question is what the second stage of this process should be, and only two answers are possible: (1) either the Council should have done no more than meet, discuss and 'consider' (but not 'decide' on) Iraq's non-compliance without taking any further action, and the authorization would thereby have been revived; or (2) the Council needed to adopt a decision which would have stated the consequences of Iraq's non-compliance.[7]

16. The FCO legal advisors and Lord Goldsmith up until his 7 March opinion both thought that the right answer to this question was (2).[8] But then Lord Goldsmith changed his mind. The reason he gave for doing so was that the UK and US negotiators during the drafting of Resolution 1441 persuaded him that the Resolution did not in any way cross the US 'red line', i.e. that it did not implicitly or explicitly require further authorization for the use of force against Iraq. Thus he stated in his opinion that

> having regard to the information on the negotiating history which I have been given and to the arguments of the US Administration which I heard in Washington, I accept that a reasonable case can be made that resolution 1441 is capable in principle of reviving the authorisation in 678 without a further resolution.'[9]

17. At the Inquiry he likewise stated that he

> was told by the State Department legal adviser, the only red line that the negotiators had was that they must not concede a further decision of the Security Council because they took the view they could move in any event. … if they had agreed a decision which said the Security Council must decide, they would have then lost that freedom.'[10]

and that '[t]hey were all very, very clear that was the most important point to them and that they hadn't conceded that.'[11]

The structure of Lord Goldsmith's argument, and the non sequitur within

18. Lord Goldsmith's argument thus works like this: (1) the text of UNSCR 1441 is ambiguous and supports both readings (i.e. that all the Council had to do was to meet and 'consider'

[6] See UN Doc. S/PV.4644, 8 November 2002.
[7] See Lord Goldsmith's memorandum of 7 March 2003, paras. 13-14.
[8] See Lord Goldsmith's draft advice to the Prime Minister of 14 January and 12 February 2003.
[9] Ibid., para. 28.
[10] Iraq Inquiry hearing transcript, 27 January 2010, p. 87.
[11] Ibid., p. 111; see also pp. 128, 241, 242.

Iraq's non-compliance, or that it had to adopt a further decision); (2) the US had a red line – that UNSCR 1441 could not impose a requirement for a further decision that would modify the authority they already thought they had; (3) the US negotiators were very capable and smart, and it is unlikely in the extreme that they conceded their red line; (4) therefore, UNSCR 1441 imposed no requirement for a further decision, and the prior authorization was revived. In our view, greater issues of law aside, this argument is logically flawed and based on a *non sequitur*. Points (1)-(2) are certainly true; (3) is probably, but not necessarily, true; however, (4) does not follow from (3).

19. We think it reasonably clear that the US managed to avoid any limitation in the resolution on its supposed pre-existing authority. Nothing in UNSCR 1441 is like, say, op. para. 8 of UNSCR 1696 ('Expresses its intention, in the event that Iran has not by that date complied with this resolution, then to adopt appropriate measures under Article 41 of Chapter VII of the Charter of the United Nations to persuade Iran to comply with this resolution and the requirements of the IAEA, and underlines that further decisions will be required should such additional measures be necessary') or op. para. 16 of UNSCR 1718 with regard to North Korea ('Underlines that further decisions will be required, should additional measures be necessary'). It can be quite reasonably said that UNSCR 1441 is essentially neutral on any pre-existing authority to use force.

20. However, the fact that the Americans were successful in achieving their objectives does not mean that on the UK's version of the revival argument, which based itself on UNSCR 1441, there was no further requirement for the Council to make a decision on Iraqi non-compliance.

21. The determination by the Council in operative paragraph 1 of UNSCR 1441 that Iraq was in material breach of its obligations under relevant SC resolutions would, on its own, under the UK's revival argument, have provided a sufficient basis for the use of force against Iraq. However, the Council immediately in paragraph 2 made it clear that Iraq was to be given a final opportunity to comply with its obligations.

22. On the US view of the revival argument the commission of a material breach is an objective fact determinable by any State. On the UK view a material breach does not in and of itself provide authorization to use force. It is a Council determination that such a breach has occurred which provides that authorization. And because paragraph 2 effectively cancelled-out the determination made in paragraph 1, the success of the UK revival argument was to be determined solely by the relationship between paragraphs 4 and 12 of the resolution.

23. By relying so heavily on the views of the US negotiators in interpreting UNSCR 1441, Lord Goldsmith shifted his perspective from the UK revival argument to the US one. The fact that paragraph 12 of UNSCR 1441 is neutral on any authorization to use force that was supposedly already revived only worked for the US, but did not satisfy the demands of the UK's revival argument. The US negotiators may have been successful in achieving their red line. However, this tell us nothing about whether *action pursuant to UNSCR 1441 itself* required a further Council decision. This is because on the US view it *already* had the authority to use force regardless of UNSCR 1441. However, *Lord Goldsmith himself actually does not believe so*, and neither does anybody else.

24. Lord Goldsmith was fully aware of this fundamental difference between the US and the UK revival arguments and of its implications. In his 7 March opinion he says that he has

> considered whether this difference in the underlying legal view means that the effect of the resolution might be different for the US than for the UK, but I have concluded that it does not affect the position. If OP12 of the resolution, properly interpreted, were to mean that a further Council decision was required before force was authorised, this would constrain the US just as much as the UK. It was therefore an essential negotiating point for the US that the resolution should not concede the need for a second resolution. They are convinced that they succeeded.[12]

25. The reasoning that US success is necessarily success for the UK is in our view false. Let us assume that instead of being vague as it was, op. para. 12 explicitly said that a further Council decision was necessary for action pursuant to op. para. 4 of UNSCR 1441. This would undoubtedly have failed to satisfy the UK's revival argument. But even this very explicit formulation would not have been incompatible with the US revival argument, because it would not have affected the authority that the US thought it had *independently* of UNSCR 1441. There is nothing contradictory in saying that the resolution did not affect the authority that the US already had before it was adopted, and in saying that action pursuant to UNSCR 1441 itself and its finding of a material breach would indeed require a further decision by the Council. *US success simply does not equal a UK one*, as unlike the UK, the US did not need the resolution to revive anything – all it wanted was for the resolution not to *prohibit* the use of force against Iraq, which it admittedly did not do.

Conclusion

26. Our analysis has shown that (i) the revival argument relied on by the UK is an untenable interpretation of the UN Charter which would have destabilising effects for the UN collective security system; and (ii) even assuming that the UK's revival argument was valid, UNSCR 1441 would fail to satisfy that argument and accordingly Lord Goldsmith's change of position was unjustified.

[12] Lord Goldsmith's memorandum of 7 March 2003, para. 22.

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