

1 Wednesday, 27 January 2010

2 (10.00 am)

3 RT HON LORD GOLDSMITH QC

4 THE CHAIRMAN: Good morning.

5 RT HON LORD GOLDSMITH QC: Good morning.

6 THE CHAIRMAN: Good morning and welcome, ladies and  
7 gentlemen. Good morning, Lord Goldsmith.

8 RT HON LORD GOLDSMITH QC: Good morning.

9 THE CHAIRMAN: We have a full day of hearings today and we  
10 are continuing to hear evidence on the legal issues  
11 surrounding the military action in Iraq, and in  
12 particular to examine the legal basis for military  
13 action, including the process by which legal advice was  
14 provided to government and the substance of that advice.

15 We will also consider some of the legal issues in  
16 relation to the No Fly Zones, the conduct of the  
17 military campaign, and, if time permits, the duties and  
18 obligations of occupying powers.

19 As I indicated yesterday, we will not, in these  
20 hearings, be considering legal issues in relation to  
21 Iraqi civilian human rights, detention or related  
22 matters.

23 Now, our witness today is Lord Goldsmith, and you  
24 were Attorney General from June 2001 until June 2007.

25 RT HON LORD GOLDSMITH QC: Yes.

1 THE CHAIRMAN: Now, two preliminaries which I state on every  
2 occasion: we recognise that witnesses are giving  
3 evidence based in part on their recollection of events,  
4 and we, of course, cross-check what we hear against the  
5 papers to which we have access.

6 I remind each witness that he will later be asked to  
7 sign a transcript of the evidence to the effect that the  
8 evidence he has given is truthful, fair and accurate.

9 With those preliminaries out of the way, I will ask  
10 Sir Martin Gilbert to open the questions. Martin?

11 SIR MARTIN GILBERT: Lord Goldsmith, our first questions are  
12 about the No Fly Zones, which were established in 1991,  
13 and the legal grounds of overwhelming humanitarian  
14 catastrophe to Iraqi Kurds in the north and Iraqi Sunnis  
15 in the south.

16 What advice did you and your predecessor,  
17 Lord Williams of Mostyn, give as the legal basis for the  
18 No Fly Zones in the years after 1991?

19 RT HON LORD GOLDSMITH QC: Well, I discovered, of course,  
20 after I had become Attorney General, that he had  
21 advised -- Lord Williams had advised on the  
22 No Fly Zones, and, in short, after getting detailed  
23 assessment from others in government, principally coming  
24 from, probably, through the Cabinet Office, of the grave  
25 humanitarian risk if those areas were not patrolled, he

1       formed a judgment that there was a reasonable case under  
2       international law to operate the No Fly Zones on the  
3       basis that they were going to potentially avert  
4       a serious humanitarian risk.

5       SIR MARTIN GILBERT: I mean, you became Attorney General in  
6       2001, which is the year in which our Inquiry mandate  
7       begins. What advice did you give with regard to --

8       RT HON LORD GOLDSMITH QC: I was asked to advise, I think it  
9       was about June 2002 -- it arose in a particular context.  
10      The context was a proposal for what would be done in the  
11      event that a coalition aircraft was shot down, and there  
12      was a proposal, in that event, that certain targets  
13      would be attacked by coalition aircraft.

14      I was being asked to advise on the lawfulness of  
15      attacking those targets and the United Kingdom's  
16      potential responsibility if it appeared to participate  
17      in that with the United States if we didn't actually  
18      agree with all the targets, but in order to reach that  
19      view, it was necessary for me to reconsider the legal  
20      basis for the No Fly Zones at all, which I did, looked  
21      at it carefully, again asked for up-to-date assessments  
22      from the Cabinet Office as to the risks if the  
23      No Fly Zones were not in operation, and agreed with the  
24      view that Lord Williams had expressed, that there was  
25      a reasonable case for the No Fly Zones.

1 SIR MARTIN GILBERT: So this was established by the  
2 Cabinet Office material that they were able to give you,  
3 the situation on the ground?

4 RT HON LORD GOLDSMITH QC: What mattered was to know what  
5 was the risk. This was on the basis of a humanitarian  
6 risk. We needed to know what the risk was. We asked  
7 specifically for an up-to-date assessment, the  
8 Cabinet Office provided it. It doesn't mean necessarily  
9 it was simply coming from the Cabinet Office. They were  
10 often the channel for information coming from other  
11 parts of government.

12 SIR MARTIN GILBERT: The Ministry of Defence sent you weekly  
13 reports on the activities of the No Fly Zones. At whose  
14 request was this done and what was your involvement with  
15 these reports? How did you assess them?

16 RT HON LORD GOLDSMITH QC: The involvement was twofold.  
17 First of all, we had -- our practice before I came,  
18 I think, was the request that they would give us  
19 an up-to-date report on activity in the No Fly Zones,  
20 and that would either be saying that nothing had  
21 occurred or they would be indicating that the target had  
22 been attacked and what the consequences of that were.

23 What was important to us was to know whether there  
24 were -- what I'm afraid is called collateral damage,  
25 whether civilian casualties or damage to civilian

1 property, and why.

2 The second way in which I was involved was the  
3 Ministry of Defence would from time to time come and ask  
4 for advice on a particular target. Could they attack  
5 a particular target? That would arise in the context of  
6 the No Fly Zones, as it did in relation to other use of  
7 force -- circumstances.

8 SIR MARTIN GILBERT: On what basis would you give your  
9 advice in relation to individual targets?

10 RT HON LORD GOLDSMITH QC: Individual targeting advice was given on  
11 the basis of compliance with international humanitarian  
12 law.

13 The basic principle behind that is you avoid  
14 civilian casualties, or at least you minimise civilian  
15 casualties, and, in particular, you don't risk civilian  
16 casualties unless the military advantage justifies it.  
17 There are some detailed rules laid down about certain  
18 things that you don't attack: places of worship and  
19 Red Cross and other things of that sort.

20 So basically it was assessing the risk, particularly  
21 to civilians, being satisfied about the military  
22 objective behind the target and forming a judgment on  
23 that.

24 SIR MARTIN GILBERT: Were you able, after these targets had  
25 been attacked, to make some assessment of your own that

1 the concerns, say, for the loss of Iraqi civilian life,  
2 had been taken seriously, had been adequately --

3 RT HON LORD GOLDSMITH QC: Absolutely, and that's why we  
4 insisted on having a report on what had taken place, and  
5 from time to time -- I can't recall whether it was in  
6 the context of No Fly Zones; I certainly remember it in  
7 the context of Afghanistan, which, of course, was the  
8 first major conflict in which I was involved -- we would  
9 ask for specific reports from time to time from the  
10 Ministry of Defence and even from time to time call over  
11 people from the Ministry of Defence saying, "We have  
12 seen these reports of civilian casualties or damage.  
13 Please explain what happened and whether these reports  
14 are true". So we took that very seriously.

15 SIR MARTIN GILBERT: Were there occasions when, as a result  
16 of our scrutiny, there was a change in the targeting?

17 RT HON LORD GOLDSMITH QC: Oh, yes. There were -- the way  
18 that the targeting would take place would be that we  
19 would be shown details of the proposed target, often  
20 I would be shown aerial photographs, I would be told  
21 from intelligence what property was believed to be. I would  
22 always be looking to see what's the potential area of  
23 impact of this particular weaponry that was being used.  
24 The Ministry of Defence had some very sophisticated  
25 modelling techniques, and they would say, "With this

1       weaponry, this is what is likely to be", and I would  
2       look to see whether there were buildings within those  
3       areas, and then, "What's your view as to what those  
4       buildings are?"

5               Sometimes we know this is just a derelict farmhouse,  
6       we have been watching it, we know there is nothing  
7       there, and sometimes there would be a question mark  
8       about potential risks, and I would, from time to time,  
9       then say, "Let's see what we can do to minimise it. Can  
10      you use smaller munitions which will have a lower  
11      impact? Can you do this at a different time of day?"

12             They never liked me saying that, because they didn't  
13      like targeting at night, but occasionally I would say,  
14      "That's the only basis on which I'm prepared to approve  
15      this".

16   SIR MARTIN GILBERT: This was a close and continuous  
17      scrutiny by you and your officers?

18   RT HON LORD GOLDSMITH QC: Yes.

19   SIR MARTIN GILBERT: I would like to now turn to the legal  
20      position in relation to the use of force in Iraq before  
21      UNSCR 1441.

22             With regard to the advice that your predecessors had  
23      given on the legal basis for military action in Iraq, is  
24      it right to say that they had considered that  
25      a fundamental breach of the ceasefire in UNSCR 687 could

1       revive the authorisation to use force in 678, depending  
2       on the prevailing circumstances?

3   RT HON LORD GOLDSMITH QC:   Except I wouldn't use the word  
4       "fundamental", I would use the word "material", because  
5       that has a specific legal meaning in this context, and  
6       this wasn't just, as I understood it, the advice of my  
7       predecessors, it was the advice, as it were, across  
8       government legal services, and the first time I think  
9       I saw a detailed analysis of this actually was when  
10      a draft memorandum was sent across to my office in,  
11      I think, April 2002, by Foreign Office legal advisers  
12      putting this forward on the basis, I think quite  
13      explicitly, that there was nothing controversial in the  
14      paper and they describe the revival authority argument.

15           I was aware that on two previous occasions this had  
16      been the basis for action taken by British forces in  
17      1993 and 1998, and indeed threats of force, I think, at another  
18      time, and I at some point looked quite closely at what  
19      the support for that was, including support in 1993 from  
20      the French who took part, from the then  
21      Secretary General of the United Nations, who, on at  
22      least two occasions at the time, and subsequently,  
23      described this as being done with the mandate of the  
24      UN Security Council.

25   SIR MARTIN GILBERT:   Did you form a view yourself at this



1           time?

2   RT HON LORD GOLDSMITH QC:  I don't think I formed a view at

3           that time.  I did form a view later -- and I didn't take

4           this just for granted at all.  I asked for full

5           briefing.  I got briefing from the Foreign Office.

6           I asked the -- particularly, the Foreign Office lawyer

7           who was seconded to my office to provide further

8           research.  I looked at legal articles and commentaries

9           that had been written about this.  I examined the

10          history.  I looked back at the advices that would be

11          given, and eventually -- in due course, that is to

12          say -- I formed the view that I agreed with my

13          predecessors that the revival argument did mean that if

14          there was a material breach of the ceasefire conditions

15          in Resolution 687, then that revived the authority for

16          force if the Security Council, one way or another, took

17          the view that there was a material breach.

18   SIR MARTIN GILBERT:  With regard also to your predecessors'

19          views that it was for the Security Council rather than

20          individual states to make the assessment of whether or

21          not there had been a material breach, was this also

22          something with which you were in agreement?

23   RT HON LORD GOLDSMITH QC:  I didn't change that view, no.

24          I think there could be an argument about it, and I knew

25          that the United States took a different view, but

1 I stuck to the same position. I absolutely saw the  
2 argument for it. It was the view which had been  
3 expressed by the legal adviser to the United Nations.

4 We had comfort actually -- I'm not sure we should  
5 have done, but we did have an advice which the legal  
6 adviser to the United Nations had given to the  
7 Secretary General in 1993 -- I refer to that, I think,  
8 in my 7 March note -- in which he had confirmed that the  
9 original authority to use force in Resolution 678 could  
10 revive, if there were a material breach, but said it was  
11 for the Security Council to determine.

12 SIR MARTIN GILBERT: Thank you very much.

13 THE CHAIRMAN: Lawrence?

14 SIR LAWRENCE FREEDMAN: Just a very brief question before  
15 others take over. You described the process of briefing  
16 to get the best information. I was wondering how well  
17 you were being briefed on intelligence information in  
18 this period before 1441 about the state of Iraqi weapons  
19 of mass destruction programmes.

20 RT HON LORD GOLDSMITH QC: I did have briefings. I mean,  
21 I think the answer to the general issue is it was not  
22 a matter of course that intelligence briefings like the  
23 JIC briefings were provided to my office. I did have  
24 a bit of an issue about that. I understood the security  
25 sensitivities, but we did have to press at some stage in

1       order to get these. We did get the JIC briefings in  
2       relation to Iraq.

3           I recall, I think, probably two or three specific  
4       occasions of particular briefings. There was a briefing  
5       which I was given by John Scarlett in September 2002 and  
6       there was another briefing in February 2003, and there  
7       was also, in effect, some briefing about it shortly  
8       before the invasion.

9           Now, if it is helpful to the Inquiry, I can go  
10      through each of those.

11   SIR LAWRENCE FREEDMAN: I'm sure it will be helpful on  
12      the February and just before, but perhaps we can leave  
13      these to the chronological stage in the discussion.

14   RT HON LORD GOLDSMITH QC: Of course.

15   SIR LAWRENCE FREEDMAN: But I would like to ask you about  
16      the September 2002 one now. Was this sort of before or  
17      after the dossier?

18   RT HON LORD GOLDSMITH QC: Well, I didn't know about the  
19      dossier -- I mean, I wasn't involved in its planning.  
20      I didn't know that the dossier was being presented,  
21      until it arrived, although, as it turned out, when --  
22      when I saw John Scarlett and one of his very senior  
23      officials, they did say at that stage that they were  
24      producing a dossier, but I didn't know really what the  
25      purpose of it was.

1           May I just explain the context in which this meeting  
2           took place?

3   SIR LAWRENCE FREEDMAN:   Please do.

4   RT HON LORD GOLDSMITH QC:   As I know the Inquiry is very  
5           well aware, there were three potential bases for the use  
6           of force.   Self-defence, humanitarian crisis and  
7           United Nations authority, either by a new, explicit  
8           authority or possibly through the revival argument.

9           In July, I had looked at whether there was  
10          a self-defence argument and didn't believe that there  
11          was.   That was because I didn't see any evidence of an  
12          imminent threat, and you need an imminent threat --  
13          self-defence doesn't depend solely on there being an  
14          actual attack, but you can have an anticipated attack.

15   SIR LAWRENCE FREEDMAN:   This is another way of saying  
16          pre-emption.   It is different from anticipatory  
17          self-defence.

18   RT HON LORD GOLDSMITH QC:   No, it is not another way of  
19          saying pre-emption, because that was precisely what  
20          caused the problem.

21          Anticipatory self-defence, which happens to be the  
22          same in domestic law as well, is, if you see a threat  
23          which is imminent, which you can't deal with other than  
24          by force, then you can, as it were, land the first  
25          punch.

1           At that stage, in the summer of 2002, there was  
2           growing appearance in the press of a United States  
3           argument that there was a new doctrine of pre-emption  
4           which seems -- that's why I'm distinguishing between  
5           it -- which looked as if it was saying something  
6           different from anticipatory self-defence, particularly  
7           because of the evidence of imminence.

8           But I decided, at that stage, to the best of my  
9           recollection, that I ought to find out exactly what the  
10          degree of threat was, to see whether at least it fitted  
11          in with our understanding of anticipatory self-defence  
12          and I never agreed with the United States paper which  
13          suggested there was some greater threat, and, so as far  
14          as I can recall, I therefore asked to be briefed by the  
15          security services as to the intelligence so that I could  
16          form a judgment for myself whether there was an imminent  
17          threat, and that was the context in which I saw  
18          John Scarlett.

19       SIR LAWRENCE FREEDMAN: You concluded --

20       RT HON LORD GOLDSMITH QC: He took me -- I went with two of  
21       my officials, David Brummell and another official. He  
22       took us through the state of their knowledge in relation  
23       to WMD, in relation to chemical and biological warfare,  
24       in relation to the nuclear programme.

25           On the self-defence, the judgment I formed was this:

1       that their position in relation to the chemical and  
2       biological weapons was that they existed, but that they  
3       would not be used, as it were, first. They would be  
4       used in retaliation to an attack. They might be used on  
5       Iraqi people, and certainly, that if there were an  
6       attack, they would be used on Israel, but not that there  
7       was an imminent threat that they were going to be used,  
8       as it were, offensively in the first instance.

9       So there was no sufficient imminent threat from that  
10      in my view. So far as nuclear force was concerned,  
11      which creates particular problems in relation to  
12      self-defence, the intelligence was that they were quite  
13      a long way behind getting to a stage where nuclear  
14      weaponry would be ready, and, therefore, it would be  
15      impossible to say that there was an imminent threat from  
16      that.

17      So my judgment was -- forgive me for the long  
18      answer. My judgment was there wasn't the evidence of  
19      imminence of threat which would justify us in saying  
20      self-defence was a basis for force.

21   SIR LAWRENCE FREEDMAN: That's very helpful. Can you, just  
22      to conclude this -- presumably you were aware that not  
23      just in the United States, but in the United Kingdom as  
24      well, there was, in terms of the description of the  
25      threat, this so-called fusion argument, that, at some

1 point in the future, weapons of mass destruction, say  
2 from a country like Iraq, could be passed over to  
3 terrorists such as Al-Qaeda. But this was  
4 a hypothetical threat.

5 So if that was going to be a justification for war,  
6 you would find it very difficult, on what you have just  
7 said.

8 RT HON LORD GOLDSMITH QC: It seemed to me that this might  
9 be part of the policy arguments for saying that the  
10 United Nations Resolutions in relation to weapons of  
11 mass destruction must be enforced so as to avoid this  
12 risk in the future. But certainly it never seemed to me  
13 that that argument could be a justification for using  
14 force on the basis of self-defence, because there wasn't  
15 any imminent threat -- evidence of imminent threat, that  
16 that was about to happen, and, therefore, we needed to  
17 protect ourselves against it.

18 SIR LAWRENCE FREEDMAN: Thank you very much.

19 THE CHAIRMAN: Usha?

20 BARONESS USHA PRASHAR: Lord Goldsmith, I want to cover two  
21 areas. One is your involvement in discussions before  
22 8 November 2002 on the potential use of force and,  
23 secondly, your view of the position in international law  
24 at the time that is before 1441 was adopted. So can  
25 I first turn to your involvement in the discussions

1 before November 8th?

2 Were you aware of discussions across Whitehall  
3 during the first half of 2002 on the possible basis of  
4 use of force, including pre-emption, humanitarian  
5 intervention, which you already referred to,  
6 anticipatory self-defence, and the so-called Kosovo  
7 precedent?

8 RT HON LORD GOLDSMITH QC: Not really in the first half,  
9 apart from -- I think the first significant involvement  
10 I had, apart from getting briefing, because it was  
11 obvious to me from the press that this was where we were  
12 coming to, and, therefore, I wanted to understand --

13 BARONESS USHA PRASHAR: So you were surmising all this from  
14 the press?

15 RT HON LORD GOLDSMITH QC: I could see from the press what  
16 was being said by President Bush, and then,  
17 in July 2002, I attended a meeting, I think it was --

18 BARONESS USHA PRASHAR: Before I come to that, I just want  
19 to go through that, because I'm wanting to establish  
20 whether you were aware of discussions in the first half  
21 of 2002, and you are saying you were not?

22 RT HON LORD GOLDSMITH QC: I'm not aware of the detail of  
23 discussions. I would presume there were discussions  
24 taking place. I wasn't a part of them. I didn't  
25 attend Cabinet. This was a practice which had grown up



1 over quite a long period of time, that the Attorney  
2 General didn't attend Cabinet unless apparently legal  
3 advice was called for. It wasn't called for at all in  
4 that period, so I didn't attend Cabinet and wasn't  
5 a part of any other group which was discussing this.

6 BARONESS USHA PRASHAR: Was the term "regime change" used  
7 during this time? Were you aware of it?

8 RT HON LORD GOLDSMITH QC: I had certainly seen it, but,  
9 again, I think probably from what I was picking up from  
10 the press. Maybe my officials may have been briefing me  
11 that this was something that was being raised. I can't  
12 recall.

13 BARONESS USHA PRASHAR: So what you are saying is that,  
14 during the first half of 2002, you were not asked to  
15 provide advice on a legal basis for military action?

16 RT HON LORD GOLDSMITH QC: No, I did have an exchange of  
17 correspondence with the Defence Secretary --

18 BARONESS USHA PRASHAR: I'm going to come to that. That was  
19 my next question. I think you wrote to Geoff Hoon on  
20 28 March --

21 RT HON LORD GOLDSMITH QC: Yes.

22 BARONESS USHA PRASHAR: -- because you expressed concern.  
23 Can you tell me what you were concerned about, about  
24 this interview?

25 RT HON LORD GOLDSMITH QC: He had, in an interview with

1 Jonathan Dimbleby, I think it was, expressed himself  
2 with apparent clarity and repeatedly -- it wasn't just  
3 a single remark. I looked at the transcript and he said  
4 it several times. He was saying that there was a clear  
5 basis for military action at that stage, without any  
6 further authority. He was putting it on the basis,  
7 apparently, of self-defence, as he has explained.

8 I think he was -- with respect to him, I think he  
9 was wrong in any event, because I think he wasn't  
10 applying the doctrine of imminence to that, and he  
11 was -- and that did, as my letter said, put me in  
12 something of a difficult position, if that appeared to  
13 be an authoritative statement of the British  
14 Government's position at a time that I hadn't been asked  
15 to advise, and so I wrote to him to make clear that  
16 I was unhappy about that.

17 BARONESS USHA PRASHAR: Can you recall what his response  
18 was?

19 RT HON LORD GOLDSMITH QC: We have it, I think. I have seen  
20 it again. His response was -- if I may just remind  
21 myself of it. His response was -- he said that, if I'm  
22 allowed to refer to this. It has been -- I know there  
23 is --

24 THE CHAIRMAN: It has.

25 RT HON LORD GOLDSMITH QC: I know there is a bit of an

1           issue, which is frustrating, about what has and has not  
2           been declassified.

3   THE CHAIRMAN: Can I just say, since you say that, the  
4           frustration is shared.

5   RT HON LORD GOLDSMITH QC: I want to make it very clear that  
6           I don't agree with the decision that has been apparently  
7           made that certain documents are not to be declassified,  
8           but I will give the evidence that this Inquiry seeks.

9           He said in his response, as the transcript makes  
10          clear:

11          "It is too early to give specific answers about the  
12          range of options that we need to consider. I said that  
13          we would be entitled, in principle, to act in  
14          self-defence, if it was shown that Iraq had weapons of  
15          mass destruction which were capable of posing a threat  
16          to the UK."

17          I didn't respond to that. I didn't actually think  
18          that was a correct statement of what the law was, but  
19          I had achieved my purpose of making it clear I didn't  
20          want to see senior ministers making apparently  
21          authoritative statements on behalf of HM Government  
22          about the use of force before I had even been asked to  
23          express any view about it.

24   BARONESS USHA PRASHAR: On 22 May, you and Sir Michael Wood  
25          went to the United States State Department legal

1       advisers and you discussed the legal basis for  
2       a possible military attack on Iraq. Is that right?

3   RT HON LORD GOLDSMITH QC: No, I think 22 May, I think, was  
4       when Will Taft came to see me. Will Taft IV was the  
5       legal adviser to the State Department. He was regarded  
6       as my opposite number when it came to use of force.  
7       A very senior, very experienced official. He came to  
8       see me. I know, because I've seen it again, there was  
9       briefing on the basis that we were going to discuss the  
10      use of force. Helpful to have the briefing.

11       In fact, it turned out to be much more a sort of get  
12      to know you, understand each other's role, discussion  
13      without any really detailed discussions to legal  
14      principles. I don't think I really felt ready to have  
15      that discussion. I don't know whether he did or didn't,  
16      but in the event, we didn't have it.

17   BARONESS USHA PRASHAR: So you are saying you did not  
18      discuss the legal basis for a possible military attack  
19      on Iraq at this meeting?

20   RT HON LORD GOLDSMITH QC: Not in any detail at all.

21   BARONESS USHA PRASHAR: You didn't form any opinion about  
22      whether there were any differing views or was it just  
23      about the different roles played by different officers?

24   RT HON LORD GOLDSMITH QC: It was -- no, I don't recall  
25      getting any different views. I was aware from other

1        briefing that we had a difference of view on one issue,  
2        which was whether or not -- there was a very important  
3        difference. Whether, so far as the revival argument was  
4        concerned, an individual state could form the judgment  
5        that there was a material breach or whether it had to be  
6        the Security Council.

7            I was aware that the United States took the view it  
8        was for them to decide. I was also aware that there  
9        were some differences between the two countries on how  
10       to deal with the targeting decisions but I don't think  
11       that came up. That was more the Department of Defence.

12    BARONESS USHA PRASHAR: Now, we can come to the meeting that  
13       you attended on 23 July at Downing Street, when I think  
14       you said you expressed the view that self-defence and  
15       humanitarian intervention would provide no basis for use  
16       of force.

17    RT HON LORD GOLDSMITH QC: From what I then knew.

18    BARONESS USHA PRASHAR: Then, relying on previous  
19       resolutions would be difficult. Were you satisfied that  
20       the legal considerations were taken sufficiently  
21       seriously by the Prime Minister at this time?

22    RT HON LORD GOLDSMITH QC: Can I, just before I say that,  
23       just explain that remark about reliance on previous  
24       resolutions? Because the revival argument depends upon  
25       two things. It depends, first of all, on the fact that

1 Resolution 678 authorised the use of force and that  
2 Resolution 687 suspended it on conditions, but didn't,  
3 in fact, cancel it. That remained the case throughout.

4 But then there was the second requirement that  
5 someone has to make a demonstration of material breach.  
6 In 1998, a determination had been made by the Security  
7 Council in Resolution 1205, actually not that there was  
8 a material breach, but that there was a flagrant  
9 violation. It sounds worse, actually it is not a legal  
10 term at all, and so it creates confusion, and I think it  
11 caused confusion at the time, but in any event, there  
12 was a question whether, could you still, in 2002, rely  
13 upon the fact that, in 1998, the Security Council had  
14 said that Iraq was in flagrant violation?

15 My view was then: well, no, you couldn't, because  
16 a lot has happened since then and the Security Council  
17 might take a different view today.

18 So the point about relying upon past resolutions was  
19 simply you couldn't rely upon 1205 in my judgment in  
20 2002, and you would therefore need to have at least  
21 a new determination by the Security Council, somehow or  
22 another, that there was a material breach.

23 BARONESS USHA PRASHAR: So you explained this at  
24 the meeting?

25 RT HON LORD GOLDSMITH QC: I think I spoke quite shortly at

1           the meeting. It was a meeting which dealt with quite  
2           a lot. I expressed my view.

3   BARONESS USHA PRASHAR: You followed this up with the  
4           written advice?

5   RT HON LORD GOLDSMITH QC: I followed this up with a written  
6           advice.

7   BARONESS USHA PRASHAR: Were you asked to do that or did you  
8           do it of your own volition?

9   RT HON LORD GOLDSMITH QC: I did it of my own volition  
10          because I knew that the Prime Minister was going to see  
11          President Bush in the United States. I knew that one of  
12          the topics of conversation at least was going to be the  
13          Iraq issue, because that was obviously very much on the  
14          international agenda at that stage, and I didn't want  
15          there to be any doubt that, in my view, the  
16          Prime Minister could not have the view that he could  
17          agree with President Bush somehow, "Let's go without  
18          going back to the United Nations".

19          I wasn't asked for it. I don't, frankly, think it  
20          was terribly welcome. I do believe that it may well  
21          have been one of the contributing factors to the  
22          Prime Minister, to his great credit, persuading  
23          President Bush that he must go down the United Nations  
24          route, and then, as it were, the next I saw was,  
25          in September, President Bush went to the

1           General Assembly of the United Nations and said that he  
2           was going to come to the United Nations and go on the  
3           multilateral route, which was very, very welcome.

4   BARONESS USHA PRASHAR:   Why do you think it wasn't welcome,  
5           your advice?

6   RT HON LORD GOLDSMITH QC:   I don't know.   I think you have  
7           to -- you will have to ask Mr Blair that, but I don't  
8           think it was welcome.

9   BARONESS USHA PRASHAR:   Okay.   In December last year,  
10           I think the Daily Mail stated that they had a one-page  
11           letter from you to the PM, which was signed by hand.  
12           Does this document exist?

13   RT HON LORD GOLDSMITH QC:   No.

14   BARONESS USHA PRASHAR:   It doesn't?

15   RT HON LORD GOLDSMITH QC:   It is odd -- well, quite a lot of  
16           things that certain newspapers produce which I don't  
17           recognise as truth at all.   They talk about a one-page  
18           document.   The advice that I gave was, I think, five  
19           pages.   They said that it was addressed to "Dear Tony"  
20           and signed "Peter".   It was, in fact, addressed  
21           "Prime Minister" and signed "Peter Goldsmith" in the  
22           proper way.

23           So I have no idea what it is they have got, if  
24           anything.   Well, I don't know what they have got,  
25           I should say, rather.



1 BARONESS USHA PRASHAR: Can I move on to 14 October, I think  
2 when you met with Sir David Manning and Baroness Morgan.  
3 What was the purpose of this meeting?

4 RT HON LORD GOLDSMITH QC: I think that there were a number  
5 of meetings, as it were, after the summer, before  
6 Resolution 1441 was agreed, which were -- I mean,  
7 consider -- I think the principal question was: well,  
8 you know, what does the United Nations need to decide in  
9 order to provide an authority for force, if that is  
10 politically the judgment that is taken, that that needs  
11 to happen?

12 I think that is putting it -- telescoping it,  
13 because I think that people would say, in order to make  
14 sure that there was a credible threat on the basis that  
15 the credible threat of force would be what could bring  
16 Saddam Hussein to do what the international community  
17 wanted.

18 So I don't know whether -- I don't know whether  
19 there is any note of the meeting itself, but I would  
20 have explained, I think, probably two things.  
21 I certainly did during that period, probably three  
22 things.

23 First of all, that a new resolution needed to make  
24 a clear determination that there was a material breach;  
25 secondly, that the use of force would have to still be

1 proportionate and necessary to what it was that was  
2 going to be achieved; and I probably made a third point  
3 because I certainly did during that period. I made it,  
4 for example, in the meeting in July and in my advice  
5 in July, that regime change was not a basis for legal --  
6 for lawful use of force. It could be that another  
7 lawful basis for force might lead to regime change.  
8 Indeed, it might be the only way to achieve it, but  
9 wanting regime change was not of itself a lawful basis  
10 for the use of force.

11 BARONESS USHA PRASHAR: Okay. Then I think you phoned the  
12 Foreign Secretary on 18 October to express concerns.  
13 I mean, what were your concerns at that stage?

14 RT HON LORD GOLDSMITH QC: What was happening during this  
15 period was that negotiations were taking place in  
16 New York about the terms of a resolution, in which the  
17 US, I think, was really the lead, but the United Kingdom  
18 was a co-sponsor, and various drafts were being passed  
19 around. They were being copied -- I don't know whether  
20 every draft was being copied, but certainly some drafts  
21 were copied to my office, not with a request that  
22 I should advise, which was slightly unsatisfactory,  
23 because it was sort of "keep you in the picture" but not  
24 actually ask you to advise.

25 I think I was concerned to tell the Foreign

1 Secretary at that date that, without having been able  
2 fully to examine it, without having had the benefit of  
3 advice from others, it didn't look to me as if the  
4 present draft was going to be enough. The draft did  
5 actually change importantly, because I have looked back  
6 at the notes between then and November and there are  
7 some additional things that are put into it.

8 I think, for example, the "last opportunity"  
9 reference didn't get put in until a late date, and also  
10 this operational paragraph 4, which no doubt we will  
11 talk about, I think didn't get put in until the last  
12 moment either.

13 BARONESS USHA PRASHAR: Were there things that were  
14 troubling you at this stage? Were you troubled by the  
15 developments, because you telephoned him and expressed  
16 your concerns? Were there issues that troubled you?

17 RT HON LORD GOLDSMITH QC: I regarded it throughout as my  
18 job to try to give accurate legal advice. There were  
19 obviously other big questions about what was taking  
20 place, and I might have had my own private views about  
21 those, but those were not views which would influence my  
22 view as to the what the law was.

23 So what I was anxious to do, I think, was to reach  
24 a correct legal view. I was also -- I also had some  
25 concerns, as I had had with the Defence Secretary, about

1 public statements being made about what the position would  
2 be, although that is more after 1441 than before, lest  
3 that be thought necessarily to be our position. Though  
4 I did recognise -- perhaps I may make this point at this  
5 stage -- I did recognise that it wasn't easy for  
6 ministers, because they were engaged in a -- I'm not  
7 going to say a game of poker, but, effectively, they  
8 wanted Saddam Hussein to realise there was a credible  
9 threat, and to have been very doubtful in public about  
10 what they could do would obviously change the dynamics  
11 of these very difficult negotiations and pressure that  
12 was being put on his regime.

13 BARONESS USHA PRASHAR: During this period of activity, did  
14 you feel that you were included in the meeting as  
15 a matter of course, or did you have to ask for them?  
16 Were you encouraged to put your advice in writing?

17 RT HON LORD GOLDSMITH QC: I wasn't included in meetings in  
18 a sense at all. I don't know what meetings were taking  
19 place between the Prime Minister and others. I was  
20 involved, as it were, simply on my own -- I don't mean  
21 necessarily without my officials, I mean simply as the  
22 law officers in specific discussions about the legality.  
23 I have forgotten, I am afraid, the second part of your  
24 question, Baroness Prashar.

25 BARONESS USHA PRASHAR: Were you encouraged to put your

1 advice in writing?

2 RT HON LORD GOLDSMITH QC: No, I wasn't. There came a time

3 when -- there came a time when it was agreed that

4 I would.

5 BARONESS USHA PRASHAR: But at this stage I'm talking about?

6 RT HON LORD GOLDSMITH QC: I wasn't asked to provide any

7 advice in writing at this stage.

8 BARONESS USHA PRASHAR: Were you wanting to put your views

9 in writing --

10 RT HON LORD GOLDSMITH QC: No, I don't think I did need to

11 put my views in writing at this stage. I had been very

12 clear in July about what needed to be done, and that

13 still stood, and what the parameters were. I think

14 I had been very clear in my oral statements that there

15 needed to be a clear statement of material breach and so

16 forth. So I don't think I needed to add anything else.

17 BARONESS USHA PRASHAR: But you met the Prime Minister on

18 22 October?

19 RT HON LORD GOLDSMITH QC: Yes.

20 BARONESS USHA PRASHAR: Were you anxious that he should know

21 your legal advice and did you tell him that you needed

22 to express your views in writing?

23 RT HON LORD GOLDSMITH QC: I don't think. So I couldn't

24 have given definitive legal advice at that stage,

25 because the whole point was he had had the advice

1 in July about what needed to happen. The self-defence  
2 didn't work, the humanitarian crisis didn't work. Put  
3 in those terms, there wasn't a basis for military  
4 action.

5 If there was going to be a basis for military  
6 action, it had to be as a result of the new  
7 United Nations Security Council Resolution. That needed  
8 to say there was material breach. That advice had been given.

9 Until there was a resolution finally, there wasn't  
10 really anything more to say, although I was giving a bit  
11 of guidance about a couple of matters. One of them was  
12 some expressions of concern about the developing  
13 resolution, draft resolution, though, as I have said, it  
14 actually changed in significant ways at the last moment.

15 BARONESS USHA PRASHAR: So what was the purpose of the  
16 meeting with the Prime Minister on 22 October?

17 RT HON LORD GOLDSMITH QC: I think that we had not --  
18 I think we had not met -- I think we had not met  
19 since July and I think he called the meeting, or his  
20 officials called the meeting, I think, probably to  
21 discuss what the situation was.

22 There were two other issues which cropped up at  
23 these meetings. One of them was regime change. I'm  
24 not sure whether I needed to repeat that again in  
25 October, but it was a constant theme. The other was the

1 Kosovo precedent. If I may just explain.

2 When action was taken in relation to Kosovo, there  
3 was essentially a new legal theory that was developed,  
4 which was that there could be military force used to  
5 avert a serious humanitarian crisis. In that -- on that  
6 occasion, there had been a veto by Russia I believe, in  
7 the Security Council.<sup>1</sup> So United Nations authority was  
8 not present.

9 Still the view was taken, by this country and by  
10 others, that military action was justified on this new  
11 basis and I think there was a sort of view in some  
12 places: well, we managed to, as it were, avoid the fact  
13 that there was a veto on that occasion. Does that mean  
14 that if there is an unreasonable veto by another country  
15 that that can be ignored?

16 Of course, the position is that in the Security  
17 Council, the five permanent members have a veto, and if  
18 one of them says no -- if they abstain, it is all right,  
19 but if they say no, it cannot happen, even if the other  
20 14 members of the Security Council agree. So I think  
21 that was the issue, and I did, I recall, on more than  
22 one occasion, and I repeated it on 7 March, say that  
23 Kosovo was a special situation. That wasn't on the  
24 basis it was an unreasonable veto, it was on the basis  
25 of severe humanitarian crisis. I am afraid you can't

---

<sup>1</sup> The witness subsequently added that he understood that Russia had threatened to veto a draft resolution, but the gist of the point remained the same.

1           ignore a veto, even if it is unreasonable.

2   BARONESS USHA PRASHAR:   So what you were really saying is

3           you were giving consistent advice on these issues and

4           quite emphatically?

5   RT HON LORD GOLDSMITH QC:   Yes.

6   BARONESS USHA PRASHAR:   On 7 November, you met the Foreign

7           Secretary. Was the purpose of the meeting to make clear

8           to him that he should not take it for granted that it

9           would be all right on the night?

10   RT HON LORD GOLDSMITH QC:   Probably that's right.

11   BARONESS USHA PRASHAR:   What did you mean by it would not be

12           all right on the night?

13   RT HON LORD GOLDSMITH QC:   Well, they shouldn't take it for

14           granted that -- I can't remember whether they got the

15           resolution the next day, or if it was at an advanced

16           state on, sort of, that day. They shouldn't take it for

17           granted that, when it came to it and definitive legal

18           advice was given, that it was going to be that we are in

19           a position to take military action.

20   THE CHAIRMAN:   Just for the record, it was four days later

21           that 1441 --

22   RT HON LORD GOLDSMITH QC:   Thank you. So the resolution

23           probably wasn't even in its final form at that stage.

24   BARONESS USHA PRASHAR:   So the picture I'm getting is that

25           you were giving consistent advice. You expressed some



1 concerns about the statements made by some ministers,  
2 but before I hand over to colleagues, I would like to  
3 know now, what was your position in international law at  
4 the time before the 1441 in relation to the use of force  
5 in Iraq? So if you can just sort of summarise for me  
6 what was your view before 1441.

7 RT HON LORD GOLDSMITH QC: Before 1441, it was that there  
8 were only three potential bases for the use of force:  
9 self-defence, humanitarian crisis, United Nations  
10 authority.

11 In relation to self-defence, I established that  
12 there wasn't sufficient evidence of imminence to justify  
13 military action on that basis, and I didn't agree with  
14 the United States' expanded doctrine of pre-emption.

15 On humanitarian crisis, it justified the  
16 No Fly Zones in those specific areas but didn't justify  
17 anything more. Nobody suggested that it did.

18 So far as United Nations authority was concerned,  
19 I agreed in principle that the revival argument would --  
20 could justify action, but that could not be based on the  
21 existing resolutions, particularly 1205. There needed  
22 at least to be a further United Nations Security Council  
23 Resolution.

24 BARONESS USHA PRASHAR: Okay, thank you very much.

25 THE CHAIRMAN: I would like to ask a couple of general

1 questions about relations between the Attorney General  
2 and his/your office and the Foreign Office legal  
3 advisers. We took evidence yesterday from  
4 Sir Michael Wood and also from your former legal  
5 secretary, David Brummell.

6 RT HON LORD GOLDSMITH QC: Yes.

7 THE CHAIRMAN: First, the general working arrangements. We  
8 were told yesterday that there was a good, even pretty  
9 constant interflow of paper and of discussion between  
10 your legal secretary and his staff, your staff, and the  
11 Foreign Office legal advisers.

12 Would that be across the board, in terms of  
13 Foreign Office business, treaty-making, litigation, the  
14 rest of it?

15 RT HON LORD GOLDSMITH QC: It would depend on whether my  
16 advice was required or not. They obviously did a lot of  
17 business in which I didn't need to be involved. I had  
18 many other things to be concerned with, and so they  
19 wouldn't come to me on that. They may have been keeping  
20 the secondees in my office informed of some things, but  
21 I wouldn't necessarily know about that until it raised  
22 an issue that I needed to deal with.

23 THE CHAIRMAN: Again, just for the record, it was said  
24 yesterday it was the normal practice to second from the  
25 Foreign Office legal advisers' department someone with

1 expertise in international law to the law officers'  
2 secretariat, the law officers' department.  
3 RT HON LORD GOLDSMITH QC: Yes, if I could, the way that the  
4 Attorney General's office worked was that with the  
5 exception of the two top officials, the legal secretary  
6 and the deputy legal secretary, now called the  
7 Director General and Deputy Director General, I think, all  
8 the lawyers present were secondees from other  
9 departments.

10 The reason for that was that they brought with them  
11 specific expertise in the areas that the law officers  
12 were concerned with. They were there to support the law  
13 officers. They didn't ever give advice of their own.  
14 So there were specialists in criminal law, international  
15 law, European Union law and all the other areas that the  
16 Attorney and the Solicitor General might be concerned  
17 with.

18 THE CHAIRMAN: Thank you. Turning to specifically the  
19 dimension of international law, it would be interesting  
20 to know what your view then, and indeed now, would be  
21 when a critical United Nations Security Council  
22 Resolution is being negotiated in draft, sometimes at  
23 great speed, but, in the case of 1441, both at great  
24 speed and over quite a long period.

25 How far would it be normal or occasionally necessary

1       for the Attorney General to give advice on the  
2       prospective effect of particular drafting changes?

3   RT HON LORD GOLDSMITH QC: Well, in the context of the  
4       United Nations Security Council, it didn't seem to be  
5       the practice to do that. As I have said, we were sort  
6       of kept informed of drafts, but always sort of  
7       explicitly on the basis of, "We are telling you but we  
8       are not asking you to do anything about it".

9       In some other areas, the European Union, for  
10      example, I would, from time to time, give specific  
11      advice on a proposed Directive or something of that  
12      sort.

13   THE CHAIRMAN: Just to round off on that, is 1441 a special  
14      case, in that the prospective effect of it from the  
15      standpoint of the British Government's policy objective,  
16      would be to certainly reinforce the threat against  
17      Saddam where he failed to comply, but ultimately to  
18      justify the use of force against him, should he fail to  
19      comply?

20      It was therefore a very special case and looked  
21      further forward into the future. Was that something  
22      that should have come under your eye at that time?

23   RT HON LORD GOLDSMITH QC: Well, obviously it was a special  
24      case in the sense it was of particular importance and  
25      significance, and later resolutions relating to Iraq in

1 relation to reconstruction and the interim authority,  
2 for example, also I was given some knowledge of.

3 I think the Foreign Office would say, well, it did  
4 come under my eye because they were keeping us informed  
5 of the state of the negotiation, even if not  
6 specifically asking for formal advice about it.

7 THE CHAIRMAN: Last point on this: with hindsight and in the  
8 context of 1441, do you think the arrangements between  
9 the Foreign Office and your own department worked  
10 sufficiently well in terms of alerting you, alerting the  
11 existence of a potential issue as to the effectiveness  
12 of 1441 as drafts developed?

13 RT HON LORD GOLDSMITH QC: I'm not sure -- and it is  
14 a counsel of perfection and it is with hindsight -- that  
15 they worked quite as well as they could have done.  
16 Because it was a very, very important resolution. It  
17 was changing and that's the nature of United Nations  
18 negotiations.

19 If time had permitted (and there were other demands  
20 on my time) -- perhaps with hindsight it would have been  
21 desirable if I had been asked to be rather more involved  
22 in the detail, but I wasn't and that was the practice.

23 THE CHAIRMAN: Thank you. Well, I'll turn now, if I may, to  
24 Sir Roderic Lyne. Roderic?

25 SIR RODERIC LYNE: I would like to go back, if I could, to

1 Resolution 1441 and I think, for the sake of clarity, it  
2 was actually adopted on 8 November, so your conversation  
3 that you referred to just now was, indeed, just before  
4 it was adopted.

5 RT HON LORD GOLDSMITH QC: Thank you.

6 SIR RODERIC LYNE: Specifically, I would like to draw your  
7 attention to operative paragraph 12 of the resolution.

8 RT HON LORD GOLDSMITH QC: Yes.

9 SIR RODERIC LYNE: It is probably helpful if I just read it.

10 RT HON LORD GOLDSMITH QC: I have it in front of me.

11 SIR RODERIC LYNE: You have the draft in front of you, but  
12 for the record, and that reads that the Security  
13 Council, and I quote:

14 "... decides to convene immediately upon receipt of  
15 a report, in accordance with paragraphs 4 or 11 above,  
16 in order to consider the situation and the need for full  
17 compliance with all of the relevant Council resolutions  
18 in order to secure international peace and security."

19 Now, there was a great deal of debate, which carried  
20 through the following months, about the meaning of the  
21 word "consider" in that sentence.

22 At the time that 1441 was adopted, and having looked  
23 at what the United States, the United Kingdom, France,  
24 Germany -- France, China, Russia, some other countries  
25 such as Mexico and Ireland, said on the record in their

1 explanations of vote, did you see that there was  
2 a discrepancy between our understanding of this  
3 paragraph and the way that other people were  
4 interpreting it?

5 RT HON LORD GOLDSMITH QC: No, I wouldn't put it that way.

6 First of all, you know, the way I approach all legal  
7 problems is to try to assemble all the material that  
8 will help me reach a decision, to look at it very  
9 carefully, to enquire, to consider other views and then  
10 to form a judgment. So I don't read a document like  
11 this and say, "Ah, I understand what this means", unless  
12 it is crystal clear.

13 Sir Michael, I think yesterday, said that  
14 Resolution 1441 was clear. I would have thought that  
15 was the one thing it wasn't, but that's a difference  
16 between us, and, therefore, you have to look at other  
17 materials in order to resolve the ambiguities, and no  
18 doubt we will come on to discuss how I did that.

19 But that was one -- the explanations of vote was one  
20 of the matters to be taken into account in determining  
21 what was meant in operative paragraph 12, as, of course,  
22 the whole of the resolution. You don't interpret any  
23 document like this just by looking at one paragraph.  
24 You have to look at it as a whole. You have to  
25 understand the purpose behind it and then you have to

1           form a view as to what it means.

2   SIR RODERIC LYNE:   The United States in their explanation of  
3           vote was very clear that it did not see paragraph 12  
4           requiring the further consideration by the Council as  
5           meaning that the Security Council would need to take  
6           another decision, and they said that it did not, in  
7           their view, constrain any member state from acting to  
8           enforce relevant United Nations Resolutions and protect  
9           world peace and security.  France took a very different  
10          position.  France said that they felt that they had  
11          attained their objective of a two-stage approach under  
12          which the Security Council would maintain control of the  
13          process at each stage, and they interpreted the  
14          resolution as meaning that the Council would meet, if  
15          there had been a report of a further breach, and draw  
16          the appropriate conclusions.

17          So you have got quite a wide gap there.  You  
18          referred to Sir Michael Wood.  He talked about the  
19          United Kingdom's explanation of vote, which is obviously  
20          of particular importance to us yesterday, and we had  
21          adopted a position, which I'm sure you are familiar  
22          with, in which we had said that, if there was a further  
23          Iraqi breach, the matter would return to the Council for  
24          discussion, as required in paragraph 12, and we then  
25          said we would then expect the Security Council then to



1 meet its responsibilities.

2 Sir Michael described that as a subtle statement, an  
3 accurate statement, but it may have been a bit of  
4 a misleading statement, and he had said that it had --  
5 it was a statement which left our options open.

6 RT HON LORD GOLDSMITH QC: I don't think this is misleading.

7 I just would like to explain one point which seems to me  
8 important in this debate, particularly when one looks at  
9 the expression "automaticity", which crops up.

10 There were plainly two distinct issues that were  
11 going on in the discussions. One was a concern that, if  
12 the Security Council passed a resolution which said Iraq  
13 is in material breach, that would mean that the fighter  
14 planes could go in the following day, and on the basis  
15 of past experience, that's exactly what could have  
16 happened. That's what happened in relation to 1205.  
17 Actually, there was a small, short delay, but the point  
18 was that the United States, the United Kingdom took the  
19 view, and indeed France, in 1993, had taken the view,  
20 that once the Council had said material breach, that was  
21 the revival of the use of force and member states could  
22 go in without more.

23 So there was a concern that there should be not  
24 automaticity, therefore that there should be not the  
25 ability to go in the following day, and that was

1       important to a number of states. That much is clear.  
2       So the firebreak was put in, which is really operational  
3       paragraph 2, that there is a one last opportunity to  
4       comply. Now, that's one issue.

5       SIR RODERIC LYNE: Can I just pause on that issue?

6       RT HON LORD GOLDSMITH QC: Yes.

7       SIR RODERIC LYNE: Were you concerned that automaticity --  
8       everybody said there is no automaticity there -- could  
9       itself be interpreted in two different ways? The way  
10      that you have just described: this means we do not go  
11      immediately into action; or, alternatively, as meaning  
12      that this resolution does not automatically mean that  
13      you can go to war, time unstated, without a further  
14      resolution.

15      RT HON LORD GOLDSMITH QC: I think that some external  
16      observers have interpreted the word in that second  
17      sense. If one looks carefully at the explanations of  
18      vote, and certainly -- and no doubt we will come on to  
19      this -- to the negotiating history, I don't believe the  
20      principal players understood it in that way.

21      There was this second issue, which was what was  
22      going to happen, and, actually, I think the thing that  
23      is most significant about what was said by the French,  
24      and indeed the joint statement that was made by the  
25      French, the Russians and the Chinese afterwards, was

1           they never said, "And the Council must decide".

2           They avoided using that expression, and with respect  
3           to those to who take a different view, that does seem to  
4           me to be significant.

5   SIR RODERIC LYNE: I'd like to come back at a later stage of  
6           our discussion to the negotiating history, which is  
7           obviously of crucial importance, but just looking at the  
8           situation at the time that this was adopted, there is,  
9           I think, as we have just agreed, a degree of ambiguity  
10          about the word "automaticity", and there are at least  
11          three different interpretations being put upon what the  
12          Council has decided when it says that we will meet again  
13          to consider.

14          There is an American position, a French, Russian,  
15          Chinese and other position -- actually, there was  
16          a fourth one, because Syria said, "No way, nothing", and  
17          then the British had kept all their options open through  
18          a very carefully crafted explanation of vote.

19          So there was a lot, just taking the British view of  
20          this, that was left unclear about what would happen.

21          Would that be accurate?

22   RT HON LORD GOLDSMITH QC: I think what, with respect, would  
23          be accurate is, as I said before, the difficulty about  
24          1441 was that it was not crystal clear, and that is what  
25          led to me particularly having to consider very carefully

1       which was the better interpretation of this, because at  
2       the end of the day you can't throw up your hands and  
3       say, "I don't really know what this means". You  
4       actually have to reach a decision at some point which  
5       way you go, and you weigh up all the evidence, and, as  
6       you have said, Sir Roderic, there are elements there  
7       which point in one direction, equally, there are  
8       elements which point in another. That was the  
9       difficulty.

10    SIR RODERIC LYNE: I think we are of one mind. We are  
11       agreed that it was not crystal clear. Whether that  
12       makes it ambiguous or not is --

13    RT HON LORD GOLDSMITH QC: Can I just add one point, just on  
14       what Sir Jeremy Greenstock said? I did read that at the  
15       time as quite a subtle way, actually, of saying: the  
16       United Kingdom shares the view of the United States that  
17       the Security Council does not need to decide.

18    SIR RODERIC LYNE: Though, again, it could be read in the  
19       opposite sense. If you say the Security Council will  
20       have to meet its responsibilities at that stage,  
21       a layman, such as myself, not a lawyer, might read that  
22       as meaning "meeting responsibilities" implies it will  
23       have to take some form of decision. So there are two  
24       possible readings of that.

25    RT HON LORD GOLDSMITH QC: He did say "I trust". This is

1 diplomatic language. There is a lot of code, I suspect,  
2 in all of this, which the diplomats understand,  
3 Sir Roderic, you amongst them.

4 SIR RODERIC LYNE: Very long retired.

5 RT HON LORD GOLDSMITH QC: I think in those circumstances  
6 that the words were obviously very carefully chosen and,  
7 "I trust they will meet their responsibilities", I'm  
8 sure he did trust they would meet their responsibilities  
9 but what is unspoken is what happens if they don't.

10 SIR RODERIC LYNE: In this situation that was not crystal  
11 clear, would it be right to say that because the  
12 Security Council had not succeeded in reaching a crystal  
13 clear position in 1441 it had effectively deferred the  
14 resolution of this disagreement for a later stage of the  
15 issue?

16 RT HON LORD GOLDSMITH QC: They couldn't have done that.  
17 I mean, 1441 either meant that the Security Council had  
18 to meet to consider, but no more, and there were the  
19 existing paragraphs in operative paragraphs 1 and 4 in  
20 particular, which I hope we will talk about, which meant  
21 that authority for force was revived, or they had not  
22 reached that conclusion; they had actually decided that  
23 the Security Council would have to decide. There are  
24 only two possibilities.

25 SIR RODERIC LYNE: They had left open the possibility that

1       there might be a second decision or there might not be  
2       a second decision.

3   RT HON LORD GOLDSMITH QC:  Oh, that is absolutely true.

4       They had left open the possibility.  They had said --  
5       and I think that the French reference to "two-stage  
6       process", this was important, because the French wanted  
7       there to be a further, at least, discussion.  We will  
8       come on to discuss negotiating, but if the position was  
9       that the French wanted that discussion, were prepared to  
10      accept that, but without an agreement that there should  
11      be a decision at that point, it would mean there would  
12      be the opportunity for discussion, the Security Council  
13      could have decided in that discussion to give Iraq more  
14      time, to impose some other sanction, or, indeed, it  
15      could have decided explicitly at that stage, enough is  
16      enough, force is authorised.

17      The question is, if they didn't make that decision,  
18      what was the legal position?  I repeat, 1441 had to  
19      resolve that question.  It meant either one thing or the  
20      other.

21   SIR RODERIC LYNE:  The French, as you say, were very firm  
22      that they saw this as a two-stage process.  Some, at  
23      least, within the United States administration, possibly  
24      some within the British Government, had entered the  
25      negotiation with a preference that there would be

1 a one-stage process. At the end of this negotiation, it  
2 was still not clear, from 1441, whether there had to be  
3 a second stage or not.

4 RT HON LORD GOLDSMITH QC: No, no, it was quite clear there  
5 had to be a second stage. The question was what the  
6 second stage was.

7 SIR RODERIC LYNE: All right.

8 RT HON LORD GOLDSMITH QC: It is very important.

9 SIR RODERIC LYNE: It is very important whether there had to  
10 be a further decision by the Security Council.

11 RT HON LORD GOLDSMITH QC: Yes.

12 SIR RODERIC LYNE: That is the point what was unclear.

13 RT HON LORD GOLDSMITH QC: That is the point about which  
14 argument has raged and, therefore, which was unclear.

15 SIR RODERIC LYNE: That argument had not been concluded by  
16 1441?

17 RT HON LORD GOLDSMITH QC: It had been. The question is:  
18 what did 1441 mean? Legal documents mean something.

19 SIR RODERIC LYNE: If it is not clear what it means, it  
20 can't have been concluded.

21 RT HON LORD GOLDSMITH QC: With respect, it is not. The  
22 courts are there frequently to decide exactly these  
23 issues in relation to contracts and statutes and  
24 international instruments. They do mean something.  
25 Sometimes it is not obvious what it is, but you have to

1       divine it and you have to use all the tools.

2               This is a very serious point. You can't say,  
3       because it is not clear, it hasn't been decided. It had  
4       been decided. We know what the United States think it  
5       had been. Actually, we also know what the French  
6       believe it had been.

7               You may have seen in the documents a minute of  
8       a lunch I had with the French Ambassador to the  
9       United Kingdom afterwards in which he told me that the  
10      position of the French was that we didn't need a second  
11      resolution. I have seen since then -- I have never  
12      really spoken about this publicly, because it was  
13      a private lunch, but I have seen since then a public  
14      statement by Mr Levitte, who was the French  
15      Ambassador to the United Nations, who took part in these  
16      negotiations, saying in terms, "I went, after 1441, to  
17      the White House. I told them they didn't need a second  
18      resolution, and I wish they wouldn't ask for it".

19   SIR RODERIC LYNE: I can think of a number of political  
20      rather than legal reasons why the French, or indeed the  
21      Russians, might very well have taken that position,  
22      because going for a second resolution would have obliged  
23      them to take another decision.

24              But this is not really the point I'm trying to  
25      establish at this stage. I think what we have agreed on



1 is it wasn't crystal clear, and it wasn't crystal clear  
2 because there were differing views about whether or not  
3 a second decision was going to be required.

4 RT HON LORD GOLDSMITH QC: I don't agree with that. I agree  
5 that the wording is not crystal clear in one sense  
6 because it is open to interpretation. In one sense, the  
7 wording is crystal clear, because these members of the  
8 Security Council, who know the difference between the  
9 word "decide" and "consider the situation", chose,  
10 I believe quite deliberately to use the words "consider  
11 the situation", and they could have said "decide" if  
12 that's what they meant.

13 The French, in their explanations of vote, the  
14 French, the Russians and the Chinese in their statement  
15 afterwards, could have said, "This means the Security  
16 Council has to decide", and they didn't, and I regard  
17 that as significant.

18 SIR RODERIC LYNE: I think we are going to need to take  
19 a break in a moment, and we are obviously going to need  
20 to come back to this, because this is a point of  
21 critical importance --

22 RT HON LORD GOLDSMITH QC: Of course.

23 SIR RODERIC LYNE: -- that was debated, effectively, for  
24 some months afterwards. But just to conclude at this  
25 stage, did the way that 1441 come out present the

1 United Kingdom with a difficult decision as to whether  
2 or not we should seek a further decision or resolution  
3 by the Security Council before we might find ourselves  
4 going into military action?

5 RT HON LORD GOLDSMITH QC: I think it did, and, obviously,  
6 as I have consistently said, from the legal point of  
7 view it would have been safer to have had a second  
8 resolution because it would have put the matter beyond  
9 doubt. Nobody could have then challenged the legality.

10 From a political point of view, as I heard ministers  
11 explaining and as I obviously saw from what was  
12 happening in Parliament and the press, it was  
13 potentially enormously important, because in the  
14 circumstances of doubt in relation to it, people who  
15 were very unhappy about what was to take place would  
16 have felt much better about it -- I don't mean "better"  
17 in an emotional sense, but they would have been much  
18 more persuaded about this if there had been a second  
19 resolution, which would have demonstrated that the  
20 international community was solidly behind the action.

21 That's what I understand Sir Jeremy Greenstock to  
22 mean when he talks about the word "legitimacy". That it  
23 would have had that sort of legitimacy because it would  
24 have been supported by the international community, and  
25 that obviously did give rise to a problem.

1 SIR RODERIC LYNE: But at this stage, from a legal point of  
2 view, you were still of the view, as you have just said,  
3 I think, that the safest course would be to have  
4 a further Security Council Resolution --

5 RT HON LORD GOLDSMITH QC: Yes.

6 SIR RODERIC LYNE: -- to authorise the use of force?

7 That, of course, is not the position that the  
8 United States had taken in its explanation of vote on  
9 this resolution.

10 RT HON LORD GOLDSMITH QC: No.

11 SIR RODERIC LYNE: So there was quite a substantial  
12 difference between your position and that of the  
13 United States.

14 Did you express any concern about this to the  
15 Foreign Secretary or the Prime Minister?

16 RT HON LORD GOLDSMITH QC: Well, I'm not sure, Sir Roderic,  
17 in what sense you mean "concern". It was necessary for  
18 me then to consider, after 1441 had been passed, what it  
19 did actually mean, and that was a difficult judgment  
20 because there were competing arguments.

21 In fact, the one that I found most important to deal  
22 with wasn't actually quite the one that he had raised,  
23 but was actually what was meant by the word "assessment"  
24 in operational paragraph 4, which came in at a late  
25 stage. I don't believe I had seen that before 1441 had



1 SIR RODERIC LYNE: -- in the period from there leading up  
2 towards your advice to the Prime Minister of  
3 7 March 2003.

4 RT HON LORD GOLDSMITH QC: Yes.

5 SIR RODERIC LYNE: I understand that -- just picking up from  
6 where we were before the break -- soon after, or fairly  
7 soon after 1441 was agreed, you were in touch with both  
8 the Foreign Secretary and Jonathan Powell at Number 10  
9 Downing Street and that you had some concerns at that  
10 time about the way in which you had heard that your own  
11 views were being described. The phrase "Chinese  
12 whispers" has cropped up in this context.  
13 David Brummell yesterday used a different phrase to  
14 express your concern.

15 Is that right and can you tell us what your concerns  
16 were?

17 RT HON LORD GOLDSMITH QC: Well, I think it is exactly as  
18 you put it. You pick up, usually officials saying  
19 occasionally something in a newspaper which seems to  
20 suggest that, you know, there is a view taken of what  
21 your opinion is, which actually isn't it, and that's  
22 a dangerous situation because you are then faced with  
23 the problem: well, if I don't say something about it  
24 now, is someone going to say you didn't pick it up then  
25 and you didn't contradict it, and, therefore, it is too

1 late for you to say it. So you have got to watch out  
2 for that.

3 There is also, I think -- I see this quite a lot in  
4 government -- there is also the problem that sometimes  
5 the qualifications to what you have said don't seem to  
6 be heard as clearly as you intended them to be. I have  
7 heard the expression about, you know, the "yes, but" and  
8 the "but" is forgotten in another context. I think this  
9 happens sometimes in government and sometimes,  
10 therefore, have to shout the "but" rather harder than  
11 you would normally, to make sure it is not forgotten.

12 SIR RODERIC LYNE: Where do you think these Chinese whispers  
13 were coming from?

14 RT HON LORD GOLDSMITH QC: I have no idea. There is --  
15 there is a great deal -- there is an undergrowth, if  
16 I can say, beneath ministers, of communications between  
17 departments. There is a great deal of discussion  
18 between ministers and their advisers and members of the  
19 press, and sometimes people who are least involved in  
20 issues pick up things and they then come out. That is  
21 just the way government seems to work.

22 SIR RODERIC LYNE: But when you decided to pick up the phone  
23 to Jonathan Powell, did that suggest that you were a bit  
24 worried that this might have been coming out of  
25 Number 10?

1 RT HON LORD GOLDSMITH QC: I don't know. I don't know  
2 whether I picked up the phone to him or whether it was  
3 arranged that there would be a meeting or a call.  
4 I don't know. But of course, at the end of the day,  
5 what mattered was what was the view in Number 10.  
6 You know, wherever the Chinese whispers had been  
7 coming from, what mattered was their view, and each time  
8 I did say, "I want this to be understood", the response  
9 I always got was, "Yes, that is understood", and  
10 sometimes afterwards you wondered if that's the way  
11 everyone was acting.  
12 SIR RODERIC LYNE: But what also mattered, obviously, was  
13 your view. So you presumably reiterated your view to  
14 Jack Straw and to Jonathan Powell in those  
15 conversations?  
16 RT HON LORD GOLDSMITH QC: I think there was an important  
17 moment after 1441, when I had a conversation with  
18 Jack Straw and I hadn't at that stage received what  
19 I would call instructions. I want to explain that word  
20 because it could be completely misunderstood.  
21 The way that lawyers work, particularly barristers,  
22 which, of course, is what I come from, is you get  
23 instructions, which means a request to advise, and the  
24 request to advise comes through with the detail of the  
25 question and with the supporting materials, often with

1 views expressed that you can -- and until I had had  
2 that, particularly the Foreign Office legal advisers'  
3 point of view, and been able to analyse that, I wasn't  
4 really in a position to give a definitive point of view.

5 So there came a moment, I remember, when I was  
6 discussing this with Jack Straw. He was particularly  
7 anxious, I think, that I should understand the  
8 negotiating history and I said, "That must be something  
9 then that I'm properly briefed about", because  
10 I wouldn't have otherwise been able to work that out --  
11 well, not satisfactorily -- for myself.

12 So I think there then came this moment when it was  
13 agreed that I would receive this request for advice, and  
14 that finally came at some stage in December. Until that  
15 had arrived, I couldn't actually form -- start to form  
16 a definitive view anyway.

17 SIR RODERIC LYNE: You were keen, were you, at this point  
18 in November, to get to the position where you were  
19 instructed to give advice, asked to give your formal  
20 advice?

21 RT HON LORD GOLDSMITH QC: Well, in a sense, it wasn't  
22 necessary for me to give advice until it mattered, and  
23 it wouldn't really matter until we were at the point, if  
24 we ever came to the point -- I very much hoped we  
25 wouldn't, but we did -- we came to the point that



1 a decision had to be made whether it was lawful to go to  
2 use force, and it is not uncommon in government that the  
3 Attorney General's advice is not asked for until it  
4 matters.

5 This was slightly different, because this was  
6 happening, as it were, in real time, against  
7 a background of public statements being made, and so  
8 there was this degree of -- some degree of concern that  
9 people might say things and then start to believe that  
10 those were necessarily the true position.

11 SIR MARTIN GILBERT: Sorry to interrupt, am I right that the  
12 Chinese whispers were that you took an optimistic view  
13 that, if Iraq were in breach, there might not be a need  
14 for a second resolution?

15 RT HON LORD GOLDSMITH QC: Yes. Exactly so.

16 SIR RODERIC LYNE: So it mattered that there was no lack of  
17 clarity about your view, and did you reiterate to the  
18 Foreign Secretary that only the Security Council could  
19 make the decision on whether there had been a material  
20 breach and only the Security Council could authorise the  
21 use of necessary means to deal with that breach?

22 RT HON LORD GOLDSMITH QC: That is so, although I do think  
23 there is a point here, if I may, that is worth  
24 explaining, because I mentioned before the break the  
25 significance of operational paragraph 4.

1           Now, the architecture of Resolution 1441 is  
2           extremely important. Operational paragraph 1 says that  
3           Iraq is in material breach. Operational paragraph 2  
4           then says it is going to be given a final opportunity.  
5           Operational paragraph 4 then says very, very importantly  
6           that the Security Council determines now that any  
7           failure by Iraq to comply with the clear obligations for  
8           cooperation will constitute a further material breach.

9           Now, that meant -- otherwise what could have  
10          happened would have been that three months after the  
11          event somebody would have said, "Look, they are in  
12          material breach and they haven't complied", and there  
13          might have been a question: well, given what has  
14          happened to date, have they committed a further material  
15          breach? So operational paragraph 4 was very important,  
16          and if you will permit me, because I think it is  
17          relevant later on, just to deconstruct for a moment this  
18          expression "material breach". Material breach is  
19          a legal term. It strictly comes from the -- Article 60  
20          of the Vienna Convention on the law of treaties, which  
21          is to do with treaties rather than Security Council  
22          Resolutions, but everyone seems to find this is a useful  
23          phrase to use.

24          What that means is such a nature of breach as  
25          entitles the other party to invoke that breach as

1 a ground for terminating the treaty or suspending it.  
2 In a sense, there are two elements to that. One is: is  
3 there, in fact, a breach? And the second is: is it of  
4 the character which, you know, entitles you to  
5 suspend --

6 SIR RODERIC LYNE: The degree of seriousness?

7 RT HON LORD GOLDSMITH QC: It could be. It depends what the  
8 treaty is and, as I understood it, what the Security  
9 Council were saying here was, after ten years of many  
10 resolutions, many attempts to get Iraq to comply with  
11 687, this was the last opportunity. We are going to  
12 give you this last opportunity, but any failure to  
13 comply with the clear obligations we have imposed upon  
14 you will be a further material breach; in other words,  
15 will of itself be a justification for deriving  
16 authority.

17 What that means is, if, as a matter of fact, there  
18 is then that failure to comply, the Security Council has  
19 already decided that that has the character of an event  
20 which justifies the revival.

21 Put in colloquial terms, the Security Council was  
22 saying, "This is the last straw" -- no pun intended,  
23 forgive me -- "but this is the last" -- I didn't mean to  
24 make a joke by that. I'm sorry, I shouldn't have said  
25 that. It is far too serious for me to be making

1        comments like that, and I didn't mean to.

2            But the important point is they had pre-determined  
3        that: this is the final opportunity, and, if you fail to  
4        comply, that's it. So there needed later to be --  
5        sorry.

6        SIR RODERIC LYNE: Yes. We'll certainly come back later on  
7        to the fine meaning of the Security Council. At the  
8        moment, I would just like to establish the process  
9        a little bit further before we do so.

10       RT HON LORD GOLDSMITH QC: Yes, of course.

11       SIR RODERIC LYNE: In November, I think we have established  
12       after the resolution has been adopted that you were  
13       concerned that your view wasn't being accurately  
14       represented in some of the whispers that got back to  
15       you. You took action with Number 10 and the Foreign  
16       Secretary to ensure that they were not in doubt of your  
17       view and it was your view that it would be for the  
18       Security Council to take the decisions on material  
19       breach, the detail of which we will come back to later  
20       on, and means. So that would have been the point you  
21       emphasised.

22       RT HON LORD GOLDSMITH QC: Forgive me, I don't think I had  
23       reached that view at that stage. I think what I was  
24       saying is, at that stage -- sorry, that's why I'm trying  
25       to distinguish between the determination of material

1 breach and this question of decision. I think I was  
2 saying at that stage, "Please don't take me as being  
3 optimistic that there doesn't need to be a further  
4 Security Council Resolution. That's an issue that we  
5 will have to deal with. I'm concerned that the  
6 resolution as it stands does require a further  
7 resolution".

8 SIR RODERIC LYNE: The resolution, as it stands, does  
9 require further resolution?

10 RT HON LORD GOLDSMITH QC: That was my concern and that's --

11 SIR RODERIC LYNE: That was your concern at the time?

12 RT HON LORD GOLDSMITH QC: Yes.

13 SIR RODERIC LYNE: I think that is very important. The  
14 detail of this we can't go into much further because  
15 I think it is in the area of documentation that neither  
16 you nor I can quote from at this moment, for reasons  
17 which you said were frustrating you earlier on. I will  
18 say no more about that.

19 Now, you said a few moments ago, I think in your  
20 conversation with Jack Straw in which he offered to send  
21 you a negotiating history, which presumably you then  
22 received, that this was a step towards your being asked  
23 to give your formal advice and I think you said that  
24 that came in December.

25 RT HON LORD GOLDSMITH QC: Yes.

1 SIR RODERIC LYNE: Can you tell us where that request came  
2 from and what meetings you might have had or discussions  
3 in December with Downing Street or the Foreign Secretary  
4 about the process whereby you were going to offer  
5 advice?

6 RT HON LORD GOLDSMITH QC: Certainly. The request for  
7 advice, the instructions to advise, as it were, came  
8 from the Foreign Office legal adviser. They came in the  
9 form of a detailed letter which set out both arguments  
10 and set out the arguments in favour of both arguments.  
11 That is to say: one, that there is a need for a further  
12 resolution; and one that there isn't.

13 It set them both out without expressing a view  
14 between them, although I think I knew what view  
15 Sir Michael took about it, but it set them both out in  
16 a way which presented them both, I have to say, as both  
17 plausible arguments, both of which were supported by  
18 reasoning, and it was plain from his letter, to be  
19 frank, that the view that a resolution wasn't required  
20 was stated to be one which the UK Mission in New York,  
21 which of course, had a Foreign Office legal adviser,  
22 I think the expression was "deserved serious  
23 consideration".

24 In other words, you know, it was a proper -- whether  
25 it was a preferred or not point of view, but it was

1 a proper point of view.

2 So it came in that form. What then happened was  
3 that my officials, particularly the Foreign Office  
4 secondee in my office then prepared, as is usual,  
5 a covering note which analysed that. Didn't, in fact,  
6 agree with all the points that had been made. Actually,  
7 seemed to see that some of the arguments which had been  
8 said to be against the view that a resolution was not  
9 necessary were actually overstated and disagreed with  
10 them, but, still, there was an important issue there.

11 Following that, I believe that there was  
12 a conversation with Jonathan Powell, in which  
13 I indicated that I was concerned about what was meant in  
14 operational paragraph 4 by "for assessment". I wanted  
15 help on that issue. Either then, or subsequently, it  
16 was agreed that I would be able to see  
17 Sir Jeremy Greenstock, who had been the negotiator.

18 At some stage there was a question of seeing the  
19 United States negotiators as well, which subsequently  
20 happened, and it was also suggested at that meeting that  
21 it would be helpful if I produced a draft advice for  
22 discussion.

23 SIR RODERIC LYNE: So the request for you to produce draft  
24 advice actually came from Jonathan Powell or from  
25 Sir Michael Wood?

1 RT HON LORD GOLDSMITH QC: Well, the request came in  
2 a letter from Sir Michael Wood.

3 SIR RODERIC LYNE: He talked yesterday about that letter.  
4 I can't remember now -- I'm so confused about which  
5 documents we are allowed to refer to -- whether that is  
6 a letter that's on the public record, but he described  
7 it fully as one that set out the arguments on both sides  
8 but not one in which he, himself, was making a firm  
9 recommendation. So it was essentially providing  
10 background for your subsequent advice?

11 RT HON LORD GOLDSMITH QC: A little bit more than  
12 background.

13 SIR RODERIC LYNE: Setting out arguments?

14 RT HON LORD GOLDSMITH QC: Absolutely, yes.

15 SIR RODERIC LYNE: Setting out arguments for your advice.

16 RT HON LORD GOLDSMITH QC: And apparently putting them both  
17 forward as plausible.

18 SIR RODERIC LYNE: Yes. But Jonathan Powell then agreed  
19 with you -- was this in a meeting or on the telephone,  
20 or was it -- that you would actually provide formal  
21 advice to the Prime Minister?

22 RT HON LORD GOLDSMITH QC: No, I think there was  
23 a meeting -- it was a meeting, I believe, and there  
24 wasn't so much a request for formal advice at that  
25 stage. I explained that I was concerned about what was



1       meant by the expression "for assessment" in operational  
2       paragraph 4, which seemed to me to be an essential  
3       issue.

4       SIR RODERIC LYNE:   Why did you have to discuss that with  
5       Jonathan Powell rather than with Sir Michael Wood?

6       RT HON LORD GOLDSMITH QC:   Because I wanted to get further  
7       information.   I wanted to get further information on  
8       these issues.

9       SIR RODERIC LYNE:   But he shouldn't have been part of the  
10      negotiation.

11      RT HON LORD GOLDSMITH QC:   Forgive me, I wasn't asking him  
12      for the information, I was channelling my request, but  
13      I think that Number 10 wanted to know at that stage --

14      SIR RODERIC LYNE:   You couldn't have channelled your request  
15      through your Foreign Office secondee to the  
16      Foreign Office legal advisers?   Wouldn't that have been  
17      a more direct channel for your requests?

18      RT HON LORD GOLDSMITH QC:   There are a number of ways it  
19      could have been done, and I'm not sure that the  
20      Foreign Office would have been able to deal ultimately  
21      with the US side, but it could have been.

22      SIR RODERIC LYNE:   You mean, you wanted to meet  
23      Sir Jeremy Greenstock?

24      RT HON LORD GOLDSMITH QC:   I wanted to understand  
25      principally what was meant -- what was understood by

1        what was meant by "for assessment", and I also wanted to  
2        know what were the -- what the answers to a number of  
3        other textual points that I raised as giving rise to  
4        questions about what was meant by 1441.

5            This was a technique I have used in private  
6        practice, and other lawyers have used with me, that,  
7        when you are trying to form a view, you want to go to  
8        your clients saying, "Look, here are these issues. Now,  
9        what can you say about them?" Either you have got the  
10       facts right or wrong or there may be explanations that  
11       they can give that you haven't seen, and the consequence  
12       of that is that that helps you reach your opinion.

13           So it wasn't a request at that stage for a formal  
14        advice. It was thought that it would be a helpful way  
15        of continuing if I produced this for discussion with the  
16        Prime Minister.

17    SIR RODERIC LYNE: Yes, what puzzles me about that is why  
18       Jonathan Powell, the Prime Minister's Chief of Staff,  
19       should have been the person with whom to discuss these  
20       textual points about Resolution 1441, but were you  
21       talking to him as the client?

22    RT HON LORD GOLDSMITH QC: I wasn't expecting to discuss it  
23       with Jonathan Powell. That wasn't the point. I did  
24       want to discuss that with the Prime Minister, with the  
25       Foreign Secretary, who had been very closely involved in

1           the negotiations, and this was a channel.

2           I suspect this arose because they asked for the

3           meeting, "Where are you up to?" or something of that

4           sort, and I told them in the course of it that this is

5           what I wanted to do.

6   SIR RODERIC LYNE:   So Number 10 asked you to come over, you

7           had this meeting, you had this discussion, you asked for

8           their help in organising things so that you could move

9           forward with your advice, including a meeting with

10          Jeremy Greenstock, ultimately with American

11          counterparts.

12   RT HON LORD GOLDSMITH QC:   Also, that I would want to have,

13          as it were, from the client, you know, "What do you say

14          in relation to certain of these arguments?"

15   SIR RODERIC LYNE:   Yes.

16   RT HON LORD GOLDSMITH QC:   Because often the client, who has

17          been involved -- put it that way -- is in a position to

18          say, "Ah, well, this is how we see that", and sometimes

19          you say, "Well, it is very interesting but it doesn't

20          change anything", and sometimes we say, "That actually

21          helps me now see this in a clearer light".

22   SIR RODERIC LYNE:   The client in this case was?

23   RT HON LORD GOLDSMITH QC:   Ultimately, it was the

24          Prime Minister.

25   SIR RODERIC LYNE:   The Prime Minister, which is why you were

1           handling this with his Chief of Staff?

2   RT HON LORD GOLDSMITH QC:   Yes.

3   SIR RODERIC LYNE:   Was the client at this stage expressing

4           a view on how soon your advice was required?

5   RT HON LORD GOLDSMITH QC:   I don't recall.   Certainly there

6           wasn't, as I recall, any request at that stage for final

7           advice, but given what I had said about needing to

8           understand certain further matters before I did, it

9           obviously wasn't going to be then and there.

10  SIR RODERIC LYNE:   But you said earlier that the advice you

11           volunteered at the end of July you felt hadn't been

12           particularly welcome.   I wondered if the client was

13           concerned that you shouldn't come in too soon with your

14           advice?

15  RT HON LORD GOLDSMITH QC:   As I have said, I think you

16           really have got to put that to Mr Blair.

17  SIR RODERIC LYNE:   But he wasn't at the meeting.

18  RT HON LORD GOLDSMITH QC:   Well, I think, though, that

19           his --

20  SIR RODERIC LYNE:   You would rather not answer that?

21  RT HON LORD GOLDSMITH QC:   No, I'm perfectly happy to answer

22           that.   I think his staff, his Chief of Staff and his

23           very close advisers know what his mind was.   He may say,

24           no, he didn't know about that at all.

25  SIR RODERIC LYNE:   I'm not asking what his mind was, but

1        what was indicated to you at that meeting about the  
2        timing of your replies.

3    RT HON LORD GOLDSMITH QC: I'm so sorry. I can't recall.

4        If there is a record of them saying, "We don't require  
5        your advice now", then that's what was said.

6            All I was saying was I wasn't actually in a position  
7        to provide my advice at that stage, and what was agreed  
8        was -- because I hadn't completed my researches and my  
9        enquiries, and what I was indicating was -- and it was  
10       agreed that I would provide a draft advice which would  
11       be something that would then enable me to raise  
12       questions which were causing me concern, so I could  
13       understand what the response to them was.

14    SIR RODERIC LYNE: Right. I think it is probably useful now  
15       if we move forward from that point and that meeting to  
16       the next stage. I think what we have just discussed is  
17       very important, just in parenthesis, because we were  
18       hearing yesterday both from Sir Michael Wood and  
19       Ms Elizabeth Wilmschurst that they felt that it would  
20       have been useful if your advice had been brought in at  
21       an earlier stage.

22            That's why a number of us have been, as it were,  
23        raising the question of the timing of when you were able  
24        to give that advice. We will come back to that later  
25        on.

1           When did you actually give the Prime Minister your  
2       first advice?

3   RT HON LORD GOLDSMITH QC:   Well, my advice remained  
4       preliminary until July -- I'm so sorry, until February.  
5       It remained preliminary until February, because I was  
6       still conducting my enquiries and researches.

7           On, I think, 27 February, I met in Downing Street  
8       with, again, the Prime Minister's advisers and I told  
9       them then that, in the light of the further enquiries  
10      I had made, following my visit to the United States,  
11      following discussions with Jeremy Greenstock, following  
12      my investigation of the negotiating history, I was of  
13      the view that a reasonable case could be made -- I'm  
14      sorry, there was a reasonable case that a second  
15      resolution was not necessary, and that that was, on past  
16      precedent, sufficient to constitute a green light.

17   SIR RODERIC LYNE:   You have moved ahead to 27 February.

18   RT HON LORD GOLDSMITH QC:   Yes.

19   SIR RODERIC LYNE:   We were hearing yesterday in discussion  
20      with Ms Wilmshurst, about presentation of draft advice  
21      by you in the middle of January to the Prime Minister.

22   RT HON LORD GOLDSMITH QC:   Yes.

23   SIR RODERIC LYNE:   Advice that she said that she had,  
24      I think, seen unofficially.

25   RT HON LORD GOLDSMITH QC:   She wasn't involved.

1 Ms Wilmshurst wasn't --

2 SIR RODERIC LYNE: Let's not personalise it and her.

3 I think she was speaking for the FCO legal advisers

4 collectively then.

5 The question I wished to ask you is: what did you

6 present to the Prime Minister, and how and when,

7 in January?

8 RT HON LORD GOLDSMITH QC: As I said, I presented a sort of

9 draft provisional advice as a basis for understanding

10 what the response was to some of my concerns,

11 particularly drawing attention to the need to understand

12 what was meant by "for assessment" in operational

13 paragraph 4.

14 SIR RODERIC LYNE: Was this in sort of fleshed-out form?

15 RT HON LORD GOLDSMITH QC: Yes.

16 SIR RODERIC LYNE: Was it quite a lengthy document?

17 RT HON LORD GOLDSMITH QC: Because the whole point was there

18 were a number of textual arguments that were being

19 raised. You couldn't explain those in a ten-second

20 conversation.

21 SIR RODERIC LYNE: You gave them quite a detailed paper?

22 RT HON LORD GOLDSMITH QC: Yes, exactly so, and the reason

23 for that was that, by setting them out, then it was

24 possible for those who had been involved to be able to

25 respond, as indeed -- and it was helpful in this

1       respect -- as indeed Sir Jeremy Greenstock did that  
2       month. He received it, he came and saw me. He went  
3       through this, challenging some of the arguments that  
4       I had raised, making some good points, some that  
5       I wasn't so persuaded by.

6       SIR RODERIC LYNE: You personally handed this paper to the  
7       Prime Minister?

8       RT HON LORD GOLDSMITH QC: As far as I can recall, yes.

9       SIR RODERIC LYNE: Did you then sit down and discuss it at  
10      all?

11      RT HON LORD GOLDSMITH QC: We certainly had some discussion.  
12      I think I was probably expecting he would -- I probably  
13      pointed to some of the paragraphs that were important.  
14      I don't think, in fact, there was a long discussion  
15      about it.

16      SIR RODERIC LYNE: Do you recall anything of his reaction at  
17      this stage?

18      RT HON LORD GOLDSMITH QC: The one thing I do recall was  
19      that he said -- and I believe it was at this meeting --  
20      you know, "I do understand that your advice is your  
21      advice".

22      In other words, the Prime Minister made it clear --  
23      the then Prime Minister made it clear he accepted that  
24      it was for me to reach a judgment and that he had to  
25      accept that.



1 SIR RODERIC LYNE: You were obviously at this stage offering  
2 him a preliminary draft of your advice.

3 RT HON LORD GOLDSMITH QC: Yes.

4 SIR RODERIC LYNE: Would that be a normal procedure, to give  
5 the client a preliminary draft of what eventually  
6 becomes the formal advice of the law officer?

7 RT HON LORD GOLDSMITH QC: As I have said, in relation to my  
8 own practice, it is a practice that I have used from  
9 time to time, lawyers have used it with me and it  
10 certainly was something that was done by my officials  
11 with the, as it were, requesting department.

12 They would quite often come to me and say -- what  
13 would often happen is that they would receive the  
14 request for advice, they would then produce a minute for  
15 me of their advice. They would often produce a draft  
16 letter to go with it and quite often they would say,  
17 either directly -- or, "We have discussed this with the  
18 requesting department and we've" -- I'm not quite saying  
19 they have agreed it, but what they were saying is they  
20 have discussed it, so I can be confident there isn't  
21 some point that the requesting department, which knows  
22 more about the subject, would want to see included or  
23 some point that my lawyer has overlooked.

24 SIR RODERIC LYNE: Who else would have received the document  
25 at that stage, other than the Prime Minister and

1 Sir Jeremy Greenstock?

2 RT HON LORD GOLDSMITH QC: I didn't give it to

3 Sir Jeremy Greenstock. That was something that

4 Number 10 did, I assume. The Foreign Secretary

5 obviously saw it, because he wrote to me later with his

6 comments on it. I don't know where.

7 SIR RODERIC LYNE: You didn't send it to him, so he must

8 have had it from Number 10 as well?

9 RT HON LORD GOLDSMITH QC: Yes, there were -- as you will

10 appreciate, there were also very significant

11 considerations about sensitivity and security and there

12 had been things that had been appearing from time to

13 time in the press --

14 SIR RODERIC LYNE: I think the draft advice of the senior

15 law officers for the government is always a very

16 sensitive matter before it comes out. That's, I think,

17 perfectly understandable. If it reached the Foreign

18 Secretary, I think that explains perfectly well how his

19 own legal advisers were, not surprisingly, consulted on

20 it by him or how it may have reached his own legal team.

21 RT HON LORD GOLDSMITH QC: I don't know whether it came that

22 way or whether it came from my officials.

23 SIR RODERIC LYNE: I don't wish to cast aspersions. I don't

24 think that's a material point.

25 RT HON LORD GOLDSMITH QC: Forgive me, I'm not casting

1           aspersions.

2   SIR RODERIC LYNE: No, you're not, and I'm trying to make

3           clear that I'm not either.

4   RT HON LORD GOLDSMITH QC: They talked among themselves.

5           I understood that.

6   SIR RODERIC LYNE: Not only that, but we heard from

7           Sir Michael Wood yesterday that this close relationship

8           between your department and the Foreign Office legal

9           advisers was an extremely important one, and normally

10          there was very close agreement between them. So #there

11          was nothing improper or wrong in that, it was completely

12          right.

13          So we have, I think, now moved to the point where

14          you actually meet Sir Jeremy Greenstock, which I think

15          you did on 23 January.

16   RT HON LORD GOLDSMITH QC: Yes.

17   SIR RODERIC LYNE: That was in London, presumably?

18   RT HON LORD GOLDSMITH QC: Yes.

19   SIR RODERIC LYNE: Can you describe the main purpose of your

20          conversation with Sir Jeremy? You have already told us

21          that he looked at and challenged some of the points in

22          your draft.

23   RT HON LORD GOLDSMITH QC: Yes, the purpose of the meeting

24          was to get first-hand from our principal negotiator at

25          the United Nations his observations on the negotiating

1 history and on the text which had been agreed and his  
2 understandings of what it meant, particularly to get his  
3 comments on the textual arguments we had raised.

4 Sir Jeremy was a hugely experienced diplomat. He  
5 had spent time in New York. He understood the process  
6 and, therefore, was in a very good position to explain  
7 his view of what was meant by certain provisions and  
8 that's helpful to me. It doesn't mean I follow it, but  
9 it is helpful to me and I have often followed this  
10 process again with clients, for example, in relation to  
11 contracts which are obscure, because, if you understand  
12 what somebody was trying to achieve, you can then often  
13 look at the document with that in mind, and then the  
14 words which are used become clearer to you.

15 SIR RODERIC LYNE: Was one of the arguments that he put to  
16 you about the negotiating history the argument that the  
17 French and the Russians and the Chinese had sought in  
18 the course of negotiations on Resolution 1441 to obtain  
19 some explicit words in the resolution, I think  
20 originally intended for operative paragraph 10, but that  
21 subsequently is immaterial -- explicit provision that it  
22 would be for the Security Council to decide on the use  
23 of force?

24 RT HON LORD GOLDSMITH QC: Yes, I mean, he went further than  
25 just talking about a draft that was put forward. What

1 he was saying was that this was, if you will, the key  
2 argument, the key point between the United States and  
3 us, but particularly the United States, and the French,  
4 the Russians. Not so much the Chinese, but the French  
5 and -- sort of leading on that side, and that was, was  
6 there going to be a requirement for a decision or not?

7 He was very clear in saying the French, Russians  
8 lost and they knew they had lost, and I think he repeats  
9 that in letters to me, that they knew that they had lost  
10 that critical argument, and his case was -- and his  
11 argument was -- that's why the resolution is worded the  
12 way that it is.

13 SIR RODERIC LYNE: It was a compromise?

14 RT HON LORD GOLDSMITH QC: Yes, of course. It was  
15 a compromise, but compromise in this sense: that the  
16 United States had conceded a Council discussion but no  
17 more.

18 SIR RODERIC LYNE: So the French and others standing behind  
19 them had lost and knew they had lost. Could one then  
20 advance from the fact that they had failed to achieve  
21 a clear requirement for a second decision to argue that  
22 this meant that they had implicitly acknowledged the  
23 American position that a second resolution was not  
24 required?

25 RT HON LORD GOLDSMITH QC: Well, I'm just sort of pausing

1 over the word "implicitly", because, as I was saying  
2 before, the resolution meant one thing or the other.

3 What Sir Jeremy was saying -- this was the key  
4 issue -- was they knew that what had happened was that  
5 the resolution to which they agreed meant that a second  
6 decision was not necessary. Therefore, that the  
7 United States and any others, such as ourselves, could  
8 take military action without a decision, and that is  
9 what Ambassador Levitte was saying publicly later.

10 SIR RODERIC LYNE: They knew that a second decision wasn't  
11 necessary, and yet, in their explanation of vote they  
12 had said, in effect, that they still believed that there  
13 should be a two-stage approach.

14 RT HON LORD GOLDSMITH QC: Forgive, me there was a two-stage  
15 approach because there was going to be a Council  
16 discussion, and the words that were used -- slightly  
17 ambiguous in the French, as I recall. I think the  
18 French, what you describe as taking a position is  
19 "se prononcer", and it is not absolutely clear what that  
20 means, and in the written statement which they gave  
21 afterwards, they did not use the words "decide",  
22 "necessary to decide".

23 They were obviously statements that were designed to  
24 present the position internationally and perhaps to  
25 a domestic audience as well as they could be. But they

1       were not saying -- this was -- I think the argument was  
2       being put that they were not saying that they had agreed  
3       that there would have to be a decision.

4       SIR RODERIC LYNE: No, there obviously had, indeed, been  
5       some form of compromise and they were having to stay  
6       within the parameters of it, but for their side, they,  
7       the Russians and the Chinese, were saying the Council  
8       would have to return to take a position.

9       As you say, they weren't able to use the word in  
10      their statement "decision", but "take a position", and  
11      I daresay that lawyers could probably have a very long  
12      argument about what "take a position" means, but the  
13      implication of the French statements and not only the  
14      French statements at the time that the resolution was  
15      adopted, didn't say in terms that the Council would have  
16      to take another decision, because the resolution didn't  
17      say that, but would it be fair to say that they were  
18      trying to at least press in that direction in their  
19      explanations of vote?

20      RT HON LORD GOLDSMITH QC: Well, I'm not the best person  
21      obviously to say what was in their minds.

22      SIR RODERIC LYNE: No, no, I'm more interpreting their  
23      words.

24      RT HON LORD GOLDSMITH QC: Yes, well, I think the point  
25      first of all, is, if this were all crystal clear, we

1       wouldn't be in the position that we are today. I have  
2       made that point already and some may say -- and it may  
3       be a commentary on the United Nations institutions in  
4       a sense -- that we end up, on such an important issue,  
5       debating the meaning of two or three words, but that is  
6       the position.

7               What was being said was they knew -- they had fought  
8       hard for a solution which meant that there would be  
9       a need for a Security Council decision. They got the  
10      concession that there would be a further Security  
11      Council discussion. That discussion could well have led  
12      to the Council doing a number of things: yes, no, taking  
13      further steps. But they didn't say, because they knew  
14      that this is not what they had achieved. They knew that  
15      they had not achieved a requirement for a second  
16      decision, and the point was, that's why they didn't use  
17      that precise language, but it is ambiguous, I agree.

18   SIR RODERIC LYNE: They did not in any sense in those public  
19   statements, did they, acknowledge that they had lost?  
20   They did not acknowledge the American position that  
21   a second resolution wasn't needed?

22   RT HON LORD GOLDSMITH QC: They did not in those public  
23   statements, that's quite right.

24   SIR RODERIC LYNE: It is only in private that that  
25   interpretation was placed upon the French position?



1 RT HON LORD GOLDSMITH QC: Well, I'm not sure about the  
2 words "in private". As I have said, the relevant  
3 Ambassador after -- it is after the military  
4 intervention has taken place. He said on the record,  
5 but he said to the White House, "Don't ask for a second  
6 resolution because you don't need it. You can go  
7 without it".

8 SIR RODERIC LYNE: Do you think that statements made after  
9 the invasion are of particular relevance as compared  
10 with statements made in the Security Council on the  
11 record by these governments at the time of the adoption  
12 of the resolution?

13 RT HON LORD GOLDSMITH QC: No, of course not, and I didn't  
14 know, of course, in March 2003, about either what the  
15 French Ambassador was going to tell me later or what  
16 Ambassador Levitte said.

17 SIR RODERIC LYNE: I think park that on one side.

18 RT HON LORD GOLDSMITH QC: If I may just make an  
19 observation, because I know that -- and Sir Michael made  
20 this point -- the difficulty, he says about what has  
21 been said in discussions is you can't be sure what the  
22 other side meant by it. Well, actually, in this case,  
23 as it happens, we now do, and we now do know that they  
24 both meant the same thing.

25 It obviously doesn't help you at the time, but it

1       does seem to me that it is a point that is worth making,  
2       given what he has said about my process of analysis.

3   SIR RODERIC LYNE:  People can say different things at  
4       different times for different reasons, I think, but can  
5       I now turn to the positions adopted by the  
6       United Kingdom and the United States in these same  
7       negotiations leading up to Resolution 1441?

8   RT HON LORD GOLDSMITH QC:  Yes.

9   SIR RODERIC LYNE:  In one of the early drafts of that  
10       resolution, that the United Kingdom and the  
11       United States, I think, showed to the French on  
12       25 September 2003 -- and I appreciate that you were not  
13       being consulted on the drafting process, so let me quote  
14       from that:

15       "We were bidding to include the following words in  
16       the resolution, that the Security Council", I quote:  
17       "... decides that false statements or omissions in  
18       the declaration and failure by Iraq to comply shall  
19       constitute a further material breach, and that such  
20       breach authorises member states to use all necessary  
21       means to restore international peace and security in the  
22       area."

23       Now, presumably, if we had succeeded in getting  
24       those words into the resolution, there would have been  
25       no need for a second decision at all?

1 RT HON LORD GOLDSMITH QC: Quite right.

2 SIR RODERIC LYNE: But we do not succeed in getting those

3 words into the resolution. So in order to achieve

4 a resolution, we had to give ground.

5 RT HON LORD GOLDSMITH QC: Well, the ground that was given

6 particularly was to concede some second stage. The

7 difficult question is whether the second stage was

8 a Council discussion, where they would consider the

9 discussion, or a Council discussion where they would

10 decide what would happen next.

11 SIR RODERIC LYNE: We conceded that we had not been able to

12 achieve a clear statement in this resolution that

13 authorised member states to use all necessary means, ie

14 to use force?

15 RT HON LORD GOLDSMITH QC: Well, I don't think -- I don't

16 believe that is the view that our negotiators took, that

17 they had failed to achieve a clear statement and I think

18 it is -- if I may, it is very important to point to the

19 architecture of 1441. This resolution was negotiated

20 over a period of weeks. There are very important

21 indicators of the use of force which are contained in

22 1441 and I just draw attention to preamble 4, preambular

23 paragraph 4, which recalls that it is:

24 "Resolution 678 authorised member states to use all

25 necessary means to uphold certain resolutions and to

1       restore international peace and security in the area."

2       Preambular paragraph 5 further recalling that it is:

3       "Resolution 687 1991 imposed obligations on Iraq as  
4       a necessary step for achievement of its stated objective  
5       of restoring international peace and security."

6       So necessary means in order to achieve this, and 687  
7       had said:

8       "These are the things that are necessary in order to  
9       restore international peace and security."

10       The preambular paragraph 10 recalling that:

11       "In its Resolution 687 the Council declared that  
12       a ceasefire would be based on acceptance by Iraq of the  
13       provisions of that resolution including the obligations  
14       on Iraq contained therein."

15       So that is saying all necessary means have been  
16       suspended, but on the conditions of the ceasefire, and  
17       preambular paragraph 17:

18       "... determined to secure full compliance with its  
19       decisions".

20       Then you have this language which is used in  
21       operational paragraph 1 and operational paragraph 4 of  
22       material breach, which in the context, the members of  
23       the Security Council fully understood meant this is the  
24       revival argument. This could not be -- on this point,  
25       this could not be clearer, that the revival argument is

1 in play, and that is, of course, why member states were  
2 concerned about automaticity, because, without  
3 a firebreak, they understood from past practice, from  
4 what had happened in 1998, after Resolution 1205, that  
5 the United States and the United Kingdom, and perhaps  
6 other states, would have then taken that as saying, "We  
7 now have the authority of the United Nations to move  
8 today".

9 SIR RODERIC LYNE: So this is a brilliant diplomatic  
10 compromise in which both the revival argument and the  
11 argument that a specific Security Council authorisation  
12 needed are still in play. Both sides were able to  
13 emerge from this effectively restating their own  
14 positions, but, if I come back to what the -- the ground  
15 that was conceded, that -- what you have quoted was  
16 ground that was, if you like, gained by the  
17 United States in support of the revival argument, but  
18 what was conceded by the United States and Britain, what  
19 they were not able to achieve, was a clear decision to  
20 authorise all necessary means in this resolution.

21 So from their starting position, they had had to  
22 concede: (a) that a further meeting to discuss and  
23 assess would have to be held. So in a sense, you could  
24 say that they had lost and knew that they had lost, just  
25 as -- on that point, on that point only. I don't want

1 to get into a long argument about this. Just as one  
2 could say that the French had lost and knew that they  
3 had lost.

4 So to infer, simply looking at what the French had  
5 lost, that the French had acknowledged the position of  
6 the United States in the private negotiations, is  
7 unbalanced, if you don't infer on the opposite side that  
8 the concessions we had made acknowledged the position of  
9 the French that there needed to be a two-stage approach.

10 So you have got a sort of equal and opposite  
11 situation here, if you are looking at the negotiating  
12 history as a whole.

13 RT HON LORD GOLDSMITH QC: With respect, I don't agree, and  
14 I think it is very important here to distinguish between  
15 the position of the United Kingdom and the  
16 United States. The United States, as everyone has  
17 said -- Sir Michael said it, I have said it throughout,  
18 it is apparent on 7 March -- didn't believe they needed  
19 an United Nations Resolution at all. They believed they  
20 were able themselves to make the determination that Iraq  
21 was in material breach, and, therefore, they didn't  
22 need -- they didn't need 1441. Mr Blair had -- and  
23 I said, I think to his credit -- had got President Bush  
24 to the UN table.

25 SIR RODERIC LYNE: I think, with respect, that's a separate

1 point. We have gone past that point already.

2 RT HON LORD GOLDSMITH QC: With respect, may I make the  
3 point? Because it is important, and it is one of the  
4 things that came across very clearly in the meetings  
5 I had in February with the UN.

6 Because the United States didn't need 1441 -- we did  
7 because we took the view that there had to be a  
8 determination of material breach. The United States  
9 didn't need it. They could have walked away from 1441  
10 and said, "Well, we have been to the United Nations,  
11 they haven't given us the resolution we want, we can now  
12 take force".

13 The only red line I was told by the  
14 State Department, legal adviser, the only red line that  
15 the negotiators had was that they must not concede  
16 a further decision of the Security Council because they  
17 took the view they could move in any event.

18 SIR RODERIC LYNE: Yes.

19 RT HON LORD GOLDSMITH QC: Therefore, if they had agreed  
20 a decision which said the Security Council must decide,  
21 they would have then lost that freedom.

22 SIR RODERIC LYNE: If you like, let's separate out the  
23 American position and park that on one side. They had  
24 not conceded their red line.

25 The British position, as you say, was different.

1           The British position, as you have clearly been stating,  
2           was that we needed Security Council authorisation.

3   RT HON LORD GOLDSMITH QC:   Yes.

4   SIR RODERIC LYNE:   The Security Council to determine  
5           material breach, the Security Council to authorise all  
6           necessary means for the use of force?

7   RT HON LORD GOLDSMITH QC:   No.  I'm sorry, that's where  
8           I disagree, with respect.  Provided we had  
9           a determination that there was material breach, unless  
10          the resolution then went on to say something else, that  
11          would have been sufficient.

12  SIR RODERIC LYNE:   All right, we needed Security Council  
13          determination of material breach?

14  RT HON LORD GOLDSMITH QC:   Yes.

15  SIR RODERIC LYNE:   We had a historic determination here --

16  RT HON LORD GOLDSMITH QC:   No, we had a present  
17          determination on 8 November.

18  SIR RODERIC LYNE:   But with the firebreak that you have  
19          mentioned.

20  RT HON LORD GOLDSMITH QC:   Yes.

21  SIR RODERIC LYNE:   But there has to be a further process of  
22          report, assessment, consideration?

23  RT HON LORD GOLDSMITH QC:   Yes.

24  SIR RODERIC LYNE:   I think at this point -- I have just  
25          heard Big Ben striking 12 -- it would be sensible for us



1 to take another short break, if you like, and then we  
2 can come back.

3 RT HON LORD GOLDSMITH QC: May I just stress, just in light  
4 of what you have just said, because I don't want to lose  
5 sight of this, operational paragraph 4, the Security  
6 Council had already pre-determined that a failure to  
7 meet the requirements in the resolution constituted  
8 itself a material breach.

9 THE CHAIRMAN: Thank you. Let's take another ten minutes  
10 and come back at quarter past.

11 (12.04 pm)

12 (Short break)

13 (12.15 pm)

14 THE CHAIRMAN: Sir Roderic, I think you have a bit of  
15 a question to finish.

16 SIR RODERIC LYNE: Yes, Lord Goldsmith, I would just briefly  
17 like to deal with the outcome of your meeting with  
18 Sir Jeremy Greenstock and then I must let my very  
19 patient colleagues get a word in edgeways.

20 After you had had your meeting with Sir Jeremy, did  
21 you report back to the Prime Minister?

22 RT HON LORD GOLDSMITH QC: I did. Sir Jeremy had made some  
23 good points and he had made some headway with me, but,  
24 frankly, there was still work for me to do and he hadn't  
25 got me there, if you like, yet.

1           I discovered that the Prime Minister was going to  
2           see President Bush again at the end of January and there  
3           was concern again about views being expressed that I had  
4           now been persuaded by Sir Jeremy, so I did send a short  
5           minute to the Prime Minister to make sure that he didn't  
6           think that was the case. I hadn't been asked for it,  
7           but I sent it.

8   SIR RODERIC LYNE: Okay. So you spelt out your view to him,  
9           and was it still your view that the correct legal  
10          interpretation of Resolution 1441 was that it did not  
11          authorise the use of military force without a further  
12          determination of the Security Council?

13   RT HON LORD GOLDSMITH QC: My provisional view at that stage  
14          was still the same.

15   SIR RODERIC LYNE: Therefore, it didn't merely require  
16          a Council discussion from our point of view, rather than  
17          a further decision?

18   RT HON LORD GOLDSMITH QC: Exactly.

19   SIR RODERIC LYNE: Yes. Did you, in your minute to the  
20          Prime Minister, address the question of the revival  
21          argument at all?

22   RT HON LORD GOLDSMITH QC: I don't know whether specifically  
23          I did. I mean, it was fully understood that that was  
24          the only, as it were, issue in play.

25   SIR RODERIC LYNE: If you put it another way round, you

1           weren't at this stage telling the Prime Minister, just  
2           before he sees President Bush, who believes in that  
3           argument, that a reasonable case could be made for it?

4   RT HON LORD GOLDSMITH QC:   The point was the principle of  
5           the revival argument I, and indeed the Foreign Office  
6           legal advisers, were in agreement that that principle  
7           existed. That was consistently my view.

8           The question was simply -- not "simply", because it  
9           is hugely important -- but what did 1441 say about what  
10          would happen after a further material breach? Did it  
11          say there would have to be a further decision or did it  
12          say there would have to be simply a discussion?

13   SIR RODERIC LYNE:   But at this stage, you weren't  
14          encouraging the Prime Minister that he would be on safe  
15          ground agreeing with President Bush that a good case had  
16          been made following 1441 or through 1441 for the revival  
17          argument?

18   RT HON LORD GOLDSMITH QC:   Quite.

19   SIR RODERIC LYNE:   Okay, thank you. I shall hand it back.

20   THE CHAIRMAN:   Usha, over to you.

21   BARONESS USHA PRASHAR:   Thank you very much indeed.

22          Lord Goldsmith, I want to really discuss with you  
23          your understanding of the FCO legal advisers' views  
24          during this time and those of the ministers?

25   RT HON LORD GOLDSMITH QC:   Yes.

1 BARONESS USHA PRASHAR: My understanding is that the FCO  
2 legal advisers consistently had held the view that  
3 a second resolution was necessary and that was your  
4 provisional view, as you said, until February. Would  
5 that be right?

6 RT HON LORD GOLDSMITH QC: The second part is right. As to  
7 the first part, perhaps I can just expand a little bit  
8 because you said the Foreign Office legal advisers.

9 I knew that it was Sir Michael's view, because  
10 although he didn't say it in his note of December, his  
11 instructions of December, I saw that it was his view,  
12 I had been told it was his view, and I also saw it was  
13 his view when I saw a minute from him to the Foreign  
14 Secretary.

15 I believe I knew also that it was Ms Wilmshurst's  
16 views, because I think she was one of those associated  
17 with that particular minute. I didn't know what the  
18 view was of other members of the legal service, other  
19 than, of course, of the official who was in my office  
20 and I don't think that, after I had seen that minute --  
21 I don't think I received anything further from  
22 Sir Michael. I didn't actually deal on this issue with  
23 Ms Wilmshurst at all. She dealt with the question of  
24 what the terms of the second resolution would be if they  
25 had one, by correspondence, but otherwise not. So I'm

1 not suggesting I knew that they had changed their view,  
2 I didn't, but I just want to get the sort of flavour for  
3 what I did know.

4 BARONESS USHA PRASHAR: Am I right in confirming that it was  
5 your provisional view until February that a second  
6 resolution was actually necessary?

7 RT HON LORD GOLDSMITH QC: Yes.

8 BARONESS USHA PRASHAR: I think when Sir Michael Wood came  
9 across, I think, a conversation that Jack Straw had with  
10 Dick Cheney about the question of -- that they would  
11 prefer a second resolution but it would be fine if we  
12 didn't get one a la Kosovo, and I think Sir Michael Wood  
13 wrote to Jack Straw, and I think this was revealed  
14 yesterday, that Jack Straw said:

15 "I take note of your advice, but I do not accept  
16 it."

17 RT HON LORD GOLDSMITH QC: Yes.

18 BARONESS USHA PRASHAR: You responded to this note  
19 expressing your view about the role of the legal  
20 officers. Do you want to expand on that?

21 RT HON LORD GOLDSMITH QC: Yes, I'm grateful, thank you.

22 I think that the note is very clear.

23 I was unhappy when I saw that, not because I thought  
24 it followed that Sir Michael was right and Jack Straw  
25 was wrong about the legal issue. I think I made it

1 clear that I wasn't dealing with that, but I didn't  
2 like, to be honest, the sort of tone of what has  
3 appeared to be a rebuke to a legal -- a senior legal  
4 adviser for expressing his or her view.

5 I had always taken the view in government -- indeed  
6 I told government lawyers -- that they should express  
7 their views, however unwelcome they might be --

8 BARONESS USHA PRASHAR: Is it normally called "speaking  
9 truth unto power"?

10 RT HON LORD GOLDSMITH QC: Certainly. I prefer to put it  
11 a slightly different way, as I did in this note, that  
12 I have always taken the view -- and I speak to officers  
13 in the legal services frequently, and I would say, "Your  
14 job is to tell ministers what they need to hear, not  
15 what they would like to hear".

16 BARONESS USHA PRASHAR: In that note, the Foreign Secretary  
17 asserted that international law is an uncertain field.  
18 Do you consider it to be uncertain?

19 RT HON LORD GOLDSMITH QC: I didn't really agree with what  
20 he was saying about that. There obviously are areas of  
21 international law which were uncertain, but this  
22 particular issue, at the end of the day, was: what does  
23 this resolution mean?

24 THE CHAIRMAN: It is an uncertainty of interpretation rather  
25 than what the law might be?

1 RT HON LORD GOLDSMITH QC: Yes.

2 BARONESS USHA PRASHAR: In this instance, it wasn't the  
3 uncertainty that was the issue?

4 RT HON LORD GOLDSMITH QC: It wasn't the uncertainty of the  
5 legal principles that was the issue, it was the  
6 uncertainty of interpretation, yes.

7 BARONESS USHA PRASHAR: Does the nature of international law  
8 place any additional responsibilities on states and on  
9 government legal advisers?

10 RT HON LORD GOLDSMITH QC: I take the view that it is the  
11 job of legal advisers to do their very best to get the  
12 law right and to advise their governments what the law  
13 requires of them. I certainly take the view that it is  
14 the obligation of the United Kingdom -- I wish it were  
15 true of all governments, not necessarily -- that they  
16 have an obligation to uphold international law as well  
17 as domestic law. The difficulty sometimes may be  
18 working out exactly what that law is. But once you know  
19 what it is, then you have a duty to comply with it.

20 BARONESS USHA PRASHAR: But do you think that at this time  
21 there was sort of an underlying concern that  
22 a politically expedient interpretation would underline  
23 the rule of law in international relations? Do you  
24 think that was the underlying concern?

25 RT HON LORD GOLDSMITH QC: I don't know if it was the

1       underlying concern. I'm sure a lot of people will have  
2       said that, or some people will have said that,  
3       certainly. But I don't believe that was the issue.

4             I think the issue was: actually, what does it mean?  
5       I'm quite confident that Jack Straw genuinely meant what  
6       he said. He had been involved, he did believe that the  
7       interpretation meant what he said. I think that -- and  
8       I believe he was expressing that view.

9             I wasn't terribly happy with about the way he did  
10       that to a legal adviser, and I took my responsibilities,  
11       as Attorney General, as a sort of guardian of the legal  
12       advisers, seriously, and in turn, I suppose, sent  
13       a slightly rebuking letter to him.

14   BARONESS USHA PRASHAR: I presume you have seen  
15       Sir Michael Wood's statement.

16   RT HON LORD GOLDSMITH QC: Yes.

17   BARONESS USHA PRASHAR: Can I just read a paragraph which  
18       I think he said:

19             "Another issue is the strength of the legal case  
20       that should be required before a government goes to war.

21             "Is a reasonable legal case sufficient, a  
22       respectable case, an arguable case, or should there be  
23       a higher degree of legal certainty?"

24             Now, this is something that both the former legal  
25       advisers asserted yesterday. Do you have a view on



1           that?

2   RT HON LORD GOLDSMITH QC: I do. First of all, it is very

3           clear that the precedent in the United Kingdom was that

4           a reasonable case was a sufficient lawful basis for

5           taking military action. That was the basis, as

6           I said -- say in my note of 7 March -- and I checked

7           this at the time, because this is what I had been told

8           by my officials -- it was the basis for the action in

9           Kosovo, it was also the basis for the action in 1998.

10           Indeed, I think Sir Michael's words yesterday were

11           that he approved of that and that -- I think he

12           acknowledged that that was taken on the basis that there

13           was a reasonable case for action.

14   BARONESS USHA PRASHAR: We said earlier, the Kosovo

15           precedent was irrelevant.

16   RT HON LORD GOLDSMITH QC: I think -- forgive me, I'm saying

17           on the basis of what is the right test to use, I'm

18           saying that as a matter of precedent it was standard

19           practice to use the reasonable case basis for deciding

20           on the lawfulness of military action.

21   THE CHAIRMAN: Lord Goldsmith, could I ask to you unpack the

22           word "reasonable"?

23   RT HON LORD GOLDSMITH QC: Yes. It means a case which not

24           just has some reasoning behind it, put in practical

25           terms, it is a case that you would be content to argue

1 in court, if it came to it, with a reasonable  
2 prospect of success. It is not making the judgment  
3 whether it is right or wrong, but it is -- I hope that  
4 gives a flavour of it.

5 BARONESS USHA PRASHAR: I think the other thing about the  
6 proposition that was advanced by Sir Michael Wood was  
7 that it is the responsibility of legal advisers to  
8 advise as they consider a court might decide.

9 RT HON LORD GOLDSMITH QC: Yes.

10 BARONESS USHA PRASHAR: Do you accept that?

11 RT HON LORD GOLDSMITH QC: I agree with that, yes.

12 BARONESS USHA PRASHAR: I think the Foreign Secretary, when  
13 he replied to you, said he considered the full range of  
14 views ought to be reflected in advice offered by legal  
15 advisers. What do you think of that bit?

16 RT HON LORD GOLDSMITH QC: Well, I think, ultimately, if  
17 legal advisers are asked for their advice, they would  
18 need to state what that advice is, but I do also think  
19 that ministers are entitled to be able to challenge that  
20 view, to test it. I don't think that legal opinions  
21 from whomever, from me, from lawyers in private  
22 practice, or from legal advisers, as it were, drop from  
23 the sky, from an ivory tower. I think that you have to  
24 be prepared to argue your case. You have to be prepared  
25 to respond to questions that are raised in relation to

1           it and to consider them.

2   BARONESS USHA PRASHAR: But were you concerned that, in  
3           taking the position you ultimately did, you were acting  
4           in the face of the clear advice of extremely experienced  
5           international law experts at the Foreign Office?

6   RT HON LORD GOLDSMITH QC: I paid great attention to what  
7           their views were, of course, but ultimately, I disagreed  
8           with the view that they took. We didn't disagree -- and  
9           this has become very clear now. We did not disagree on  
10          the underlying principle. We didn't disagree on the  
11          existence of the revival argument. We didn't disagree,  
12          either, I believe, that the right language was used in  
13          1441 in order to trigger the revival argument.

14                What we disagreed about was what was the  
15          interpretation when it came to, as Sir Roderic puts it,  
16          what the second stage was. That was a question of  
17          interpretation. It is difficult. Different views can  
18          exist in relation to it. I don't think it involved any  
19          particularly arcane principle in order to work out  
20          actually what it meant.

21                Sadly, at the end of the day, we disagreed about it.  
22          Of course, I thought very hard about the fact that they  
23          took that view, as indeed I thought hard about the fact  
24          that others took a different view, and  
25          Christopher Greenwood, now our judge in the

1 International Court, took a different view. It shows  
2 that there are two different points of view in relation  
3 to this.

4 BARONESS USHA PRASHAR: Can I move on to the situation in  
5 relation to the your draft advice that you gave to the  
6 Prime Minister on 14 January?

7 RT HON LORD GOLDSMITH QC: Yes.

8 BARONESS USHA PRASHAR: Do you know if that was circulated  
9 to other ministers?

10 RT HON LORD GOLDSMITH QC: As I said to Sir Roderic, it  
11 obviously went to the Foreign Secretary at some stage  
12 because he wrote me a letter dealing with points raised  
13 in it. It obviously went to Sir Jeremy Greenstock, (he is  
14 obviously not a minister), because he came to talk to  
15 me about it. Indeed, I had hoped that that would happen.  
16 I can't tell you who else, if anyone, might have seen  
17 it.

18 BARONESS USHA PRASHAR: Do you think it would have helped if  
19 you had been involved much earlier in a timely way, much  
20 earlier when the strategy was being objective, was being  
21 developed, because you said to me earlier that you were  
22 not involved until the second half of 2002, in  
23 developing this, but do you think the fact that you came  
24 late in the day, the advice you gave late in the day and  
25 in draft form, had a material impact on how things

1       developed?

2     RT HON LORD GOLDSMITH QC: I don't think so. Because I had

3       been at pains, as you have seen, to try to make sure

4       that those who were moulding the policy didn't have

5       a misunderstanding about, at least, what my view might

6       be, and I had been involved. I think -- I'm not sure to

7       what extent the Foreign Office legal advisers

8       appreciated this. I had been involved in a number of

9       discussions about -- with the run-up of 1441, some of

10      which we have talked about, about what needed to be seen

11      in the resolution. So the importance of having the

12      statement about material breach, the unreasonable veto,

13      wouldn't operate. So I think I had been involved.

14     BARONESS USHA PRASHAR: But was it timely? That's the

15      question. You were involved, but was it timely?

16     RT HON LORD GOLDSMITH QC: I think that you have got two

17      examples in this matter where I offered advice where it

18      wasn't asked for; in July 2002, and again at the end

19      of January 2003.

20      My view was, if I thought that it was necessary for

21      a minister to know, I would tell them, whether they

22      wanted to hear it or not.

23     BARONESS USHA PRASHAR: You were actually -- the sense I got

24      earlier, in the first half you were surmising what was

25      going on from the papers.

1 RT HON LORD GOLDSMITH QC: Yes.

2 BARONESS USHA PRASHAR: Then you, of course, asserted

3 yourself and you gave advice when it was needed, but my

4 question really is: would it have helped if you had been

5 involved much earlier when there was discussion?

6 Because one of the points made yesterday, by

7 Sir Michael Wood was that they don't think the role of

8 the Attorney General should be separate from being

9 a political minister because you need to be involved in

10 the policy development. Were you involved at the right

11 time in terms of policy development?

12 RT HON LORD GOLDSMITH QC: I don't know. I don't know what

13 difference, if any, it would have made. My own view is

14 that it is right that the senior legal adviser, and all

15 legal advisers, should be involved in the policy

16 development, because that helps ministers, once you

17 understand what their objectives are, to reach a way of

18 achieving those which is lawful.

19 I personally believe that the Attorney General

20 should attend Cabinet, not as a minister expressing

21 views on all the policy issues, but rather -- but to be

22 there, both so that you could understand the context in

23 which important issues were being raised, and also help

24 to keep ministers on the straight and narrow. You could

25 pick up where they perhaps were going in the wrong

1 direction.

2 So I thought that was important, and it wasn't  
3 a practice that had taken place. There was some  
4 suggestion I was excluded from Cabinet. That is simply  
5 not the case. What had happened was that it simply  
6 wasn't the practice at that stage, and I think, at  
7 a later stage, my view prevailed that, as  
8 Attorney General, I ought to be present at Cabinet so  
9 that I could hear what was taking place, and therefore  
10 be in a much better position to advise, not in a vacuum,  
11 but in context.

12 I'm afraid it is a long answer, but in a sense I'm  
13 saying I agree with you, Baroness Prashar, that I think  
14 it would have been -- my preferred route would have been  
15 different, but I really have no reason to suggest that  
16 it would have reached a different conclusion, because,  
17 when advice was needed, I gave it, whether it was asked  
18 for or not.

19 BARONESS USHA PRASHAR: That's a moot point whether  
20 a different decision would have been reached, but I  
21 think the point is you would have liked to have been  
22 involved in a timely manner.

23 RT HON LORD GOLDSMITH QC: Well, I think it would have  
24 been -- I think it would have been better if legal  
25 advisers are involved as the policy is being formulated

1       rather than at the end, and I consistently said this to  
2       lawyers who were giving departmental advice. I said,  
3       "Don't wait until the end, if you can. You should be  
4       involved in policy". So I did insert myself into that  
5       policy consideration in this way.

6       SIR MARTIN GILBERT: I'm puzzled that you weren't involved  
7       in the actual legal aspects of the negotiations of 1441  
8       and that you had to, as it were, find out about the  
9       process afterwards from Sir Jeremy Greenstock.

10       Can you just tell us whether there was ever any  
11       suggestion that you might and what your views are on  
12       being excluded from this process?

13       RT HON LORD GOLDSMITH QC: As Sir Michael rightly said, the  
14       Foreign Office legal advisers sent across to my office,  
15       you know, drafts that were being produced. The  
16       difficulty about that is that you see the words but you  
17       don't really understand the context in which they are  
18       being debated. You get some big ideas about the issues  
19       but not the detail.

20       My practice is -- I'm quite a hands-on lawyer, and  
21       if somebody had said, "Would you mind coming to New York  
22       for a week and talking this through and helping with the  
23       negotiations?" I would have been very happy to do it,  
24       but that's not the way it works and I don't imagine  
25       I would have had time to do it.



1 SIR MARTIN GILBERT: You didn't feel when you saw these  
2 notes that somehow this was something on which your  
3 judgment would be rather important?

4 RT HON LORD GOLDSMITH QC: I knew that my judgment would be  
5 important once the resolution had been agreed, of  
6 course.

7 SIR MARTIN GILBERT: Once it had been agreed, then, of  
8 course, these terrible lacks of clarity couldn't be  
9 resolved.

10 RT HON LORD GOLDSMITH QC: That's true.

11 SIR MARTIN GILBERT: As you said, it was then a decision.

12 RT HON LORD GOLDSMITH QC: That's true, but, of course, our  
13 practice is that negotiations in the Security Council,  
14 are difficult. They involve other member states. They  
15 happen in a particular way between our Ambassadors, and  
16 I wouldn't for a moment think that I would have been in  
17 any position to negotiate with other ambassadors or  
18 something of that sort.

19 SIR MARTIN GILBERT: Or to give legal advice --

20 RT HON LORD GOLDSMITH QC: Yes, there were a lot of other  
21 demands on my time and I was no doubt thought -- but it  
22 has never been done that way before. In relation to  
23 some other areas of policy -- for example, I mentioned  
24 the EU policy -- I did get much more closely involved in  
25 the negotiation.

1 BARONESS USHA PRASHAR: I want to come back to a couple of  
2 other points that -- Jack Straw, when he wrote to you,  
3 he sort of said:  
4 "In issues of international law, my experience is of  
5 advice which is more dogmatic, even though the range of  
6 reasonable interpretation is almost always greater than  
7 in respect of domestic law."  
8 Did you consider this to be a fair and proper point  
9 to make?  
10 THE CHAIRMAN: Do you need the reference?  
11 RT HON LORD GOLDSMITH QC: No, I have got it, thank you very  
12 much indeed, Sir John.  
13 I mean -- I did have a little bit of sympathy with  
14 that. I think there can be something of a tendency to be  
15 inflexible or dogmatic about a view, and I both  
16 understand why that position is taken sometimes, because  
17 it is necessary, because there isn't a court to  
18 determine it, then you stand by your point of view. But  
19 I did understand his frustration and I knew from his  
20 time in the Home Office that he had challenged legal  
21 advice he had received from time to time and he had  
22 turned out to be right.  
23 So I had some sympathy with him, but what mattered  
24 to me wasn't that point. I mean, that didn't affect my  
25 view at all. My view remained to reach, after carefully

1        considering all the arguments, all the evidence, what  
2        I considered to be the correct legal position.

3    BARONESS USHA PRASHAR:    We are aware that  
4        Christopher Greenwood's view was at that time around.  
5        Were there other people who had any different views at  
6        the time?

7    RT HON LORD GOLDSMITH QC:    There were lots of views being  
8        expressed.    There certainly were a lot of views being  
9        expressed.    Indeed, there were opinions being circulated  
10       that it would be unlawful to go without a second  
11       resolution.    Every single member of the Labour Party  
12       received an opinion at one stage or members of the  
13       Cabinet would have done, but other people expressed  
14       different views and I recall seeing those and there was  
15       quite -- there was obviously a lot of debate going on in  
16       the academic world in relation to it.

17   BARONESS USHA PRASHAR:    Indeed, and you were paying full  
18       attention to all of that?

19   RT HON LORD GOLDSMITH QC:    I would notice it.    Certainly.  
20       This is not a headcount game.    You look at the substance  
21       of the argument --

22   BARONESS USHA PRASHAR:    It is not a headcount, there were  
23       obviously views being expressed and people had different  
24       interpretations.

25   RT HON LORD GOLDSMITH QC:    Some with more credibility to

1 state what they were saying than others.

2 BARONESS USHA PRASHAR: What about ministers? Did any

3 ministers express different views to you, apart from

4 Jack Straw, or were you aware of different views?

5 RT HON LORD GOLDSMITH QC: No.

6 BARONESS USHA PRASHAR: You were not aware of any? Thank

7 you.

8 THE CHAIRMAN: I think we have got one other topic we would

9 like to pursue before the lunch break, and I will turn

10 back to the tireless Sir Roderic.

11 SIR RODERIC LYNE: Yes, I will try to take you to Washington

12 and back before lunch, which in 20 minutes is quite

13 a feat, now that Concorde is no longer with us.

14 Just on that last point, before we get on to

15 Washington, did you never at any stage have

16 a conversation with the late Robin Cook or with

17 Clare Short about their different views?

18 RT HON LORD GOLDSMITH QC: No.

19 SIR RODERIC LYNE: They never approached you?

20 RT HON LORD GOLDSMITH QC: They never approached me, no.

21 SIR RODERIC LYNE: Thank you. You went to Washington

22 in February, I think you were there on 10 February --

23 RT HON LORD GOLDSMITH QC: Yes.

24 SIR RODERIC LYNE: -- 2003.

25 RT HON LORD GOLDSMITH QC: Yes.

1 SIR RODERIC LYNE: From what you said earlier, this was  
2 a journey that arose from your discussion with  
3 Jonathan Powell in Downing Street in December, and if  
4 I remember rightly -- or maybe from your discussion with  
5 Jack Straw, but you had told them that you wanted to  
6 have a chance to talk directly to the American lawyers  
7 about the Security Council Resolution.

8 RT HON LORD GOLDSMITH QC: I think it had also come up in  
9 the conversation with Sir Jeremy Greenstock. I thought  
10 it would be helpful. The US, I was told, were the main  
11 negotiators of this, they were the ones who talked  
12 directly, for example, to the French, and although we  
13 had, they had the most direct contact.

14 I believe that their understanding -- what they  
15 could tell me about the history of the negotiating would  
16 be helpful. So I agreed that this was something  
17 I should do. I welcomed it and I went to have  
18 a meeting.

19 SIR RODERIC LYNE: Whom did you talk to in Washington?

20 RT HON LORD GOLDSMITH QC: I talked to a number of people.  
21 I suppose the most important was actually the legal  
22 adviser to the State Department, who was the man, as  
23 I said, who was regarded as my opposite number in  
24 relation to use of force - the highly experienced  
25 Will Taft IV. I spoke to the legal adviser to the

1 national Security Council and, I think, Judge Gonzalez,  
2 who was the President's counsel at that stage, briefly  
3 to Condoleezza Rice, who came into the meeting, I spoke  
4 to senior officials in the State Department,  
5 Colin Powell's people. I think I spoke to the  
6 Department of Defense, although that was more to do with  
7 targeting issues, and I recall I had a meeting with the  
8 Attorney General later in the day, although he wasn't  
9 really very engaged -- that was John Ashcroft. He  
10 wasn't really very engaged on this particular issue.

11 SIR RODERIC LYNE: We have heard from previous witnesses how  
12 this administration, like other administrations, often  
13 speaks with many voices.

14 In your conversations about this specific issue, did  
15 you find that they were speaking with one voice or more  
16 than one voice?

17 RT HON LORD GOLDSMITH QC: They were speaking with  
18 absolutely one voice on this issue. The discussion  
19 involved some detailed textual questions. I still had  
20 these sort of textual questions. Some of them really  
21 are quite detailed. You know, why is the word "and"  
22 used rather than "or", things of that sort.

23 On one point, they were absolutely speaking with one  
24 voice, which is they were very clear that what mattered  
25 to them, what mattered to President Bush is whether they

1 would, as they put it, concede a veto -- I need to  
2 explain that -- and that the red line was that they  
3 shouldn't do that, and they were confident that they had  
4 not conceded a veto.

5 The point about conceding a veto was that the red  
6 line was, "We believe" -- they were saying -- "that we  
7 have a right to go without this resolution. We have  
8 been persuaded to come to the United Nations" -- plainly  
9 some in the administration disagreed with that, you know  
10 that very well, "but the one thing that mustn't happen  
11 is that by going this route, we then find we lose the  
12 freedom of action we think we now have", and if the  
13 resolution had said there must be a further decision by  
14 the Security Council, that's what it would have done,  
15 and the United States would have been tied into that.

16 They were all very, very clear that was the most  
17 important point to them and that they hadn't conceded  
18 that, and they were very clear that the French  
19 understood that, that they said that they had told --  
20 discussed this with other members of the Security  
21 Council as well and they all understood that was the  
22 position.

23 SIR RODERIC LYNE: So they were very clear that the French  
24 had acknowledged, presumably in private, that there  
25 wasn't any need for a second decision?

1 RT HON LORD GOLDSMITH QC: Yes, in the discussions that they  
2 had had. They were very clear -- they were very clear  
3 that they had been adamant that this was key to them and  
4 that they had stuck to their guns and they had therefore  
5 conceded the discussion, the French acknowledged that,  
6 a discussion and no more.

7 SIR RODERIC LYNE: What evidence did they give you that the  
8 French had acknowledged this?

9 RT HON LORD GOLDSMITH QC: I wish that they had presented me  
10 with more. That was one of the difficulties, and I make  
11 reference to this, that, at the end of the day, we were  
12 sort of dependent upon their view in relation to that.

13 But I had seen -- certainly I had seen -- I looked  
14 very carefully at all the negotiating telegrams and  
15 I had seen that there were some acknowledgments of that,  
16 acknowledgments that the French understood the  
17 United States' position, at least, in telegrams that  
18 I had seen, and I was told of occasions when this had  
19 been clearly stated to the French.

20 SIR RODERIC LYNE: But essentially, you were only being  
21 given the views of one party to the conversation, two if  
22 you include the telegrams referring to what the British  
23 had heard. They couldn't give you clear evidence of  
24 this. You had to take their word for it?

25 RT HON LORD GOLDSMITH QC: Yes, I did. But one thing did



1        seem to me absolutely clear: I had known -- indeed I had  
2        known in October -- that the key issue had become the  
3        issue between the United States and France, on one hand,  
4        perhaps others behind France: was there going to be  
5        a need for a second resolution or not? So this was, as  
6        it were, the absolutely critical issue that was being  
7        debated. Therefore, this wasn't a sort of peripheral  
8        matter. This was the very, very heart of what the  
9        resolution said, and, therefore, when you then look back  
10       at the resolution, and you see the words that are used,  
11       you look at it in that context. You can't interpret  
12       legal documents in a vacuum.

13       The context was the most important question, or one  
14       of the most important questions, was: is there going to  
15       be a decision or something less? Then you look at  
16       operational paragraph 12 and you say, "Ultimately, can  
17       they really have made a mess of this? Can they really  
18       have used this expression except very, very  
19       deliberately?"

20       SIR RODERIC LYNE: As we established before the break, both  
21       the French and the British and the Americans had had to  
22       give ground on precisely that point, but having heard --

23       RT HON LORD GOLDSMITH QC: With respect, I don't agree.

24       I simply don't agree. I think it is a different point.

25       I think the point that the US and the UK had had to give

1 ground on was that there would be a second discussion.  
2 What I was being told they didn't give ground on was  
3 that it would be a decision, and this is why this red  
4 line of President Bush was hugely important, because he  
5 could have had walked away from it. We couldn't walk  
6 away from the resolution. He could have done, on his  
7 view of the law.

8 SIR RODERIC LYNE: The ground we had given was on our  
9 request that the Security Council should give a clear  
10 authorisation in that resolution. We were seeking  
11 a decision and we didn't get that. So we had both given  
12 ground, but we are going down a bit of a sidetrack here,  
13 but an important sidetrack.

14 THE CHAIRMAN: Did you want to?

15 RT HON LORD GOLDSMITH QC: If I may, because you are drawing  
16 attention, which I entirely understand, to a resolution,  
17 or a draft resolution, or words, as early as September.  
18 This is why I wanted to point to the fact that, by  
19 the time the resolution is concluded, there are a lot of  
20 very clear indicators of it of the use of force, the  
21 preambles we looked at before. There is the reference  
22 to serious consequences in operational paragraph 13.  
23 So I really don't think -- and actually, this was  
24 the Foreign Office view, I believe, as well, from what  
25 happened subsequently -- that there needed ever to be

1           a statement, "And you can use necessary means". So we  
2           weren't actually conceding the case at all by not  
3           insisting on those words going on.

4   SIR RODERIC LYNE: Can I come back to your conversation with  
5           the Americans? The Americans gave you their version of  
6           their conversations with the French.

7   RT HON LORD GOLDSMITH QC: Yes.

8   SIR RODERIC LYNE: Did you then go and ask the French for  
9           their side of the story?

10   RT HON LORD GOLDSMITH QC: No, I couldn't do that.  
11           I plainly couldn't have done that.

12   SIR RODERIC LYNE: It is a very important issue. Why  
13           couldn't you?

14   RT HON LORD GOLDSMITH QC: I couldn't have done that,  
15           because, there we were, plainly, by this stage, in  
16           a major diplomatic stand-off, if you like, between the  
17           United States and France.

18           I couldn't -- you couldn't have had -- and you  
19           couldn't have had the British Attorney General being  
20           seen to go the French to ask them, "What do you think?"  
21           The message that that would have given Saddam Hussein  
22           about the degree of our commitment would have been huge.

23   SIR RODERIC LYNE: Could you not have had a private  
24           discussion with the French?

25   RT HON LORD GOLDSMITH QC: I'm not sure if that's possible.

1 THE CHAIRMAN: Or pursue the matter through diplomatic  
2 channels?

3 SIR RODERIC LYNE: Or pursue the matter through diplomatic  
4 channels?

5 RT HON LORD GOLDSMITH QC: I think that comes to the same  
6 thing.

7 SIR RODERIC LYNE: We have confidential communications with  
8 the French through diplomatic channels.

9 RT HON LORD GOLDSMITH QC: I think this was a hugely  
10 sensitive political area. The United States and the  
11 United Kingdom were acting very closely together. We  
12 were not acting very closely with France. They had, or  
13 they came to have, a clear view as to what they wanted  
14 to happen. I don't know whether they did throughout.  
15 They came to have a clear view in relation to it.  
16 I don't think, if I had said to somebody, "Do you mind  
17 if I now go and talk to the French about this?" that  
18 anybody would have said that was acceptable.

19 SIR RODERIC LYNE: So we have a situation in which, as you  
20 are formulating your legal advice to the Prime Minister  
21 on this crucially important question -- you have got the  
22 accounts from Sir Jeremy Greenstock and from the  
23 Americans of exchanges held in private without written  
24 contemporaneous records with the French, and we also  
25 have on the public record what the French and other

1 governments have said about Resolution 1441, which does  
2 not point in exactly the same direction.

3 RT HON LORD GOLDSMITH QC: I have also had what Jack Straw  
4 has said. Jack Straw sent me a detailed letter.

5 I think this may be one of the things which has not been  
6 declassified, but it is important that I mention that  
7 I had a detailed letter from him, which commented again  
8 on the textual arguments which I had raised and also  
9 provided a very clear view about what the negotiating  
10 issue had been and how it had been resolved. So there  
11 were those three things that I had had.

12 You are absolutely right, Sir Roderic, that I did  
13 not have a signed statement and of course that's one of  
14 things which then gave rise to -- you know, to  
15 difficulties, and I made the point, I think on 7 March,  
16 we were dependent ultimately on their view. But that  
17 doesn't detract from the critical point that you have to  
18 interpret a resolution in the context and the context  
19 was -- and this I was persuaded on and I have seen  
20 enough to know that this was right -- was there going to  
21 be a second decision required or not?

22 Then, with that in mind, you then go back to the  
23 resolution and you look at the words that have been  
24 used, and, ultimately, the fact that a deliberate choice  
25 had been taken to use the words "considered the

1 situation" and not "decide", to me was the most powerful  
2 factor at the end of the day.

3 SIR RODERIC LYNE: If you had gone to a court of law, had  
4 such a court existed, and put to them what you had heard  
5 from the Americans, from Jack Straw, from  
6 Sir Jeremy Greenstock, about the French position, but  
7 they had also had to consider what the French had said  
8 on the record in the Security Council, what -- to which  
9 side of this would they have given greater weight?

10 RT HON LORD GOLDSMITH QC: Well, can I answer this way, and  
11 I know I'm moving forward, but at the point that I took  
12 the view -- and I'll explain why -- that I had actually  
13 to come down on one side of the argument or other,  
14 I used a test which I quite frequently use when I'm  
15 having to advise on difficult matters, which is to say  
16 "Which side of the argument would you prefer to be on?"  
17 and I took the view I would prefer to be on the side of  
18 the argument that said a second resolution wasn't  
19 necessary.

20 I would have had -- as I always do in cases, you  
21 have to then consider how you are going to present  
22 certain material, but I would have been able to present,  
23 I believe, the central issue. This is what this debate  
24 was about. There was enough in the newspapers about  
25 that. You could produce negotiating telegrams, perhaps,

1 and, therefore, said to any court, "Now come back to  
2 what the words are, look at them, and can you really say  
3 when they said 'consider the situation', they actually  
4 meant 'decide'?"

5 SIR RODERIC LYNE: You see, I'm trying to work out how much  
6 this negotiating record -- how much weight this  
7 negotiating record of private conversations can actually  
8 bear, and I put this question yesterday to  
9 Sir Michael Wood.

10 His view was that:

11 "If this matter came before a court, a court would,  
12 in my view, give very little weight to private  
13 conversations which are recorded by one side."

14 Then he went on to say:

15 "If you look both at the informal negotiations and  
16 at what was said on the record, I cannot read that as  
17 otherwise than being pretty heavily weighted towards the  
18 view that it was for the Council to take the decision on  
19 whether force could be used."

20 So that was his view of the relative weights of  
21 a negotiating record of what is said in private in the  
22 corridors of the UN and of what is said in public in  
23 formal statements in the UN Security Council.

24 RT HON LORD GOLDSMITH QC: First of all, I disagree with the  
25 second part of that. I heard him say that yesterday.

1 I was actually rather surprised that he was saying that  
2 the weight was heavily in favour of that point of view.  
3 I certainly don't read it that way myself.

4 I didn't hear him explain what you therefore make of  
5 what the UN -- a United States has to say -- and if I've  
6 missed some of his evidence I do apologise to him and to  
7 the Inquiry.

8 It doesn't grapple with that point at all and it  
9 doesn't grapple either with the question of the word  
10 that is actually used in operational paragraph 12.

11 As to the former, there is not a lot of guidance as  
12 to how you interpret a United Nations Security Council  
13 Resolution. The best that I'm aware of is in the  
14 advisory opinion of the International  
15 Court of Justice in the Namibia matter and I have got  
16 the language here:

17 "The language of a resolution of the  
18 Security Council should be carefully analysed, having  
19 regard to the terms of the resolution to be  
20 interpreted --"

21 THE CHAIRMAN: I'm sorry, can you speak slightly more slowly  
22 for the stenographer?

23 RT HON LORD GOLDSMITH QC: I'm sorry. I'm quoting:

24 "The language of a resolution of the Security  
25 Council should be carefully analysed, having regard to



1 the terms of the resolution to be interpreted, the  
2 discussions leading to it, the Charter provisions  
3 invoked and, in general, all circumstances that might  
4 assist in determining the legal consequences. ..."

5 Now, there is not a lot of other authoritative  
6 guidance on what you do. Of course, if you look at  
7 something and it is inconclusive, it doesn't help you,  
8 well, it is not going to help you.

9 SIR RODERIC LYNE: No, but if you take the discussions  
10 leading to it -- I hesitate even to get on to this  
11 ground with an eminent lawyer -- open to debate about  
12 what you mean by discussions. I, having spent four  
13 years of my life rather painfully sitting listening to  
14 discussions in the United Nations Security Council,  
15 would interpret, myself, that as meaning the discussions  
16 that take place, the debates, if you like, in the  
17 meetings of the Security Council, both when it is  
18 meeting in its private consultation mode, not in public,  
19 not with a formal published record, but with 15 states  
20 around the table and in its public records.

21 That is rather like Parliamentary debates leading up  
22 to a bit of legislation. One can take account of that  
23 because it is held in front of other people. You are  
24 not just reliant on one side and there is a record.

25 Of course, there are other discussions that take

1 place in corridors and between individuals. What we are  
2 talking about between the Americans and the French were  
3 those sorts of informal, unrecorded, private  
4 discussions. Not held in public, not held in front of  
5 other people.

6 Now, we could spend a long time on this. I hope we  
7 can agree to park that point and agree that there is not  
8 absolute clarity on how Security Council Resolutions are  
9 interpreted, as you have just said, and as  
10 Sir Michael Wood, indeed, also said in his written  
11 evidence to us, where he essentially made the same  
12 point, though referring not to the Namibia judgment but  
13 I think to a Vienna Convention.

14 RT HON LORD GOLDSMITH QC: The Vienna Convention deals with  
15 treaties rather than Security Council Resolutions, but  
16 it is of some assistance, I agree.

17 SIR RODERIC LYNE: If we can park that point, what I would  
18 like to do, just before we take a break, is to fly you  
19 back from Washington to London, if you are content.

20 Is there anything else you wish to say about the  
21 discussions in Washington before we do that?

22 RT HON LORD GOLDSMITH QC: I would just like to make this  
23 observation.

24 I do, of course, understand, Sir Roderic what you  
25 are saying. I noted that Sir Michael, for example, said

1       that I was right. He used these words: I was right to  
2       try to discover as much as I could about the negotiating  
3       process. I did that. Others didn't. What weight you  
4       place on it is a matter of judgment, and when you can  
5       see that there is a critical issue which plainly was  
6       discussed -- and I'm not convinced that this was only  
7       discussed in what Sir Roderic would term private  
8       discussions as opposed to in the private but 15-member  
9       discussions.

10       When you see there is a key issue there, then you  
11       really shouldn't ignore that, when you have got a text  
12       which is not clear, and you should say, in the light of  
13       that, in the light of that context, "I must now look at  
14       the words and see what they were intended to mean".

15       SIR RODERIC LYNE: Are you aware of any point in the  
16       15-member discussions in which the French acknowledged,  
17       in the words quoted earlier, that they had lost and knew  
18       they had lost?

19       RT HON LORD GOLDSMITH QC: Sir Jeremy said it was apparent  
20       from the way that they dealt with matters actually in  
21       the Security Council on the day that the -- on the day  
22       that the resolution was passed. In court, I suppose  
23       I would have to call him and get him to give that  
24       evidence about that.

25       SIR RODERIC LYNE: Yes.

1 RT HON LORD GOLDSMITH QC: I recognise, as I have said  
2 several times, this is one of the difficulties in  
3 relation to it. What I disagree with is you can simply  
4 ignore all of this.

5 SIR RODERIC LYNE: No one here is seeking to ignore any of  
6 this or to challenge the fact that it was quite right to  
7 dig into it. As I said earlier, I'm trying to establish  
8 what weight should be placed on the record, and if you  
9 had Sir Jeremy saying, in his view, it was apparent that  
10 the French had taken a position, and you had him in the  
11 witness box in a court and the court also had to look at  
12 what the French had said on the record formally in  
13 public, the court would make a decision as to which of  
14 those statements he gave greater weight to, and you, as  
15 a lawyer, will know much better than I do where the  
16 court might come out.

17 RT HON LORD GOLDSMITH QC: And I, as a lawyer, would also  
18 then have said to the French Ambassador, or whoever was  
19 given the evidence, "By the way, we now know what your  
20 position was, because you have set it on the record".

21 SIR RODERIC LYNE: That's after the event, and I think the  
22 court probably would have to rule that out of  
23 consideration.

24 RT HON LORD GOLDSMITH QC: Oh, no.

25 SIR RODERIC LYNE: If I can fly you back --

1 RT HON LORD GOLDSMITH QC: Please, fly me back!

2 SIR RODERIC LYNE: If I can fly you back to London, you get  
3 back here, I think, on 11 February. Is it right that on  
4 12 February you made a revision to the draft opinion  
5 that you had shown to the Prime Minister in the middle  
6 of January and that for the first time at this stage you  
7 stated that you were prepared to accept that  
8 a reasonable case could be made that 1441 revived the  
9 authorisation to use force in Resolution 678?

10 RT HON LORD GOLDSMITH QC: Yes. I'm not sure I drafted it.  
11 I think what happened, I had gone with at least one of  
12 my officials. We had obviously discussed very closely  
13 what had taken place in Washington. She had been  
14 involved in the meetings with Sir Jeremy, seen  
15 Jack Straw's letter. We discussed this and I must have  
16 told her at this stage, because it was my view, "I now  
17 do consider that there is a reasonable case".

18 SIR RODERIC LYNE: That's the first time you have said that?

19 RT HON LORD GOLDSMITH QC: Yes. I just -- may I just go  
20 back to this question of reasonable case? Because  
21 Baroness Prashar asked me the question.  
22 When I first was asked to advise, it was suggested  
23 to me in my office that it would be sufficient for me  
24 just to say what a reasonable case was.  
25 I was actually uncomfortable about that at that

1 stage, so I wasn't looking at it, at that point, on the  
2 basis of reasonable case, I was looking at it from the  
3 point of view of: where does the balance come down when  
4 you weigh up all the arguments?

5 SIR RODERIC LYNE: Which is the better view?

6 RT HON LORD GOLDSMITH QC: Which is the better view. Which  
7 is why you don't you see that language, the reasonable  
8 case language, at that stage, but having heard what  
9 Sir Jeremy had said, he hadn't sort of got me there  
10 first time round, but then it was added to by what  
11 Jack Straw said, it was added to very much by what the  
12 Americans said, particularly this point about the red  
13 line, and, in the light of that, I was saying, "I'm now  
14 satisfied that there is a reasonable case".

15 SIR RODERIC LYNE: But you are also still saying that  
16 the better view is that a further decision is needed by  
17 the Security Council?

18 RT HON LORD GOLDSMITH QC: No.

19 SIR RODERIC LYNE: That's not your position?

20 RT HON LORD GOLDSMITH QC: I don't reach that view. I don't  
21 need to, because the precedent is simply it is enough to  
22 say there is a reasonable case and this is what had  
23 been, and so I said, "Well, there is a reasonable case",  
24 and that's what the draft agreement --

25 SIR RODERIC LYNE: Were you not recognising that there would

1           be stronger ground for us if there was a further  
2           Security Council Resolution?

3   RT HON LORD GOLDSMITH QC:   Of course, of course.

4   SIR RODERIC LYNE:   Right.   Now, this is, as you have just  
5           said, the first time that you had actually acknowledged  
6           this.   Was it, therefore, the arguments that you had  
7           heard in Washington that had persuaded you of this?

8   RT HON LORD GOLDSMITH QC:   It was the combination of  
9           Sir Jeremy Greenstock, Jack Straw and what had happened  
10          in Washington.

11   SIR RODERIC LYNE:   Although after you had met  
12          Sir Jeremy Greenstock, you advised the Prime Minister  
13          that you weren't at that stage persuaded.

14   RT HON LORD GOLDSMITH QC:   As I said, Sir Jeremy on his own,  
15          he made some good points, he moved me in my mind, but he  
16          didn't quite get me there.

17   SIR RODERIC LYNE:   Right.

18   RT HON LORD GOLDSMITH QC:   It is the combination of the  
19          three.   It was, frankly, quite hard to believe, given  
20          what I had been told about the one red line that  
21          President Bush had, that all these experienced lawyers,  
22          and negotiators in the United States could actually have  
23          stumbled into doing the one thing that they had been  
24          told mustn't happen.

25   SIR RODERIC LYNE:   They might have stumbled into a situation

1       where, under very strong pressure from the British to  
2       have a Security Council Resolution, which, as you said  
3       they themselves did not think was necessary, they had  
4       made certain concessions, the concession of having  
5       a resolution, the concession that the Security Council  
6       should meet again, which at least complicated the  
7       situation.

8   RT HON LORD GOLDSMITH QC: Well, that it complicated the  
9       situation -- we would not be here today if it hadn't  
10      complicated the situation. Of course I agree with that.

11         I mean, a red line means a red line. It was the  
12      only one, I was told, that mattered. They didn't mind  
13      what else went into the resolution, so long as it did  
14      not provide a veto, and, if it required a decision, then  
15      one of the Security Council members, perhaps the French,  
16      could then have vetoed action by the United States,  
17      which, up to that point, they believed they could take  
18      in any event.

19   SIR RODERIC LYNE: Now, I suspect that if President Chirac  
20      were sitting in your seat at this moment, he would say  
21      the French had a red line, which they had also  
22      preserved, which was that this should be a two-stage  
23      approach with a further decision -- at one point,  
24      I think he referred to this as seeking a lock on this --  
25      and you would reach an argument to which there wasn't



1 a clear answer, because neither point was clear from the  
2 resolution, as we have already made clear, that it was  
3 unclear, to use a Rumsfeldism.

4 RT HON LORD GOLDSMITH QC: With respect, I don't agree  
5 because we know -- I agree we didn't know it at the  
6 time, but we now know from what Ambassador Levitte said  
7 publicly, what the French Ambassador said to me, that  
8 actually the French knew and believed that there wasn't  
9 a need for a second resolution.

10 So if we had them in front of us today, if we had  
11 President Chirac in front of us today, I don't know what  
12 he would say, but if he was acknowledging what his  
13 Ambassador said, and there were reports that he was  
14 saying this to the White House on the instructions of  
15 President Chirac, then he would have had to acknowledge  
16 that, actually, no, he did know that there wasn't going  
17 to be a decision.

18 SIR RODERIC LYNE: Mention of the French makes me think that  
19 this is a very good moment to take lunch.

20 THE CHAIRMAN: Let's break for lunch and return, if we may,  
21 at 2 o'clock.

22 (1.05 pm)

23 (The short adjournment)

24 (2.00 pm)

25 THE CHAIRMAN: Welcome back everyone. We will resume this

1 session and the questioning will be led in a moment by  
2 Sir Lawrence Freedman.

3 SIR LAWRENCE FREEDMAN: Thank you very much. I want to take  
4 you through the advice you gave to the Prime Minister on  
5 7 March.

6 RT HON LORD GOLDSMITH QC: Yes.

7 SIR LAWRENCE FREEDMAN: Now, you referred to him earlier as  
8 the "client", and I presume that these were the terms in  
9 which you gave him this advice, which means that you  
10 wanted him to be clear about the legal risks and  
11 possibilities that he had to consider.

12 RT HON LORD GOLDSMITH QC: Yes.

13 SIR LAWRENCE FREEDMAN: Why now? Why March 7th?

14 RT HON LORD GOLDSMITH QC: I had actually told him through  
15 his officials, my view that there was a reasonable case  
16 on, I think it was, 27 February. After I came back from  
17 the United States, as we saw this morning, in  
18 discussions with my officials, I had taken the view  
19 there was a reasonable case. A draft was produced which  
20 reflected that. I don't know why it took me until  
21 27 February, but that may have been the first time there  
22 was a meeting. I met with Jonathan Powell,  
23 Sir David Manning and Baroness Morgan and told them that  
24 I had been very much assisted in my considerations by  
25 Jeremy Greenstock, the Americans -- I may have mentioned

1 Jack Straw as well, and I was able to tell them that it  
2 was my view that there was a reasonable case.

3 I'm sure I added that the safest course is still to  
4 get a second resolution, you know, implicitly saying you  
5 should still keep trying. So I had given that advice --

6 SIR LAWRENCE FREEDMAN: But that was verbal rather than  
7 written?

8 RT HON LORD GOLDSMITH QC: Yes, it was verbal rather than  
9 written. Obviously, I had prepared what I was going to  
10 say. Then -- so I told them -- and I had given them,  
11 therefore, as I saw it, and as I believe they saw it --  
12 I had given them the green light, if you will, that it  
13 was lawful to take military action, should there not be  
14 a second resolution and should it be politically decided  
15 that that was the right course to take.

16 I think then in the week in which the note of  
17 7 March was given, I was then asked, "Would you now,  
18 please, produce a written advice expressing your view?"  
19 and I did, and although it contains more detail, it has  
20 the same substance as the oral advice I had given  
21 towards the end of February.

22 SIR LAWRENCE FREEDMAN: Thank you. Now, we have already  
23 spent some time on the exegesis of 1441, but I think it  
24 would be helpful, to start with, if we just went through  
25 the resolution in order to make sure we understand what

1           it means.

2           One thing we have already mentioned, I think, in  
3           your answers to Sir Martin, was the nature of the  
4           revival argument and the fact that you were aware that  
5           this didn't seem to be controversial, but that you  
6           wanted to satisfy yourself that it is -- that it worked.

7   RT HON LORD GOLDSMITH QC:   Yes.

8   SIR LAWRENCE FREEDMAN:   Now, this requires -- and I think  
9           this is why people may be interested in  
10          an explanation -- a link between a resolution passed  
11          in November 1990 with regard to Iraq's occupation of  
12          Kuwait --

13   RT HON LORD GOLDSMITH QC:   Yes.

14   SIR LAWRENCE FREEDMAN:   -- and how the members of the  
15          Security Council, acting with the Government of Kuwait,  
16          might use all necessary means to get its liberation, and  
17          the whole question of weapons of mass destruction,  
18          compliance with UN Resolutions 11 years or so later.

19          Could you explain how that link can be made?

20   RT HON LORD GOLDSMITH QC:   Absolutely.   First of all, it is  
21          very important to note that Resolution 678 was not  
22          limited to the liberation of Kuwait.   Resolution 678  
23          says in terms -- and I am reading from operative  
24          paragraph 2, that, it is to:

25          "... authorise member states ... to use all

1        necessary means. To uphold and implement Resolution 660  
2        and subsequent relevant resolutions ..."

3                That's really the removal from Kuwait:

4                "... and [importantly] to restore international  
5        peace and security in the area."

6        SIR LAWRENCE FREEDMAN: There has been a question raised  
7        about the word "restore", which suggests looking  
8        backwards rather than forwards.

9        RT HON LORD GOLDSMITH QC: I'm not sure I understand that  
10       point. Forgive me. The important point to me is that  
11       there was a dual purpose in the "all necessary means".

12               One was to cause Iraq to leave Kuwait, but also to  
13       have -- "restore", "met" whatever -- international peace  
14       and security in the area, which meant, therefore,  
15       dealing with those things which were a threat, and the  
16       issue to the Security Council -- this becomes clearer  
17       when one reads Resolution 687 -- that the Security  
18       Council were of the view that Iraq's conduct, not just  
19       by being in Kuwait, but more generally, was a threat to  
20       international peace and security. They had not just  
21       invaded Kuwait, they had intentions. There was concern  
22       about their ambitions in relation to weapons of mass  
23       destruction, which they had used, and if one looks at  
24       Resolution 687, for example, there is a -- preambular  
25       paragraph 8 talks about the Security Council being

1 conscious of the statement of Iraq threatening to use  
2 weapons in violation of its obligations under the Geneva  
3 protocol, its prior use of chemical weapons.

4 Preambular paragraph 14 refers to the Council being  
5 aware of the use by Iraq of ballistic missiles for  
6 unprovoked attack, and, therefore, of the need to take  
7 specific measures in regard to such missiles located in  
8 Iraq.

9 SIR LAWRENCE FREEDMAN: There are a lot of these.

10 RT HON LORD GOLDSMITH QC: There is a lot there.

11 SIR LAWRENCE FREEDMAN: But it has normally been its  
12 assumption -- and this indeed was partly behind the  
13 containment policy -- that the means by which Iraq was  
14 controlled on 687 was through sanctions, rather than the  
15 threat of military force.

16 RT HON LORD GOLDSMITH QC: Well, I think this was the  
17 debate. 687, as indeed 1441 says, set out the  
18 conditions for the ceasefire -- but it was a ceasefire,  
19 not a termination of authority, and over the course of  
20 the next few years, there were a number of incidents.

21 States had taken military action on two occasions  
22 because Iraq had failed, on one occasion, to allow  
23 UNSCOM inspectors in, on another occasion, I think, to  
24 allow inspection of presidential palaces where it was  
25 believed that perhaps things were. There was a long

1 process.

2 It was hoped, I have no doubt, that sanctions and,  
3 from time to time, targeted force and threat of force,  
4 would actually deal with these problems, but obviously  
5 the issue was, politically, that, by 2002, had that  
6 policy failed, was there any point doing any more  
7 sanctions or did it now have to go further?

8 SIR LAWRENCE FREEDMAN: Indeed. You mentioned the question  
9 of inspection of Saddam's palaces.

10 RT HON LORD GOLDSMITH QC: Yes.

11 SIR LAWRENCE FREEDMAN: This was the December 1998 so-called  
12 Desert Fox.

13 RT HON LORD GOLDSMITH QC: Yes.

14 SIR LAWRENCE FREEDMAN: Now, Sir Jeremy Greenstock told us  
15 that he had sought to replicate the position that had  
16 been taken in November/December 1998 in 1441.

17 RT HON LORD GOLDSMITH QC: Yes.

18 SIR LAWRENCE FREEDMAN: Did you see these as being  
19 comparable? Did you think you'd succeeded?

20 RT HON LORD GOLDSMITH QC: In some respects 1441 was  
21 actually significantly stronger than 1205. 1205, which  
22 was a short resolution -- first of all, 1441 sets out in  
23 detail, in the preambles, the revival argument. That's  
24 essentially what it does and what I referred to this  
25 morning. 1205 did nothing of the sort.

1           Secondly, 1205 used this language of "flagrant  
2           violation" which, although it sounds very bad, doesn't  
3           have a legal meaning, whereas "material breach" was  
4           recognised as the thing which would then revive  
5           authorisation under 678.

6           1441 warns of serious consequences for  
7           non-compliance with this resolution, whereas 1205 sort  
8           of referred back to previous warnings. 1205 was also  
9           interesting because, 1205, there wasn't actually action  
10          taken immediately after the resolution was passed.

11          What happened, the resolution was passed, as  
12          I recall, Saddam Hussein then made a statement that he  
13          was going to comply. The United Kingdom, I think, Prime  
14          Minister Blair, then said, "As a result of that, we are  
15          holding back", and then UNSCOM said, I think, that,  
16          "This is not actually happening", and so then military  
17          action took place. But there was a gap between the  
18          resolution and military action. So those were the  
19          points.

20       SIR LAWRENCE FREEDMAN: The head of UNSCOM, in fact,  
21       declared the material breach, as it were, or the  
22       flagrant violation which then provided the basis for  
23       military action.

24       RT HON LORD GOLDSMITH QC: I think in 1205 -- at the time  
25       1205, yes.



1 SIR LAWRENCE FREEDMAN: Now, Elizabeth Wilmshurst yesterday  
2 described the argument that had been used in late 1998  
3 as a strained legal argument, and it was strongly  
4 criticised thereafter by Security Council members. Were  
5 you aware of that? Did you have a view on that?

6 RT HON LORD GOLDSMITH QC: I was aware that it had been  
7 criticised, although the criticism, at least in part,  
8 was because there had been resistance by some to the use  
9 of the term "material breach" in the resolution, as  
10 I understand it, precisely because that was known to be  
11 the thing that would allow the revival argument to  
12 operate.

13 Different language was used, but still the  
14 United States and the United Kingdom, thought there was  
15 enough there.

16 I was, if I may say so -- and I don't want to  
17 personalise this -- a little bit surprised to hear that,  
18 because 1205 and the operation in 1998 was supported by  
19 Foreign Office legal advisers. When I received my first  
20 briefing in relation to the revival argument, there was  
21 no hint from the Foreign Office legal advisers that they  
22 regarded the revival argument as not appropriate, and  
23 I never heard that said until the comment that was made  
24 yesterday -- from us; other countries disagree, that's  
25 perfectly true.

1 SIR LAWRENCE FREEDMAN: I think she acknowledged that she  
2 had gone along with it and worked with it at the time.

3 RT HON LORD GOLDSMITH QC: I'm saying nobody told me in the  
4 run-up to March 2003, "Actually, the Foreign Office has  
5 changed its mind", if, indeed, it had. I'm sure it  
6 hadn't.

7 SIR LAWRENCE FREEDMAN: Thank you. That leads us quite  
8 neatly on to the language of 1441, and the operative  
9 paragraphs start by explaining that Iraq is in material  
10 breach, and you have already given us an explanation of  
11 your understanding of "material breach".

12 It sounds a very either/or thing. Are there  
13 gradations of material breach? Can you have more severe  
14 material breach or is it just one basic category?

15 RT HON LORD GOLDSMITH QC: Of course you can have more  
16 severe material breach. The point is that the language  
17 is there to indicate a breach of such a character that,  
18 as I said in the language of the Vienna Convention on  
19 the Law of Treaties, means that the other party can treat  
20 that as a ground for terminating or suspending the  
21 obligation in question. So here terminating or  
22 suspending the ceasefire.

23 SIR LAWRENCE FREEDMAN: So that is what it allows you to do,  
24 but there can be variations in the nature of the breach  
25 and how serious it is?

1 RT HON LORD GOLDSMITH QC: Yes, the question is: does it  
2 pass that threshold to cause force to be -- the  
3 authority for force to be revived. If there had been an  
4 attack by Iraq on another country, that obviously would  
5 have been a most serious material breach, but there  
6 could be far less conduct than that and it would have  
7 been a material breach.

8 SIR LAWRENCE FREEDMAN: Then the next operational  
9 paragraph 2 gives Iraq a chance to comply with its  
10 disarmament obligations. Then it is required to issue  
11 a currently accurate, full and complete declaration to  
12 cover all aspects of its WMD programmes with which the  
13 Security Council has been concerned.

14 Then we come to this critical paragraph 4, and this  
15 defines the Iraqi behaviour that would constitute the  
16 sort of next and most potentially fundamental material  
17 breach.

18 Can I just check with you two aspects of this?  
19 First, while the discovery of actual weapons of mass  
20 destruction was being referred to as the smoking gun,  
21 presumably, you would have decided the issue once and  
22 for all. That's not actually the test. The test is an  
23 inaccurate and incomplete disclosure document and then  
24 inadequate cooperation with "the enhanced inspection".

25 RT HON LORD GOLDSMITH QC: A failure by Iraq at any time to

1       comply with and cooperate fully in the implementation of  
2       this resolution. I think that Mr Blix made it clear in  
3       his early reports that this was a resolution which  
4       called for positive action on the part of Iraq. It had  
5       to demonstrate its compliance. It wasn't a case for the  
6       inspectors to, as it were, catch as catch can.

7       SIR LAWRENCE FREEDMAN: It was both of these? An inaccurate  
8       disclosure document by itself wouldn't be sufficient?  
9       You would need -- that's the and/or argument?

10      RT HON LORD GOLDSMITH QC: As a matter of interpretation --  
11       that's what was said. I actually am not sure, as  
12       a matter of interpretation, whether that's right.  
13       I actually read that as disjunctive, but it doesn't  
14       matter because, in fact, we have got into the second  
15       part of it.

16      SIR LAWRENCE FREEDMAN: So, okay. But what about means in  
17       terms of people's understanding of what a material  
18       breach might be? You are talking about this  
19       non-cooperation with the inspectors as a test, not  
20       necessarily a smoking gun, and I think  
21       Sir Jeremy Greenstock described to us the developing  
22       view within the Security Council that, without a smoking  
23       gun, it was going to be quite hard. Were you aware of  
24       this as an issue?

25      RT HON LORD GOLDSMITH QC: Of course, this was an issue in

1 the broader sense politically. What would be the right  
2 thing to do? Obviously, if there had been discovery of WMD,  
3 that might have made it different. The question is what  
4 the resolution required.

5 THE CHAIRMAN: You would say that that was a political  
6 judgment, not a matter of legal interpretation?

7 RT HON LORD GOLDSMITH QC: Exactly.

8 SIR LAWRENCE FREEDMAN: The resolution then describes the  
9 enhanced inspection regime in some detail. Then, in  
10 paragraph 11, it directs the Chairman of UNMOVIC and the  
11 Director General of the IAEA to report any interference  
12 or non-compliance.

13 Paragraph 12 explains how, on receipt of a report,  
14 the Security Council will convene to consider the  
15 situation, and then paragraph 13 recalls the repeated  
16 warnings to Iraq that it will face serious consequences.

17 RT HON LORD GOLDSMITH QC: Yes.

18 SIR LAWRENCE FREEDMAN: Now, you drew attention before  
19 lunch, and you have just done it again, to the  
20 preambular paragraphs and the references to "all  
21 necessary means", but in this paragraph 13 it refers to  
22 "serious consequences".

23 RT HON LORD GOLDSMITH QC: Yes.

24 SIR LAWRENCE FREEDMAN: Now, we know -- this has already  
25 been raised -- that the Americans would have preferred

1       the term "all necessary means" there, and that would --  
2       that's the normal Security Council Resolution. That was  
3       the language. That was the language of 678.

4   RT HON LORD GOLDSMITH QC: It was the language of 678.

5   SIR LAWRENCE FREEDMAN: It had been used in other Security  
6       Council --

7   RT HON LORD GOLDSMITH QC: It had been used in other  
8       Security Council Resolutions, yes.

9   SIR LAWRENCE FREEDMAN: So what was your understanding of  
10       the phrase "serious consequences"?

11   RT HON LORD GOLDSMITH QC: My understanding of the phrase  
12       "serious consequences" in the context was it was  
13       actually saying the same thing, threatening that there  
14       would be a use of force. I base that, I think, on two  
15       things.

16       First of all, that was actually the advice  
17       I received from Foreign Office legal advisers and it  
18       came up, for example, particularly in the context of  
19       what the terms of a second resolution would be, because,  
20       after 1441, there was work being done on what a second  
21       resolution would be, what did it need to say, and there  
22       was very clear advice it didn't need to say then "use  
23       all necessary means". I was also told that "serious  
24       consequences" was regarded as coded language for "use of  
25       force".

1           It is also, as a matter of common sense, not that  
2           obvious what else it could have meant. Iraq was already  
3           under a very stringent sanctions regime. There is all  
4           this talk about "use of force" earlier on in the  
5           resolution, I would have thought that it would have been  
6           pretty clear that this is what the Security Council were  
7           getting at.

8   SIR LAWRENCE FREEDMAN: But in 1998, the action that had  
9           been taken was military.

10   RT HON LORD GOLDSMITH QC: Yes.

11   SIR LAWRENCE FREEDMAN: But far short of a full-scale  
12           invasion --

13   RT HON LORD GOLDSMITH QC: That is true.

14   SIR LAWRENCE FREEDMAN: -- of Iraq. So it might have  
15           implied, be understood, as threatening the use of force,  
16           but what sort of force does it imply?

17   RT HON LORD GOLDSMITH QC: The legal question -- and I think  
18           Sir Michael said this too. The legal question is  
19           precisely the same, whether it is a limited military  
20           intervention, or, as you say, a sort of wholesale  
21           military attack.

22           The question in either case is: is there  
23           a justification for force? Is there a legal basis for  
24           force? The next question you then have to consider, and  
25           I constantly made this point in my advice, is, even

1       though you have got authority to use force, that force  
2       must be no more than is necessary and proportionate to  
3       the objective you are trying to achieve.

4           If all you were trying to achieve was to open up  
5       a particular place for inspection, you probably wouldn't  
6       need to do more than a limited military intervention.  
7       If you are trying to do more than that, because -- in  
8       this case, because the regime had demonstrated that it  
9       was not going to comply and the only way, therefore, to  
10      have full compliance was to take much stronger action,  
11      then that is what you would need to do, but that's  
12      a separate question from whether there is a lawful basis  
13      for your action.

14   SIR LAWRENCE FREEDMAN: Can I just check what authority this  
15      notion that serious consequences is tantamount to  
16      military force is based on?

17   RT HON LORD GOLDSMITH QC: I was so advised by  
18      Foreign Office legal advisers based on past experience.

19   SIR LAWRENCE FREEDMAN: I may be wrong, but my understanding  
20      is that in current UN Resolutions in relation to Iran,  
21      the phrase "serious consequences" is used, and I am sure  
22      in that case, I hope in that case, it doesn't  
23      necessarily just mean full-scale military operations.

24   RT HON LORD GOLDSMITH QC: With respect, I agree with you.  
25      I hope so too. The answer may well be, as I have sort



1 of been saying, you have got to look at the context, and  
2 if the context is you talk a lot about use of force and  
3 the context is one last chance, and the context is all  
4 the sanctions regimes are in place at that stage.

5 SIR LAWRENCE FREEDMAN: The difficulty you can see  
6 developing, and why members of the Security Council  
7 might be concerned, would be that you can imagine  
8 a situation where the material breach is  
9 non-cooperation --

10 RT HON LORD GOLDSMITH QC: Yes.

11 SIR LAWRENCE FREEDMAN: -- with the inspectors, and it is  
12 well-known at the time that the view of the  
13 United States, and, indeed, the United Kingdom, is that,  
14 should it come to military action, this will not be an  
15 air strike to open up the site, this will be the  
16 invasion and occupation of another country.

17 So the issue of proportionality that you raise is to  
18 the fore in this matter. It is an interesting  
19 policy question, it is well understood what this must  
20 mean.

21 RT HON LORD GOLDSMITH QC: I agree with you. Can I just  
22 clarify one thing as well?

23 SIR LAWRENCE FREEDMAN: Please do.

24 RT HON LORD GOLDSMITH QC: I have told you what in the  
25 context "serious consequences" I believe meant. Of

1 course, the basis for saying that there is authority for  
2 the use of force is because of the revival back to the  
3 "all necessary means" in 678, rather than just because  
4 of operational paragraph 13, which provides some  
5 additional context. That's what I'm saying.

6 But I do agree with you that the extent of what  
7 takes place is an important question, which was why  
8 I consistently advised it is not enough that there is  
9 lawful authority, you must do -- use no more force than  
10 is necessary and proportionate to the objective that you  
11 are seeking to attain.

12 SIR LAWRENCE FREEDMAN: You would accept that the invasion  
13 and occupation of Iraq could come into that category?

14 RT HON LORD GOLDSMITH QC: Yes, I think that's a military  
15 and political judgment, but if the objective was -- and  
16 it plainly was, so far as 1441 is concerned -- achieving  
17 the complete verifiable disarmament of Iraq, the  
18 stopping of all programmes, the reduction, the removal  
19 of all threat that was coming from that, if the  
20 political and military judgment was that the only way to  
21 achieve that would be a full-scale invasion, then that  
22 would be justified as a matter of law.

23 SIR LAWRENCE FREEDMAN: But you might understand why  
24 a member of the Security Council, looking at this  
25 situation, might be concerned that on a certain

1        interpretation of 1441, what it had done was to give the  
2        United States the right -- and the United Kingdom -- to  
3        take what might seem to be a minor or temporary act of  
4        non-cooperation with the inspectors and turn that into  
5        full-blown military action.

6        RT HON LORD GOLDSMITH QC: Well, as a lawyer, what I would  
7        say is, "Well, you shouldn't have agreed to 1441. If  
8        you wanted to reserve to yourself the right to stop that  
9        happening, you shouldn't have agreed to 1441 in these  
10       terms. You should have made it clear that there needed  
11       to be a decision".

12       THE CHAIRMAN: At the back of it, there is still the  
13       requirement for proportionality between the action taken  
14       and the objectives sought.

15       RT HON LORD GOLDSMITH QC: Absolutely.

16       SIR LAWRENCE FREEDMAN: But they might also say that's  
17       precisely why an assessment is needed, that that is why  
18       there is a provision in the resolution for an  
19       assessment.

20       RT HON LORD GOLDSMITH QC: Yes, they might indeed, but then  
21       you come to the question, this either means you need  
22       a decision or you don't, and that was the question that  
23       was regrettably difficult, but, at the end of the day,  
24       it required an answer.

25       SIR LAWRENCE FREEDMAN: So if we then are working out the

1 process by which military action might take place, you  
2 referred earlier to the paragraph in 1441, where it  
3 requires a report of a material breach by UNMOVIC or the  
4 IAEA. Does it allow a member state also to report  
5 a breach or does it have to come from them?

6 RT HON LORD GOLDSMITH QC: No, it allows a member state to  
7 do so. I think that paragraph 4 allows for that to  
8 happen.

9 SIR LAWRENCE FREEDMAN: Would you imagine it would be  
10 difficult to do that without corroborative evidence from  
11 the Director General of the IAEA or the head of UNMOVIC?

12 RT HON LORD GOLDSMITH QC: As a matter of practical  
13 politics, of course the Security Council would want to  
14 know what was being said by the inspectors, and, indeed,  
15 they received that information.

16 SIR LAWRENCE FREEDMAN: So the process is that somebody,  
17 a member state, one of the international organisations,  
18 reports a material breach --

19 RT HON LORD GOLDSMITH QC: Yes.

20 SIR LAWRENCE FREEDMAN: -- and then there are two questions:  
21 how it is assessed and what to do about it?

22 RT HON LORD GOLDSMITH QC: Well, this is the question  
23 really, the difficult question, of what was meant about  
24 "for assessment".

25 Certainly the Security Council was required, before

1 anything else happened, before military action took  
2 place -- this was definitely the second stage --  
3 required to meet and to consider the situation.

4 Now, on the ultimate analysis, having considered the  
5 situation, they could have done a number of different  
6 things. They could have suggested more time, they could  
7 have decided to go -- have military action there and  
8 then, or they could have not decided.

9 The question then was: if they didn't decide, was  
10 there authority in the rest of the resolution?

11 SIR LAWRENCE FREEDMAN: So it is important that they have  
12 a serious discussion?

13 RT HON LORD GOLDSMITH QC: Yes.

14 SIR LAWRENCE FREEDMAN: It did mean that there was something  
15 to discuss.

16 RT HON LORD GOLDSMITH QC: Yes.

17 SIR LAWRENCE FREEDMAN: But if they didn't agree amongst  
18 themselves, then member states that took a particular  
19 view could then go off and do what they thought was  
20 necessary?

21 RT HON LORD GOLDSMITH QC: That's the architecture, in my  
22 view, of 1441, and that follows, you know, to some  
23 extent, if I may say so, from the fact -- and it is  
24 a very, very important point -- that operational  
25 paragraph 2 is saying: this is one last opportunity

1 after however many resolutions, the period of time for  
2 inspections. This is the context in which it takes  
3 place, repeated defiance, deception, all the things that  
4 the Inquiry knows very well about the history leading up  
5 to 2002.

6 SIR LAWRENCE FREEDMAN: So when the British and the  
7 Americans said there was no automaticity here, they were  
8 basically saying you would go through some sort of  
9 process, but that process didn't have to conclude with  
10 a particular decision?

11 RT HON LORD GOLDSMITH QC: Yes.

12 SIR LAWRENCE FREEDMAN: I now want to look at your opinion,  
13 but rather than go through it all in detail, because it  
14 is quite long, I really want to focus on the summary,  
15 where you are giving your advice to the Prime Minister.

16 RT HON LORD GOLDSMITH QC: Yes.

17 SIR LAWRENCE FREEDMAN: Now, in paragraph 26, which is  
18 getting into your summary, you noted the unclear  
19 language of 1441 and you give two views: either a need  
20 for the Security Council to make an assessment on  
21 whether Iraq is not taking its final opportunity; or  
22 that's not needed because the Council has pre-determined  
23 the issue.

24 Now -- you see, I don't quite understand. I can see  
25 theological connotations in pre-determination, but I'm

1 not quite sure what it means in this case. Could you  
2 explain?

3 RT HON LORD GOLDSMITH QC: As I indicated this morning, the  
4 context of material breach really carries with it two  
5 elements.

6 One is the fact that there is a breach, which, in  
7 a sense, is a factual question; either there is or there  
8 isn't depending on what the obligation is.

9 The second is an assessment of its quality, and is  
10 it of the quality which enables you to say, "This is  
11 such a breach which entitles the other party to invoke  
12 it as a reason for terminating or suspending the  
13 relevant obligation".

14 Pre-determination meant that the Security Council,  
15 having said, "One last chance, if you like, but only one  
16 last chance", is saying, "Any further failure  
17 constitutes a material breach, which entitles member  
18 states to move for action".

19 So they have determined already the question of the  
20 quality of the act. Then what matters is whether, as  
21 a matter of fact, it occurs.

22 SIR LAWRENCE FREEDMAN: In your report earlier -- as I say,  
23 I'm not sure I fully understand that -- you said the  
24 American view is:

25 "Whether or not there has been a material breach is

1 an objective fact, and doesn't require any multilateral  
2 assessment mechanisms."  
3 You then say:  
4 "I'm not aware of any other state which supports  
5 this view."  
6 RT HON LORD GOLDSMITH QC: Yes.  
7 SIR LAWRENCE FREEDMAN: So you are setting up here  
8 a particularly American view --  
9 RT HON LORD GOLDSMITH QC: No, absolutely not at all.  
10 The point is that, because the Americans took the  
11 view that they could decide material breach, therefore  
12 they didn't need the Security Council Resolution at all.  
13 We took the view that we did.  
14 What the Security Council decided was: there is  
15 a material breach as we stand at the moment, and, what's  
16 more, if you don't take the final opportunity, you don't  
17 comply in every respect, there will be a further  
18 material breach.  
19 So it is still the Security Council which is making  
20 that determination. All that is left is the factual  
21 question whether or not they have, in fact, failed, not  
22 really an assessment of the --  
23 SIR LAWRENCE FREEDMAN: You see this as a purely factual  
24 question?  
25 RT HON LORD GOLDSMITH QC: I think it is a factual question.



1 I would add -- and I have looked at this and others have  
2 looked at it -- that in the Security Council meeting on  
3 7 March, coincidentally the same day, no member state on  
4 that occasion actually took the view, that I can see,  
5 that Iraq had taken that final opportunity. Indeed,  
6 quite a number of them were quite clear that it hadn't.  
7 Indeed, I think one could say the majority hadn't.

8 So on that question of fact, had they taken that  
9 final opportunity, it did seem that the Council had  
10 considered it, and there was a very strong, if not quite  
11 unanimous, view that they had not taken that final  
12 opportunity. The question then was: what, politically,  
13 is the best thing to do? Do we delay or do we go now?

14 SIR LAWRENCE FREEDMAN: This goes back again to the fact  
15 that, if there were opportunities to get themselves out  
16 of material breach, as it were, then there would be no  
17 need for war. So it leads to the question: is material  
18 breach something you can get out of, once you are in?

19 RT HON LORD GOLDSMITH QC: The whole point about 1441 was it  
20 was enabling Saddam Hussein to do just that, provided  
21 that he made this declaration and that he cooperated  
22 fully in every respect that had been set out in the  
23 resolution with what was required.

24 SIR LAWRENCE FREEDMAN: So the argument then would be -- and  
25 this was clearly an argument that was running on the

1       Security Council -- that the issue about a second  
2       resolution may not be, do we need one at all, but, do we  
3       need one at this moment, because this story has got  
4       a little bit further to go.

5       RT HON LORD GOLDSMITH QC: Yes, but I may, if I may, draw  
6       a distinction: legality is a necessary condition for  
7       military action. It is not a sufficient condition. Once  
8       you have decided if it is lawful, then there is a very  
9       important question, maybe a bigger question, as to  
10      whether it is right to do it.

11      SIR LAWRENCE FREEDMAN: That's not a question on which you  
12      were advising?

13      RT HON LORD GOLDSMITH QC: It is not a question of law, it  
14      is a question for governments and so forth. Cabinet,  
15      Houses of Parliament.

16      SIR LAWRENCE FREEDMAN: That's why you go on to say the  
17      safest legal course would be to secure the adoption of  
18      a further resolution, and then this question of the  
19      negotiating history comes in --

20      RT HON LORD GOLDSMITH QC: Yes.

21      SIR LAWRENCE FREEDMAN: -- in paragraph 28.

22      Now, you had a very long conversation with  
23      Sir Roderic about this before lunch and you made your  
24      view about its relevance very clear.

25      It is important to note, however, that you do say in

1           this advice that, "We had very little hard evidence".

2   RT HON LORD GOLDSMITH QC:   Yes.

3   SIR LAWRENCE FREEDMAN:   So though you are putting quite

4           a bit of weight on it, the evidential basis is not that

5           strong.

6   RT HON LORD GOLDSMITH QC:   Yes, but I think that -- I tried

7           to make this point this morning, which is actually, at

8           the end of the day, the key question still remains: what

9           do the words mean?

10           In circumstances where it is clear from the

11           negotiating history -- and on this it was clear that

12           that, at least, was the critical question, "Was there

13           going to be a need for a decision or not?" -- then the

14           fact that those words are not used -- the Security

15           Council members knew very well the difference between

16           "consider" and "decide", that that is a deliberate

17           choice, then you draw the conclusion that it was

18           intended that there should not be a decision.

19   SIR LAWRENCE FREEDMAN:   Without going over all the ground

20           again, we had an interesting discussion about the

21           possibility of getting French views.

22   RT HON LORD GOLDSMITH QC:   Yes.

23   SIR LAWRENCE FREEDMAN:   Now, on, I think, 4 February, the

24           Prime Minister actually met with President Chirac while

25           he was still in this process of getting your views.

1        Were you aware that that meeting was going to take  
2        place?

3        RT HON LORD GOLDSMITH QC: I cannot recall. I may have seen  
4        it in the press. I may have known. I wasn't part of  
5        any briefing for the Prime Minister, or, as far as I can  
6        recall, saw any record of it afterwards.

7        SIR LAWRENCE FREEDMAN: It seems this might have been  
8        a rather good opportunity for the Prime Minister to ask  
9        President Chirac directly what he might have thought  
10       about the need for a further resolution.

11       RT HON LORD GOLDSMITH QC: Well, given where the two states  
12       were at that stage, I suspect -- but he can speak for  
13       himself -- that Mr Blair would say I couldn't possibly  
14       go to the French and say, "Could you tell me what I'm  
15       entitled to do?"

16       SIR LAWRENCE FREEDMAN: I'm sure he couldn't, and this is  
17       a question obviously for the Prime Minister of the day,  
18       but there is an issue about having just come back, and  
19       you will have known, because you were advising before  
20       the meeting with President Bush, at this stage, that the  
21       balance of your view was against moving without a second  
22       resolution, that it wouldn't be surprising if the  
23       Prime Minister wished to speak to President Chirac about  
24       the possibility of working together on what that second  
25       resolution might be, in which case, views might have

1           come out about them.

2   RT HON LORD GOLDSMITH QC: I very strongly suspect that he

3           did talk to him about -- I'm sure it was a very

4           important topic of discussion for them, what was going

5           to happen next, "Can we work together?" and this and

6           that.

7   SIR LAWRENCE FREEDMAN: You didn't get any intelligence

8           back?

9   RT HON LORD GOLDSMITH QC: No. I mean, it is interesting

10          because I had actually seen a telegram reporting what

11          French legal views were at an earlier stage as well,

12          before Resolution 1441, and they had said that they had

13          given President Chirac advice -- this was reported to

14          us -- that determination of material breach would revive

15          the authority under Resolution 1441.

16   SIR LAWRENCE FREEDMAN: Well, that's quite interesting

17          additional evidence you have given us.

18   RT HON LORD GOLDSMITH QC: It is in the files that my former

19          office I know has made available to the Inquiry. That

20          is not specific to 1441. That is before --

21   SIR LAWRENCE FREEDMAN: An indication of the advice that

22          they may have got. It doesn't alter the fact that they

23          may still have wished for something different in 1441

24          itself.

25          Can I then look at the consequences of no decision

1 by the Security Council?

2 In paragraph 24 of your advice you give three

3 arguments that support the approach that a decision is

4 necessary. The first of these is that when taken with

5 the word "assessment", the language of paragraph 12

6 indicates that the Council would be assessing the

7 seriousness of any Iraqi breach.

8 RT HON LORD GOLDSMITH QC: Yes.

9 SIR LAWRENCE FREEDMAN: Which was the point I was making

10 before. So that if some assessment is necessary --

11 RT HON LORD GOLDSMITH QC: I think I say, "if some

12 assessment is necessary". That's the question.

13 SIR LAWRENCE FREEDMAN: So this is what we have been

14 discussing. Okay.

15 Then you refer to the special significance of the

16 words "in order to secure international peace and

17 security".

18 RT HON LORD GOLDSMITH QC: Yes.

19 SIR LAWRENCE FREEDMAN: Could you elaborate on why you

20 thought that was important?

21 RT HON LORD GOLDSMITH QC: These are arguments. I set out

22 the arguments both ways, of course.

23 SIR LAWRENCE FREEDMAN: I know. We are trying to understand

24 the weight of these arguments.

25 RT HON LORD GOLDSMITH QC: You would say, "Because this

1 reflects the language as to what the Security Council's  
2 obligations are, does the fact that that is referred to,  
3 sort of point you in the direction that it is for the  
4 Security Council to decide?" to which part of the answer  
5 is, "Well, they have decided". That's the point about  
6 pre-determination.

7 But that was the argument that I was -- I was  
8 setting out the arguments that could be put that way.

9 SIR LAWRENCE FREEDMAN: So despite the fact that, in  
10 a sense, they have delegated their authority in a way,  
11 that seems to be the implication?

12 RT HON LORD GOLDSMITH QC: That's what one is actually  
13 trying to discover by the process of interpretation,  
14 whether they have, by looking at all of the features,  
15 and that means looking at the language but also the  
16 arguments.

17 The whole point is, of course there were features  
18 which pointed the other way. That's why we were where  
19 we were and why I had taken provisionally the view that  
20 I did that then became clearer as to what I considered  
21 the true meaning of Resolution 1441 was.

22 SIR LAWRENCE FREEDMAN: Then, third:

23 "Any other construction reduces the role of the  
24 Council discussion under operation 12 to a procedural  
25 formality."

1           You seem to accept that this would be potentially of  
2           consequence.

3   RT HON LORD GOLDSMITH QC: I do say in legal terms -- and  
4           that's quite significant because what I'm really saying  
5           is -- people didn't like that expression "procedural  
6           formality", they said, "That simply isn't right".

7           What I'm saying is, as a matter of law, in a sense  
8           it amounts to that, because it would have been possible  
9           to have avoided even a discussion, as a matter of --  
10          well, not to -- to avoid any engaged discussion, but as  
11          a matter of fact, of course, what it did provide -- and  
12          we saw this over the months between November  
13          and March -- was a series of discussions in which the  
14          extent of non-compliance was discussed, what the right  
15          thing to do at the end of it was, and it did provide for  
16          other member states the opportunity of expressing their  
17          view and whether they had a right to prevent it at least  
18          to seek to influence what was taking place.

19          So I said, in legal terms, in practical terms,  
20          I think that was perhaps quite a narrow thing to say.  
21          In practical terms, it did provide some real  
22          significance.

23   SIR LAWRENCE FREEDMAN: I mean, as you say, it means that  
24          members of the Security Council can come to the debate,  
25          engage in it in good faith, put forward compelling



1 arguments, but, in the end, military action could  
2 proceed regardless?

3 RT HON LORD GOLDSMITH QC: That's the legal consequence,  
4 yes.

5 SIR LAWRENCE FREEDMAN: You said before that, if member  
6 states didn't want that, then they shouldn't have voted  
7 for it.

8 RT HON LORD GOLDSMITH QC: Yes.

9 SIR LAWRENCE FREEDMAN: But what you are also indicating is  
10 that these are questions of interpretation. So it is  
11 perfectly possible that they did think they were voting  
12 for something else.

13 RT HON LORD GOLDSMITH QC: Well, you know, it would have  
14 been, if I may say so -- if what really mattered, and it  
15 appears that it was what really mattered, that there  
16 should be either a decision or leave it for discussion  
17 and then the United States -- because I'm sure that's  
18 what people particularly had in mind -- would do what it  
19 believed it had to do, then it would have been easy for  
20 member states to have said, "We are not prepared to vote  
21 for this resolution unless it says 'decide' in  
22 operational paragraph 12".

23 Whether politically it is easy for them to do is  
24 another matter, but legally that could have been done.

25 SIR LAWRENCE FREEDMAN: But at least in the explanations of

1        voting a number seemed to indicate this is precisely  
2        what they did expect.

3    RT HON LORD GOLDSMITH QC: I don't share that view. Two  
4        member states, I think Mexico and Ireland, although  
5        Ireland in a slightly conditional way, seemed to be  
6        taking that view. Then there are some obscure, perhaps  
7        ambiguous phrases used by others, and, given the central  
8        position that France played, I think you can make the  
9        point that it is significant that they did not say in  
10       terms, which they could have done, "This means there has  
11       to be a decision".

12    SIR LAWRENCE FREEDMAN: So I see the consequences then of  
13       the Security Council not taking the decision -- and this  
14       is your paragraph 29. If 1441 alone had revived 678,  
15       that requires strong factual grounds for concluding that  
16       Iraq has failed to take the final opportunity.

17       Now, where was this strong factual basis to come  
18       from?

19    RT HON LORD GOLDSMITH QC: The strong factual basis was to  
20       come from the facts. That sounds obvious, but that is  
21       the point, and the point I was really making was, if  
22       this ever came to court, and we were saying -- we would  
23       have to persuade a court of our interpretation of 1441,  
24       but they would also say, "What's the evidence that they  
25       did actually fail?" and I was saying, at that stage,

1           there needs to be strong factual evidence of failure.

2           I wrote this before this discussion on 7 March in  
3           the Security Council that I have referred to, but it  
4           will be a question of fact whether that had happened or  
5           not.

6   SIR LAWRENCE FREEDMAN: Just before I move on, you  
7           mentioned, when we had a discussion about intelligence  
8           advice, that you had received a briefing in February.

9   RT HON LORD GOLDSMITH QC: Yes.

10   SIR LAWRENCE FREEDMAN: Can you just explain the nature of  
11           that briefing and how relevant it was to this part of  
12           your advice?

13   RT HON LORD GOLDSMITH QC: Yes. I can't remember who asked  
14           for the briefing, but I do recall John Scarlett,  
15           probably with others, came, gave me a briefing. The  
16           briefing was focused on the question of compliance. The  
17           clear intelligence, the clear advice that I was being  
18           given by him was that Saddam Hussein in Iraq had not  
19           complied with the resolution, not just that there were  
20           specific elements of non-cooperation, serious  
21           non-cooperation, including, for example, intimidation of  
22           potential interviewees, this was an important part of  
23           the resolution that interviewees should be left to be  
24           interviewed by inspectors without intimidation. They  
25           could be flown abroad, if need be, and that there was

1 evidence, both Humint and Sigint, of deception and --  
2 concealment and dispersal of relevant elements of WMD.

3 SIR LAWRENCE FREEDMAN: So how weighty was this intelligence  
4 in terms of your opinion --

5 RT HON LORD GOLDSMITH QC: Well, at the end of the day,  
6 I did not have the resources to be able to evaluate  
7 intelligence of that sort. My office didn't have  
8 a weapons specialist or something of that sort. At the  
9 end of the day -- and like any lawyer who is dependent  
10 upon the facts from his client -- I was dependent upon  
11 the assessment by the government which had all the  
12 resources it had, all the intelligence agencies. It had  
13 the military experts, people with great experience, who  
14 could judge that, and that was why I particularly wanted  
15 to be sure, come the week before the events, that the  
16 Prime Minister, who did have access to all that  
17 information, was of the view that there had been  
18 a failure.

19 SIR LAWRENCE FREEDMAN: So you couldn't really just say the  
20 facts spoke for themselves, somebody would have to  
21 collect the facts, present them and take a view about  
22 what they meant?

23 RT HON LORD GOLDSMITH QC: No, not really. The facts would  
24 speak for themselves. It was just, what were the facts  
25 at the time? Well, the facts were the facts. But it is

1 a commonplace for a lawyer to find somebody says, "These  
2 are the facts 1, 2, 3", and ultimately that may be  
3 established in court because they are the facts and they  
4 haven't changed, but you need to -- you don't know, you  
5 weren't there, and, therefore, you say to your client,  
6 "You must confirm that these are the facts".

7 SIR LAWRENCE FREEDMAN: So that leads you to say:

8 "We would need to be able to demonstrate hard  
9 evidence of non-compliance and non-cooperation."

10 The "we" is --

11 RT HON LORD GOLDSMITH QC: The United Kingdom.

12 SIR LAWRENCE FREEDMAN: The government?

13 RT HON LORD GOLDSMITH QC: Yes.

14 SIR LAWRENCE FREEDMAN: Given the structure of the  
15 resolution, you go on to say that the views of UNMOVIC  
16 and the IAEA will be highly significant in this respect.

17 RT HON LORD GOLDSMITH QC: Yes.

18 SIR LAWRENCE FREEDMAN: You note that in the light of the  
19 latest reporting by UNMOVIC, you will need to consider  
20 extremely carefully whether the evidence of  
21 non-cooperation and non-compliance by Iraq is  
22 sufficiently compelling.

23 RT HON LORD GOLDSMITH QC: Yes.

24 SIR LAWRENCE FREEDMAN: Now, presumably, this was, from what  
25 you said, where you said you got the Clusters document

1           after this.

2   RT HON LORD GOLDSMITH QC: I think the Clusters document may

3           have --

4   SIR LAWRENCE FREEDMAN: It came around almost exactly the

5           same time.

6   RT HON LORD GOLDSMITH QC: Yes.

7   SIR LAWRENCE FREEDMAN: But that could well have been

8           a reference to the mid-February presentations by Dr Blix

9           and El-Baradei, which had been interpreted as being

10          somewhat more positive on Iraqi cooperation than

11          the January 27th presentations had been.

12   RT HON LORD GOLDSMITH QC: I think I heard it said that that

13          presentation sort of contained something for everybody.

14          I don't know whether that was a fair statement, but

15          I really wasn't -- it really wasn't for me to seek to

16          assess that.

17          What I was saying in this paragraph -- and it was --

18          this is partly a sort of point about -- just based on

19          litigation experience. You get to court, whatever the

20          court may be, and you need to have -- you know, a strong

21          case, as it were, on the facts that you are putting

22          forward, and I think I was -- I really was saying,

23          "I don't know. I see some of this stuff coming out of

24          the inspectors, you need to assess very carefully

25          whether the position actually is that Iraq is now

1           complying or whether it is not".

2   SIR LAWRENCE FREEDMAN:   The consequence of this is that the

3           determination of material breach, however strong the

4           factual evidence, however much everybody else may be in

5           sympathy with this point, is actually going to be made

6           by the British Government.

7   RT HON LORD GOLDSMITH QC:   Well, I think you know I don't

8           agree with that, because the determining of material

9           breach is actually being made by the --

10   SIR LAWRENCE FREEDMAN:   There has been pre-determination, but

11           not the one that is necessarily now going to trigger

12           military action.

13   RT HON LORD GOLDSMITH QC:   I hope I'm not quibbling, but it

14           is an important point, the pre-determination had been

15           made that, if there was a failure, it would be

16           a material breach.

17           Yes, we had to decide whether there was a failure,

18           but, if there was a failure, then the Security Council's

19           pre-determination would come in and clothe that with the

20           character of material breach.

21   SIR LAWRENCE FREEDMAN:   So in paragraph 22 you had said the

22           UK view has always been that it is for the

23           Security Council to determine the existence of the

24           material breach of the ceasefire.   You are now saying

25           that has already been done in 1441?

1 RT HON LORD GOLDSMITH QC: Yes.

2 SIR LAWRENCE FREEDMAN: So what is the need now for the  
3 Prime Minister to give a view? What is he giving a view  
4 on, if that determination has already been made?

5 RT HON LORD GOLDSMITH QC: I don't know really what the  
6 facts are. I had a view, of course, and you have  
7 identified some of the reasons why I had a view, but  
8 I thought, frankly, two things.

9 First of all, because it did depend upon the  
10 failure, it was important to point out you need to be  
11 satisfied about that and, secondly, I wanted the  
12 Prime Minister, consciously and deliberately, to focus  
13 on that question. I wanted it to be a question that he  
14 would really apply his mind to.

15 Forgive me for even suggesting that he wouldn't have  
16 done. That wasn't the point. That he should have  
17 focused his mind on whether there was, in fact,  
18 a failure, and that was the purpose of saying, "I want  
19 this in writing", it was so there was a really conscious  
20 consideration of that.

21 SIR LAWRENCE FREEDMAN: In a sense, this is the client  
22 confirming his own views, though, his own facts?

23 RT HON LORD GOLDSMITH QC: Well --

24 SIR LAWRENCE FREEDMAN: The Prime Minister's views on Iraqi  
25 weapons of mass destruction were well-known. It would



1       have been very surprising if, at this stage, he had  
2       suddenly said, "I'm not actually very sure".

3   RT HON LORD GOLDSMITH QC: I think subsequently, if it had  
4       emerged that in these very few days there had suddenly  
5       been a sea change in attitude and something important  
6       had taken place so that there was now compliance, and  
7       the Prime Minister had given to the Attorney General  
8       a letter confirming his view; when, if one saw  
9       subsequently, it was not the case, that would have been  
10      a very serious matter.

11   SIR LAWRENCE FREEDMAN: So you are pushing the issue away  
12      from the Security Council -- accepting the issue goes  
13      away from the Security Council and back to the British  
14      government on this crucial determination, and then, in  
15      paragraph 30, you make a point that you have already  
16      made to us, that:

17            "In Operation Desert Fox in 1998 and Kosovo in 1999,  
18      British forces had participated in military action on  
19      the basis of the advice from my predecessors that the  
20      legality of the action under international law was no  
21      more than reasonably arguable."

22            So you are accepting here that "reasonably arguable"  
23      is a somewhat lesser standard than others that you might  
24      like to present?

25   RT HON LORD GOLDSMITH QC: I think the key difference

1       here -- and it emerged subsequently, and I'm sure we  
2       will come on to it shortly -- was between the authority  
3       based on the assessment that there was a reasonable case  
4       that it was lawful, to authority which is based upon  
5       having balanced all the arguments and come down one side  
6       or the other, is it, in fact, lawful?

7               That's the distinction I was drawing.

8   SIR LAWRENCE FREEDMAN:   Were the precedents that helpful?

9       You have already indicated that Kosovo was a completely  
10      different basis of law.   Desert Fox is obviously  
11      relevant, but, again, you have indicated a difference  
12      there.   How strong were these precedents, and isn't it  
13      a bit unnerving at this sort of stage to say that we are  
14      going into this with no more than a reasonable argument?

15   RT HON LORD GOLDSMITH QC:   I don't think "reasonable case"  
16      quite means that, but, of course, I see, Sir Lawrence,  
17      the point that you are making.

18              That is why, when the armed forces and the  
19      Civil Service said, "We need to know that you think it  
20      is right to do it", I saw that point of view.   I had  
21      been doubtful originally.   I had originally been not  
22      that instinctively in favour of this "reasonable case" approach,  
23      but these precedents were helpful, because, although  
24      Kosovo was a different legal basis, the point was that  
25      the British Government had committed itself to military

1       action on the basis of legal advice that there was  
2       a reasonable case. That was the precedent. It had been  
3       pressed upon me that that was the precedent in the past.

4           I can see, and in a sense this is right, that, with  
5       hindsight, I was being overly cautious in expressing it  
6       in this way, but that was the precedent that had been  
7       used and I went along with it. Not, "I went along with  
8       it", I followed the same practice.

9   SIR LAWRENCE FREEDMAN: So overly cautious in the sense that  
10       you could have been stronger at this point?

11   RT HON LORD GOLDSMITH QC: Because subsequently, when I get  
12       the request from the armed services and from the  
13       Civil Service to say, "Please, will you say -- we want  
14       the Attorney General to say is he of the opinion that it  
15       is or isn't lawful", then I very quickly saw that  
16       actually this wasn't satisfactory from their point of  
17       view. They deserved more, our troops deserved more, our  
18       civil servants who might be on the line deserved more,  
19       than my saying there was a reasonable case.

20           So, therefore, it was important for me to come down  
21       clearly on one side of the argument or the other, which  
22       is what I proceeded to do.

23   SIR LAWRENCE FREEDMAN: One might think it is either  
24       a reasonable case or it is not a reasonable case. How  
25       does it suddenly become a stronger case?

1 RT HON LORD GOLDSMITH QC: It is the decision you make about  
2 it. It is the decision you make about it. You make  
3 a judgment. You say I'm asked to advise whether there  
4 is a reasonable case, and you examine all the evidence  
5 and you say, "Yes, there is a reasonable case". You  
6 don't need to go any further, and in that respect, I can  
7 see, with hindsight, that I was being overly cautious.  
8 Then somebody says to you, "Actually, I don't want  
9 to know whether you say there is a reasonable case,  
10 I want to know whether or not you consider that it will  
11 be lawful".  
12 Well, I regard that as a different question and you  
13 then have to -- you have to answer it.  
14 SIR LAWRENCE FREEDMAN: Some might argue that justifiably  
15 you would be cautious in another direction, in that, if  
16 you are going to invade a sovereign state, you would  
17 want something more than a reasonable case.  
18 RT HON LORD GOLDSMITH QC: Well, I think that's what the  
19 armed forces were saying in a sense. We don't want to  
20 go to war on the basis of -- I don't know if they were  
21 putting it quite this way, but they were saying, "We  
22 want an unequivocal yes or no. Please, what is the  
23 Attorney General's opinion?"  
24 SIR LAWRENCE FREEDMAN: What I'm struggling with here is  
25 something which is cautious about the strength of the

1 arguments, because the arguments are difficult and the  
2 resolution does have an ambiguity in it --

3 RT HON LORD GOLDSMITH QC: Yes.

4 SIR LAWRENCE FREEDMAN: -- and then suddenly he is becoming  
5 quite firm on that. You are giving the armed forces  
6 more but not on the basis of any more legal arguments.

7 RT HON LORD GOLDSMITH QC: Well, not on the basis of more  
8 legal argument, but on the basis of asking a different  
9 question. This is, in a sense, why I'm saying "with  
10 hindsight". I would have liked to have known before the  
11 following week that what the armed services and the  
12 Civil Service expect was not what had been by precedent  
13 given in the past, that they wanted more, they wanted an  
14 unequivocal answer.

15 Had I known that, then I would have approached the  
16 question differently, and I'm simply saying I was  
17 cautious in not going further than I needed to do on  
18 7 March.

19 SIR LAWRENCE FREEDMAN: But there is another argument that  
20 you make. You say:

21 "A reasonable case does not mean that if the matter  
22 ever came before a court I would be confident that the  
23 court would agree with this view."

24 I mean, just on that point first, if you make  
25 a stronger argument, isn't there even a greater risk

1           that a court would not agree with this view?

2   RT HON LORD GOLDSMITH QC: I think what I'm saying here is

3           I'm explaining what I mean by "reasonable case", and

4           this is -- if you like, this is the "yes, but" point.

5           I wanted to sort of underline to the Prime Minister that

6           I was saying that reasonable case is enough. I'm saying

7           it is a reasonable case. So that is the green light.

8           Indeed, I had said that, as I told the Inquiry

9           earlier in February, but I want to underline, "Please

10          don't misunderstand, a reasonable case doesn't mean of

11          itself that, if this matter were to go to court, you

12          would necessarily win". I go on to say, "On the other

13          hand, the counter view can reasonably be maintained". So

14          you might, you might well.

15   SIR LAWRENCE FREEDMAN: Then you also warn about the

16          unusually intensive degree of public and Parliamentary

17          scrutiny.

18   RT HON LORD GOLDSMITH QC: Yes.

19   SIR LAWRENCE FREEDMAN: Just to conclude, because I suspect

20          we will need a break, what you are essentially saying to

21          the Prime Minister at this point is, "There is an

22          argument. I have considered it. This is what it is.

23          But be aware that it needs from you a clear statement on

24          material breach. You are not necessarily going to get

25          it from anywhere else, and it needs -- you need to be

1       aware that the argument I have produced will be one that  
2       will be subject to considerable scrutiny, even if not in  
3       a court and has to be able to stand up there".

4               So you are putting, in some sense, the risks of what  
5       you are proposing back to the Prime Minister?

6   RT HON LORD GOLDSMITH QC:   Well, you do that with clients  
7       from time to time.   I think I'm saying two things.

8               First of all, I wasn't actually saying there needed  
9       to be a declaration by him.   I was saying, "You need to  
10      be satisfied.   You need to judge that there really is  
11      a failure to take the final opportunity.   You need to  
12      judge that on the basis of the resources, the  
13      intelligence and the information that you have got", and  
14      I also wanted to express this "but".

15              It is a pretty obvious point, actually.   Probably  
16      not thanked for making it.   This was going to be a very  
17      controversial decision, whichever way it went.   There  
18      would be a lot of scrutiny.   We had had sort of legal  
19      actions bubbling up already.   So, "Whereas in the past  
20      reasonable case was sufficient, you can expect a degree  
21      of scrutiny on this occasion".

22   SIR LAWRENCE FREEDMAN:   So the issue was not necessarily  
23      going to be closed by this advice?

24   RT HON LORD GOLDSMITH QC:   Well, at the time, I thought it  
25      was, because I thought I had given the green light

1 in February, I was following precedent in giving the  
2 green light again, and I thought, therefore, the issue  
3 was closed, and, therefore, if, politically, the  
4 decision was taken wherever it needed to be taken in the  
5 United Kingdom, and no doubt the United States, about  
6 military action, then that would be it.

7 I did say in the advice, on the other hand,  
8 recognising that things could change, I said at the end  
9 of paragraph 31 that we would need to assess it in the  
10 light of -- assess the strength of the legal case in the  
11 light of circumstances at the time if there were  
12 a failure to obtain the second resolution. I think at  
13 that stage it was beginning to look doubtful, but it  
14 wasn't yet clear that there wouldn't be a second  
15 resolution and there could have been events which could  
16 have affected the legal analysis taking place between  
17 then and --

18 SIR LAWRENCE FREEDMAN: This was still not definite.

19 I think we have a precedent: at the chimes of  
20 Big Ben, we break. So I think it would be best to stop  
21 there.

22 THE CHAIRMAN: Good. Thank you very much. Let's stop for  
23 ten minutes and come back at quarter past.

24 (3.02 pm)

25 (Short break)



1 (3.15 pm)

2 THE CHAIRMAN: Well, let's resume and I'll ask

3 Sir Martin Gilbert to open the questioning.

4 SIR MARTIN GILBERT: Lord Goldsmith, I would like to talk

5 briefly about the risks and consequences.

6 In the aftermath of Resolution 1441 what was your  
7 view of the potential negative consequences to the UK  
8 civil servants here, to military personnel, if we acted  
9 without specific authorisation?

10 RT HON LORD GOLDSMITH QC: Well, if we acted without  
11 specific authorisation -- well, first of all, if the  
12 question is getting at what was my view of the  
13 consequences if we acted unlawfully and knew we were  
14 acting unlawfully, that would have been a very wrong  
15 thing to do.

16 What would be the risk if we believed we were acting  
17 lawfully and what happened afterwards? Well, a number  
18 of things: there was a potential for court action in  
19 different ways -- I set some of this out in my advice --  
20 and there was a concern about the position of servicemen  
21 and women and about civil servants. There was actually  
22 a difference of view between the Ministry of Defence and  
23 the Foreign Office about how real that risk was, but the  
24 Ministry of Defence taking the view that, if soldiers  
25 operated under orders in these circumstances, they had

1 nothing to fear.

2 But I know that subsequently -- I have learned  
3 subsequently there were concerns from senior military  
4 commanders about their personal position. I was told  
5 subsequently -- I think I said this publicly -- that the  
6 First Sea Lord actually took his own legal advice as to  
7 whether the invasion would be lawful, and he tells me  
8 that the advice that he received was that it was lawful.

9 SIR MARTIN GILBERT: At that time, were you aware of  
10 Sir Michael Wood's advice to the Foreign Secretary  
11 in October 2002 that to advocate the use of force  
12 without, as he put it, a credible legal base, would be  
13 to advocate the commission of a crime of aggression and  
14 would expose members of the armed forces to charges of  
15 murder?

16 RT HON LORD GOLDSMITH QC: I think, so far as the first  
17 point is concerned, I don't know whether I was aware of  
18 his view particularly. I'm not sure if that's the  
19 minute that I saw, but I wouldn't have disagreed that  
20 for us to take action without what we believed to be  
21 a proper basis for lawful action would have been a very  
22 wrong thing for us to have done.

23 Whether it would have exposed servicemen and women  
24 to the possible prosecution for murder is precisely the  
25 point I have just raised, as to whether it does do that

1 in relation to individual servicemen and women, but,  
2 undoubtedly, there was an issue, so far as commanders  
3 were concerned. They are in a different position.

4 SIR MARTIN GILBERT: Did you discuss this with the Foreign  
5 Secretary and the Secretary of State for Defence?

6 RT HON LORD GOLDSMITH QC: No, I didn't, although it is  
7 dealt with in my minute of 7 March.

8 SIR MARTIN GILBERT: They didn't take it up with you  
9 following your minute?

10 RT HON LORD GOLDSMITH QC: No.

11 SIR MARTIN GILBERT: In your minute of 7 March, in  
12 paragraph 32 you list some of the potential legal areas  
13 of activity, the legal case you say internationally or  
14 domestically against the members of the government, UK  
15 military personnel, and that it would not be surprising,  
16 despite what you call the fairly remote possibilities of  
17 this happening, that it might not be surprising if some  
18 attempts were made to get a case of some sort off the  
19 ground.

20 With regard to getting a case of some sort off the  
21 ground, at what point might that take place and what  
22 particular court or courts would this potentially  
23 involve?

24 RT HON LORD GOLDSMITH QC: Well, it could have taken place,  
25 as it were, immediately that we had announced we were

1 going to take military action, or it could have taken  
2 place after it had started.

3 As I recall in relation to Kosovo, there was an  
4 attempt to get some sort of injunction from the  
5 International Court of Justice and I can't recall  
6 whether the bombing had started or was about to start at  
7 that stage, and there had already been some attempts to  
8 get an injunction even before we got to this point, but  
9 they had not been accepted by the courts.

10 SIR MARTIN GILBERT: The adoption of the statute of the  
11 International Criminal Court which I believe had just  
12 taken place in July 2002, was that an added factor with  
13 regard to potential legal action?

14 RT HON LORD GOLDSMITH QC: I think it was a little bit  
15 earlier than that, actually, because my recollection was  
16 we passed the International Criminal Court Act before  
17 I was in government. So perhaps it is 2000 or just  
18 before, but in any event, it was an important issue.

19 The legal position was that it would not have been  
20 possible for the International Criminal Court to have  
21 taken proceedings in relation to the crime of  
22 aggression, because, although that was, as it were,  
23 within the envelope of possible authority of the  
24 International Criminal Court, it required there being  
25 agreement on what the definition was and that had not

1           taken place.

2   THE CHAIRMAN:  When it does, we heard in evidence yesterday,

3           it would not have retrospective effect.

4   RT HON LORD GOLDSMITH QC:  Exactly.  What could have

5           happened -- and I made this point -- was that the

6           United Kingdom was a party to the Rome statute, in my

7           view very rightly, and it could mean that it would

8           therefore be subject to possible proceedings based on

9           the conduct of any military action, the international

10          breach of international humanitarian law, and I think

11          there had been a threat that there would be an attempt

12          to do that.

13                I suppose in the world of practical politics,

14          although the legality of the original act in a sense

15          doesn't come into it, then it may add a certain context

16          to any accusation that there had been indiscriminate

17          military action or military action which had imperilled

18          civilians more than it should properly have done.

19   SIR MARTIN GILBERT:  You lay out the basis of this in

20          your March 7 advice.  Did you also discuss this aspect

21          with the Prime Minister personally?

22   RT HON LORD GOLDSMITH QC:  I actually think I did.  I think

23          I spoke to him about these consequences.

24   SIR MARTIN GILBERT:  Can you recall his response?

25   RT HON LORD GOLDSMITH QC:  I think he noted what I had said.

1 I can't recall anything more than that.

2 SIR MARTIN GILBERT: You did do it verbally, as well as --

3 RT HON LORD GOLDSMITH QC: I believe I did, yes.

4 THE CHAIRMAN: Thank you. Sir Roderic?

5 SIR RODERIC LYNE: There are a number of points, I think,

6 arising from your conversation with Sir Lawrence, that

7 we will want to pursue with other witnesses. In

8 particular, the question of why the UK continued

9 pressing for a second Security Council Resolution and

10 whether or not the final opportunity, which you

11 mentioned, had indeed been taken and the diplomatic

12 route exhausted, but I think to a large extent these are

13 political issues and time is pressing on us, so I will

14 register those for the record.

15 We will come back to them, but what I would like now

16 in the time available to us to focus on, as quickly as

17 I can, is the way that your position developed between

18 7 March, when you submitted your formal advice to the

19 Prime Minister, and 17 March, when you gave

20 a Parliamentary answer to Baroness Ramsay.

21 A key document here obviously is the note of your

22 discussion, which, happily for both of us, has been

23 declassified by our ever bountiful government, with

24 David Brummell on 13 March. We understand from David

25 that that discussion took place early on 13 March and

1       this bit of paper says that his record of the discussion  
2       was actually approved by you. So it is presumably  
3       a very accurate record.

4             It says here that, after further reflection, you  
5       told David Brummell that you had come:

6             "... to the clear view that, on balance, the better  
7       view was that the conditions for the operation of the  
8       revival argument were met in this case; ie there was  
9       a lawful basis for the use of force without further  
10      resolution beyond Resolution 1441."

11   RT HON LORD GOLDSMITH QC: Yes.

12   SIR RODERIC LYNE: Now, what this note doesn't tell us is  
13      precisely why you had come to that clear view. You  
14      referred earlier to your conversation with the CDS but  
15      that isn't mentioned in this note.

16             Can you tell us what led you, on 13 March, to this  
17      clear view?

18   RT HON LORD GOLDSMITH QC: Absolutely. I mean, there were  
19      a number of things which happened after 7 March. It was  
20      becoming clear, thought it hadn't yet become definitive,  
21      that the second resolution was going to be very  
22      difficult to obtain.

23             There had been the debate on 7 March at the Security  
24      Council, which actually is mentioned in this note at the  
25      end of paragraph 4. But, most importantly, I had had

1 sort of two conversations.

2 First of all, I had been presented with a letter  
3 which had come from the Ministry of Defence, which  
4 reflected the view of CDS, and which was, as in the  
5 sense you have heard from him and as I understood in  
6 discussions about that letter, calling for this clear  
7 view, a yes or no answer, as I think he has put it.

8 At about the same time, I also received a visit from  
9 Juliet Wheldon. Juliet Wheldon was the Treasury  
10 Solicitor. I understood her to be speaking on behalf of  
11 the Civil Service, and, indeed, from what I have --  
12 I can't remember whether she said this, but from what  
13 I now know, I suspect, believe, she would at least have  
14 been encouraged to do that by the Cabinet Secretary, as  
15 it were, on behalf of the Civil Service.

16 Both of them in a sense were saying the same thing.  
17 They were saying, "We are potentially at risk personally  
18 if we participate", or, in the case of the  
19 Civil Service, "assist in war, if it turns out to be  
20 unlawful, and, therefore, we want to know whether the  
21 Attorney's view is yes or no, lawful".

22 That seemed to me to be actually a very reasonable  
23 approach for them to take. They were the people we  
24 would be asking, if it was then decided to take action,  
25 possibly to take personal risk and they were entitled to



1 have a clear view. They weren't to be put in the  
2 position of being sent off, "Maybe it is and maybe it  
3 isn't lawful". I thought it was a reasonable request.

4 There was no other way of anybody answering that  
5 question but me. The courts couldn't deal with it, and  
6 so I had to, as I have described it, clear the decision,  
7 yes or no. It was my responsibility. I therefore now  
8 recognise, as I actually suspected at the outset,  
9 that -- I now recognise that it wasn't good enough to  
10 say, "There is a reasonable case" and I must now consider  
11 whether or not on balance my view was that it was right  
12 or wrong, and so it was a question then of taking that  
13 step, of considering those issues, and I reached the  
14 view -- I'm happy to explain why -- I reached the view  
15 that, on balance, the better view was that it was lawful  
16 and that's why I came out with that view.

17 THE CHAIRMAN: Could I just ask: was the fact of the  
18 existence of the International Criminal Court part of  
19 the background and was there a line of precedent  
20 stretching back on previous comparable occasions of such  
21 requests from the Chief of Defence Staff or the head of  
22 the Civil Service?

23 RT HON LORD GOLDSMITH QC: I don't think there was any  
24 precedent for this, because I think that if there had  
25 been, I think it would have been drawn to my attention

1       before, when people were saying, "You can say there is  
2       a reasonable case".

3           I think there are sort of two elements. I think  
4       first of all, the International Criminal Court certainly  
5       focused the attention of the armed services on their  
6       personal responsibility. I think there is also another  
7       feature, which is a sort of growing interest, belief, in  
8       legality, and the individual responsibilities of people  
9       who are involved in actions.

10       I'm happy to welcome that, but it did result in this  
11       request or these requests.

12   THE CHAIRMAN: Just to be clear I have understood what you  
13       have just said, Lord Goldsmith: this has nothing much or  
14       has it to do with the offence of corporate manslaughter,  
15       which was very much under consideration?

16   RT HON LORD GOLDSMITH QC: No, not at all.

17   THE CHAIRMAN: Right.

18   SIR RODERIC LYNE: If I just take the two points made  
19       there, the difficulties we were running into in the  
20       Security Council made it much more likely now that we  
21       wouldn't have a further determination, a determination  
22       of further breach from the Security Council, and,  
23       therefore, all the more important to know, in those  
24       circumstances, without that determination, whether we  
25       would have sufficient legal basis for military action.

1 RT HON LORD GOLDSMITH QC: Yes.

2 SIR RODERIC LYNE: So that's why you had to focus on that  
3 channel and see -- then to advance to your second  
4 point -- whether you could give a yes or no answer to  
5 that because your advice of 7 March had looked at  
6 a wider range of options?

7 RT HON LORD GOLDSMITH QC: Well, I think I would put it, if  
8 I may, this way: that, until the Civil Service and the  
9 armed services said they wanted this clear view, I was  
10 working on the basis with -- I take full responsibility  
11 for this, but it was with the approval of my office on  
12 the basis that saying there was a reasonable case was  
13 a green light. It was sufficient for the government,  
14 and if the Cabinet and, as it turns out, the House of  
15 Commons, took the view that it was the right thing to  
16 do, then we had done enough to explain what the legal  
17 basis was and to justify it.

18 But when they came with their request, I then saw  
19 that actually that wasn't fair on them.

20 SIR RODERIC LYNE: Yes, and as I think you have explained  
21 earlier, the reasonable case doesn't have to be the  
22 safest case.

23 RT HON LORD GOLDSMITH QC: Well, the safest case remained  
24 getting -- but that's legally safe. Of course, we would  
25 rather --

1 SIR RODERIC LYNE: We are talking very much about the legal  
2 position.

3 Now, how important in this reflection had been the  
4 actual meeting in Downing Street on 11 March?

5 RT HON LORD GOLDSMITH QC: Actually not at all. 11 March  
6 I met -- and CDS was there and the Cabinet Secretary was  
7 there and the Prime Minister, I think the Deputy  
8 Prime Minister was there. I recall that.

9 I know there was some reference to CDS saying, "I will  
10 have to put in my operational orders", something about  
11 the basis of law.

12 Subsequently, I saw the minute -- I don't know  
13 whether it was the following day -- and the minute says  
14 something about "which the Attorney General will clear".  
15 I didn't actually terribly remember that being said at  
16 the time, but actually it was wasn't that meeting,  
17 although I can now see that the communications that  
18 I received led back to that meeting, it was the specific  
19 request that was coming from the legal adviser at the  
20 Ministry of Defence -- I don't know whether that is one  
21 of the documents that is declassified or not, but I know  
22 you have seen it -- and then the visit from the Treasury  
23 Solicitor, Dame Juliet Wheldon.

24 SIR RODERIC LYNE: Yes. At that meeting, chaired presumably  
25 by the Prime Minister, did the Prime Minister express

1 a view, for example, in support of the request of the  
2 CDS for a clear yes or no position?

3 RT HON LORD GOLDSMITH QC: I don't actually recall CDS  
4 making the request at that meeting. I can understand --

5 SIR RODERIC LYNE: All right, did the Prime Minister express  
6 a view of any kind on this?

7 RT HON LORD GOLDSMITH QC: No.

8 SIR RODERIC LYNE: He didn't?

9 RT HON LORD GOLDSMITH QC: No.

10 SIR RODERIC LYNE: He didn't ask you now to come up with  
11 some definitive position?

12 RT HON LORD GOLDSMITH QC: I don't recall it that way. The  
13 way it may have been seen by others or interpreted by  
14 others, or recollected by others, I don't know, but  
15 I don't recall the Prime Minister asking for that, no,  
16 definitely not.

17 SIR RODERIC LYNE: If we look at the context, we are by then  
18 in a very serious situation, in which, if we did not  
19 have a legal basis for going to action, the government  
20 would have been in an extraordinarily difficult position  
21 with troops deployed. If it had had to, as it were,  
22 return from the theatre, that would have been treated as  
23 a huge triumph for Saddam Hussein.

24 Perhaps you would like to say what the political  
25 consequences, as well as the international consequences,

1       would have been if we had said, "No, we can't  
2       participate without a second decision from the Security  
3       Council"?  
4   RT HON LORD GOLDSMITH QC:  I really don't think I'm the  
5       right person to say what the political consequences  
6       would have been.  
7   SIR RODERIC LYNE:  You were a minister in the government.  
8   RT HON LORD GOLDSMITH QC:  Well, I was, with a specific  
9       responsibility, but I think -- and there were obviously  
10      two points of view in relation to this.  
11      There was a point of view that proceeding would be  
12      a mistake, and there was a point of view that not  
13      proceeding would be a mistake, because of what it would  
14      have done, as I recall it, particularly to the  
15      principles of upholding the United Nations and enforcing  
16      the resolutions which had been defied for a significant  
17      period of time.  
18   SIR RODERIC LYNE:  Other witnesses have suggested that the  
19      Prime Minister's personal future was at stake, the  
20      government's future perhaps was at stake.  There was  
21      huge pressure on the government at this point and you  
22      must have been conscious of that.  Did it weigh on you?  
23   RT HON LORD GOLDSMITH QC:  No.  
24   SIR RODERIC LYNE:  Not at all?  
25   RT HON LORD GOLDSMITH QC:  The consequences for the

1 government did not. Sorry to say that to my colleagues  
2 in government, but it didn't. What did matter to me, of  
3 course, was the United Kingdom as a country, in terms,  
4 and the people that we were -- would have been asking to  
5 take part in this with a potential personal  
6 responsibility, and I did believe it was right to  
7 respond to the request from the head of the armed  
8 services, "We want you to tell us, we want your backing,  
9 because otherwise -- because that will give us  
10 legitimate cover for what we are doing, and we genuinely  
11 want to know what your view is, of course, and for the  
12 Civil Service". That weighed with me.

13 SIR RODERIC LYNE: Did the international consequences,  
14 particularly vis a vis Saddam Hussein and disarming him  
15 of his WMD presumed at the time of telling the Grand Old  
16 Duke of York, the CDS in this case, that he had to take  
17 his troops down from the top of the hill, not also weigh  
18 upon you?

19 RT HON LORD GOLDSMITH QC: That wasn't --

20 SIR RODERIC LYNE: If you had had to say that to him?

21 RT HON LORD GOLDSMITH QC: No. Those sort of consequences  
22 are not what the lawyer has to take into account. What  
23 the lawyer has to do is to weigh up the arguments and  
24 evidence carefully and reach what he believes is the  
25 correct legal view, whatever the consequences may be,

1       and it is a commonplace, and has been, in my practice,  
2       that you had to make decisions and sometimes people  
3       would say, "This will be terrible if you make this  
4       decision", and you would say, "I'm very sorry. I will  
5       do what I can to mitigate those perhaps, but that is the  
6       consequence".

7   SIR RODERIC LYNE: So you separated that very clearly, as  
8       you have just said very emphatically, from the legal  
9       decision. That was the decision you made. Can I just  
10      quickly look through your diary on 13 March --

11   RT HON LORD GOLDSMITH QC: Yes, of course.

12   SIR RODERIC LYNE: -- of which I think you and I have a copy  
13      in front of us, just to be clear about this, and, as you  
14      know, we have also discussed this with David Brummell  
15      yesterday.

16   RT HON LORD GOLDSMITH QC: Yes.

17   SIR RODERIC LYNE: So I hope we can do this quite briefly.  
18      I think you met with him before the first appointment  
19      written down in the diary to give your legal advice.

20   RT HON LORD GOLDSMITH QC: Yes.

21   SIR RODERIC LYNE: I do not think we need deal with your  
22      meeting with Jonathan Crow which I understand was on  
23      a completely separate issue not relevant to the Inquiry.

24   RT HON LORD GOLDSMITH QC: That's right.

25   SIR RODERIC LYNE: At lunchtime, you met David Brummell



1           again, with Cathy Adams, to discuss where you go from  
2           here having now made the decision that you have made.  
3   RT HON LORD GOLDSMITH QC:   Yes.  
4   SIR RODERIC LYNE:   Then you met Christopher Greenwood who  
5           has been mentioned earlier.  
6   RT HON LORD GOLDSMITH QC:   Yes.  
7   SIR RODERIC LYNE:   Was he effectively the only well-known  
8           specialist in international law outside the government  
9           who was arguing in favour in the UK of the revival  
10          argument?  
11   RT HON LORD GOLDSMITH QC:   I certainly didn't know that to  
12          be the case and that had nothing to do with why he was  
13          there.  
14   SIR RODERIC LYNE:   Are you aware that there were others  
15          taking the same line as Christopher Greenwood?  
16   RT HON LORD GOLDSMITH QC:   As it happens, I am, but that  
17          wasn't the point. As David Brummell's note makes clear,  
18          what I wanted to do at that stage was prepare for  
19          possible legal action. That was my primary concern. As  
20          I have said, it had happened in Kosovo, I'm the sort of  
21          lawyer who says, "Okay. I can see this on the horizon.  
22          Let's get on with it", and therefore I wanted to  
23          instruct counsel who would be able to argue the case for  
24          us. Christopher Greenwood was the obvious choice,  
25          a hugely distinguished international lawyer, regularly

1 appeared, as it happened, for the government, and  
2 exactly the sort of person who would be a very strong  
3 and able advocate to present our case, if need be.

4 As it happens, before I instructed him -- and  
5 I believe this was in the morning and David Brummell  
6 refers to this. I spoke to him on the phone and I did  
7 ask him then, told him my view and asked him what his  
8 view was -- or at least I asked him what his view was,  
9 I may not even have told him what my view was, and asked  
10 him what his view was, and he told me then that it was  
11 his view that it was lawful to proceed without a second  
12 resolution.

13 So that gave me some comfort, but I had reached my  
14 decision. What I then wanted to do was make sure we  
15 were well prepared for any legal action. That was one  
16 of my jobs as Attorney General, to deal with litigation  
17 against the government, and, therefore, you get  
18 prepared.

19 SIR RODERIC LYNE: Did you reach outside the government at  
20 this point, because you were not fully confident that  
21 you were going to get the right kind of advocacy advice  
22 from international lawyers inside the government who,  
23 like Sir Michael Wood, didn't 100 per cent agree with  
24 the view that you had taken?

25 RT HON LORD GOLDSMITH QC: No, this is not advocacy advice,

1           this is my primary --

2   SIR RODERIC LYNE:  Advice preparing for a possible challenge

3           to your decision?

4   RT HON LORD GOLDSMITH QC:  This was, in sort of classic

5           terms, to instruct counsel to be ready to turn up with

6           wig and gown at the relevant court the following day.

7   SIR RODERIC LYNE:  So he wasn't going to be involved also in

8           presenting the decision in advocacy terms.

9   RT HON LORD GOLDSMITH QC:  I think the way it developed was

10          that was the reason that I was interested in instructing

11          him, and, indeed, two other names are mentioned as to

12          people who would be instructed with him.

13                As it happened, the idea then emerged, not from me,

14          but I think from others, that it would be a good idea to

15          use him, with his great experience, to help produce the

16          arguments, as it were, not just for court but for other

17          purposes as well.

18   SIR RODERIC LYNE:  Why didn't you use Sir Michael Wood who

19          was also hugely experienced?

20   RT HON LORD GOLDSMITH QC:  In the end, I did.

21   SIR RODERIC LYNE:  But you also felt the need --

22   RT HON LORD GOLDSMITH QC:  Michael Wood would not have

23          argued the case in court.  Sir Michael would not have

24          been the advocate in court.  I'm sure if we had been

25          taken to court, he would have been an important part of

1 the team.

2 SIR RODERIC LYNE: You wouldn't have argued the case

3 yourself in court --

4 RT HON LORD GOLDSMITH QC: I might have done --

5 SIR RODERIC LYNE: -- advised by somebody like

6 Sir Michael Wood?

7 RT HON LORD GOLDSMITH QC: -- but I would have wanted

8 somebody hugely experienced in the International

9 Court of Justice, like Professor Greenwood and the other

10 names mentioned. There is a lot of work to do in these

11 circumstances, presenting the evidence and the arguments

12 and the detailed points. So I would have done.

13 I hadn't made a decision as to whether -- I'm sure

14 I would have turned up. Whether I would have borne the

15 brunt of the argument -- well, we never came to it, so

16 I don't know.

17 SIR RODERIC LYNE: Thank you. Let's move on to your next

18 engagement, which was with Lord Mayhew, one of your

19 predecessors. Is that relevant or not?

20 RT HON LORD GOLDSMITH QC: It is relevant. He had asked to

21 see me. He is a former distinguished Attorney General,

22 he had some knowledge of these things. He had asked to

23 come and see me and he wanted to know what my view was,

24 and I told him.

25 SIR RODERIC LYNE: Was he supportive?

1 RT HON LORD GOLDSMITH QC: Well --

2 THE CHAIRMAN: Was this professional confidence at work?

3 RT HON LORD GOLDSMITH QC: Can I put it this way? You can

4 read what he said in the debate the following Monday

5 when he professed himself in agreement with the course

6 that had been taken.

7 SIR RODERIC LYNE: So that was a useful conversation?

8 RT HON LORD GOLDSMITH QC: Yes, it was a useful

9 conversation. It was one, as I say, that he had asked

10 for. These matters are actually apolitical. People may

11 be surprised that I spoke to a member of the

12 Conservative Party about this, but Law Officers, we

13 talked often about difficult issues.

14 I think I was the one minister who is allowed to see

15 the advice of former ministers in other administrations.

16 So I knew what he had said before on various matters,

17 and it was a useful conversation, but it was really

18 there to tell him what my view was, and I did.

19 SIR RODERIC LYNE: Then you saw the Foreign Secretary. What

20 was the main thrust of your discussion with him?

21 RT HON LORD GOLDSMITH QC: Planning, particularly for what

22 was going to happen. I can't recall whether he had

23 already got to know of my view I had reached or not, but

24 in any event, there was some discussion about that, but

25 the rest was planning for what was going to happen next.

1 SIR RODERIC LYNE: Did that include planning for how you  
2 were going to present your decision to the Cabinet and  
3 then to Parliament?

4 RT HON LORD GOLDSMITH QC: No, not really. The planning  
5 I had in mind was telling him, "Look, there is a risk  
6 that we will be taken to court if the decision is taken  
7 to go. I have instructed Professor Greenwood". "Very  
8 good", he said, "That's a good decision". I think he  
9 said maybe there was somebody -- other people that he  
10 would suggest should be part of that team, and I think  
11 we may well have discussed -- I'm not sure -- developing  
12 the arguments.

13 SIR RODERIC LYNE: So at what point, did you initiate the  
14 process of working out what you were going to tell the  
15 Cabinet and how much?

16 RT HON LORD GOLDSMITH QC: Well, there are two things were  
17 happening. First of all, there was this sort of --  
18 there was a huge interest in what my view was in  
19 relation to the legality of war, and I had had, for  
20 example, I think, almost weekly calls from the Shadow  
21 Attorney General, who had both been telling me what his  
22 view was, which was that it was lawful, and saying, "You  
23 will have to tell Parliament what your view is in  
24 relation to this".

25 Normally, a Law Officer's opinion is not disclosed.

1       It was, in fact, impossible in these circumstances not  
2       to disclose what my conclusion was, because the clamour  
3       to know, "Well, Prime Minister, does the  
4       Attorney General agree with you or not?" would have  
5       been, frankly, impossible to avoid. So I knew that  
6       I would have to make some sort of statement as to what  
7       my position was. So that is -- that's the point about  
8       the Parliamentary answer.

9               So far as Cabinet is concerned, I can't remember at  
10       what stage I was told the Cabinet was going to meet and  
11       I was going to be asked to come to Cabinet on that  
12       occasion. I think it would have been the second  
13       occasion ever that I had attended Cabinet.

14   SIR RODERIC LYNE: Only the second occasion?

15   RT HON LORD GOLDSMITH QC: Only the second occasion.

16       I don't think my predecessors -- I'm not sure, my  
17       immediate predecessors, whether they had attended  
18       Cabinet at all. I didn't attend Cabinet, for  
19       example, when I advised that the Afghanistan conflict  
20       was lawful.

21   SIR RODERIC LYNE: Before you went to Cabinet -- I know I'm  
22       going ahead a bit here -- how was it decided that you  
23       would present the advice to Cabinet in the way that you  
24       presented it to Cabinet? Was it solely by you or was it  
25       by you in discussion with the Prime Minister or the

1 Foreign Secretary or others?

2 RT HON LORD GOLDSMITH QC: No, this was really my decision,  
3 and the point for me was to decide what the -- determine  
4 how to express my view to Parliament, and the  
5 Parliamentary answer then seemed to be a convenient way,  
6 as a framework really, for what I would then say to  
7 Cabinet about my view on legality.

8 SIR RODERIC LYNE: So no one at any stage asked you to  
9 restrict what you said to Cabinet to the fairly limited  
10 terms in which you presented this to Cabinet?

11 RT HON LORD GOLDSMITH QC: No.

12 SIR RODERIC LYNE: Nobody else, no outside party.

13 Can I just finally, because I think this helps to  
14 dispose of something that has attracted attention in the  
15 newspapers, raise the question of your last appointment  
16 that day --

17 RT HON LORD GOLDSMITH QC: Yes.

18 SIR RODERIC LYNE: -- which was a meeting with Lord Falconer  
19 and Baroness Morgan, which was the subject of an article  
20 in a tabloid newspaper in November of last year, in  
21 which it was alleged that you had been more or less  
22 pinned to the wall at a Downing Street showdown with  
23 Lord Falconer and Baroness Morgan, who allegedly had  
24 performed a pincer movement on you and told you what Blair  
25 wanted. Would you like to comment on that?



1 RT HON LORD GOLDSMITH QC: Thank you.

2 Absolute complete and utter nonsense. I had not

3 spoken to Lord Falconer about this issue before. When

4 I saw them, I, of course, had reached my opinion.

5 I communicated it to my officials, to the Foreign

6 Secretary, as it happens to Lord Mayhew as well. There

7 was no question of them performing a pincer movement.

8 Baroness Morgan, I don't believe -- she doesn't --

9 I have never seen her do anything of the sort in any

10 event. Lord Falconer, it is perfectly true, is a more

11 forceful character but he was junior to me in chambers

12 and he wasn't the person -- and he would have known

13 that -- who would persuade me to a different point of

14 view.

15 SIR RODERIC LYNE: So the allegation in the paper that

16 sources close to you had briefed that newspaper is

17 untrue?

18 RT HON LORD GOLDSMITH QC: Absolutely, and it is very odd,

19 because "sources close to" is often thought to be the

20 person himself. It is a sort of code. This certainly

21 didn't come from me. Nobody has acknowledged to me that

22 it came from them. I didn't ask anybody to speak to

23 this newspaper. So I simply don't understand this.

24 SIR RODERIC LYNE: So that we can just close off that

25 discussion, can you tell us what you did discuss with

1 Lord Falconer and Sally Morgan?

2 RT HON LORD GOLDSMITH QC: I told them the conclusion that

3 I reached and I think briefly why, and I think we then

4 went on to discuss -- I think by that stage it was known

5 that there was going to be a debate the following Monday

6 in the House of Lords and I think we discussed something

7 about how that debate would be dealt with, the debate on

8 the legality issue, I think a Liberal Democrat peer put

9 down a motion. That's what I recall of that meeting.

10 But I started by telling them what conclusion I had

11 reached.

12 THE CHAIRMAN: Thank you. I think back to you, Lawrence.

13 SIR LAWRENCE FREEDMAN: Thank you. In our previous

14 discussion you explained why you thought it was

15 necessary for the Prime Minister -- why you thought it

16 was necessary for the Prime Minister to decide whether

17 Iraq had failed to take its final opportunity.

18 RT HON LORD GOLDSMITH QC: Yes.

19 SIR LAWRENCE FREEDMAN: I just want to check with you --

20 clarify why you told the Prime Minister this. Was it as

21 a political precaution, because trouble was to be

22 expected and he should be very sure of his ground? Was

23 it a sort of double-check on the position being reached

24 by UNMOVIC, or was it because in the end he was the one

25 who had to make the determination?

1 RT HON LORD GOLDSMITH QC: I think certainly the first and  
2 third. I'm not sure about double-check on UNMOVIC. But  
3 certainly he had to make -- well, not make the  
4 determination in a legal sense. He had to make the  
5 political judgment, ultimately, whether to ask for  
6 authority to take military action, and, therefore,  
7 I thought it right that he should understand that he had  
8 to be very clear of his ground on this and conscious of  
9 the considerable significance of that particular  
10 statement.

11 SIR LAWRENCE FREEDMAN: So it was basically: make sure of  
12 your case?

13 RT HON LORD GOLDSMITH QC: Make sure of your case and make  
14 sure -- sorry to say this: make sure that the  
15 Prime Minister understood that this was an important  
16 issue and he had focused his mind on it.

17 Sorry. Of course, he had focused his mind on it,  
18 but there we are, this is what lawyers do.

19 SIR LAWRENCE FREEDMAN: I suspect he had probably realised  
20 by then. I just want to therefore just check on the  
21 evidence you used for -- to say that there was, as you  
22 said in your final submission -- your final opinion that  
23 there was a material breach.

24 You have mentioned that you had seen the Clusters  
25 document.

1 RT HON LORD GOLDSMITH QC: Yes.

2 SIR LAWRENCE FREEDMAN: Now, Jack Straw made particular  
3 mention of this when he saw us. Did you see that as  
4 a particularly important document in this process?

5 RT HON LORD GOLDSMITH QC: It was a document which set out  
6 a statement of the falsities, the deceptions, and lack  
7 of cooperation and unanswered questions and I think --  
8 was it 29 or 39, I can't recall, separate areas of the  
9 inspectors' activities.

10 SIR LAWRENCE FREEDMAN: Had you -- you had also by this time  
11 presumably been able to see the reports that had been  
12 made by the inspectors to the Security Council?

13 RT HON LORD GOLDSMITH QC: Yes, whether I read the  
14 detail of them or I relied upon reports, and -- of  
15 course, they were all over the television. I'm not  
16 sure.

17 SIR LAWRENCE FREEDMAN: Presumably you were aware that  
18 Dr El-Baradei had more or less given Iraq a clean bill  
19 of health on the nuclear issue.

20 RT HON LORD GOLDSMITH QC: Yes.

21 SIR LAWRENCE FREEDMAN: So that issue was, in that sense, no  
22 longer a material breach?

23 RT HON LORD GOLDSMITH QC: I think that's right, yes, it was  
24 really the other side, the chemical and biological  
25 weapons obviously.

1 SIR LAWRENCE FREEDMAN: With UNMOVIC, the issue is that,  
2 though Dr Blix was reporting difficulties, he hadn't  
3 said that he had given up. Indeed, he was seen to be  
4 setting out a timetable for further work that stretched  
5 some way ahead.

6 RT HON LORD GOLDSMITH QC: There was the political judgment,  
7 the political will, with perhaps a small "p", about  
8 whether Iraq had frankly been given enough time to meet  
9 the final opportunity they had been given or not.

10 SIR LAWRENCE FREEDMAN: So do you consider timing to be  
11 a matter for a lawyer? This is, as we have discussed,  
12 a situation that is moving a lot. You continually refer  
13 to the need to take account of the circumstances of the  
14 time. So why stop now? Why take the decision at this  
15 moment? Why not say that, "Of course, in two weeks'  
16 time, or three weeks time, or four weeks' time, if  
17 UNMOVIC is able to carry on, they may reach a much more  
18 positive conclusion"?

19 RT HON LORD GOLDSMITH QC: Sir Lawrence, you are absolutely  
20 right, that is not a question for a lawyer.

21 The question for the lawyer is saying "Politically,  
22 this may be the moment when we know we are not going to  
23 get a second resolution and when we believe politically  
24 it is right to take military action. Lawyer, you must  
25 advise us whether or not, if we do this now, it will be

1       lawful or not".

2       SIR LAWRENCE FREEDMAN:   So the timing of your advice at this

3       stage is obviously determined by the questions of

4       diplomacy and the questions of readiness of the armed

5       forces, but that your own advice might well have been

6       different if you had been asked for it two or three

7       weeks later?

8       RT HON LORD GOLDSMITH QC:   That depends what would have

9       happened.

10      SIR LAWRENCE FREEDMAN:   Of course.

11      RT HON LORD GOLDSMITH QC:   One of the things we had in mind

12      particularly, and I think it is referred to in at least

13      one of these documents, is that, if there were things

14      said at the time of a further Security Council

15      Resolution being put, and, for example, not accepted,

16      then that might be relevant to the interpretation of

17      1441.   So things could have changed and there may have

18      been more material that came to light in relation to

19      that.

20      SIR LAWRENCE FREEDMAN:   But this question of material breach

21      is potentially a moving target, that -- we have seen

22      with the nuclear side that it started off with Iraq

23      being believed to be in material breach and now it is no

24      longer the case.

25      RT HON LORD GOLDSMITH QC:   I think that, putting a sort of

1 another possibility, if, for example, what had happened  
2 had been -- there had been a sea change in the Iraqi  
3 regime, if Saddam Hussein, for example, had gone into  
4 exile at that moment, that would of course have put  
5 a very different complexion on it, because then one  
6 would at least have said, "Why do you now need" --  
7 because you need to have a reason for the force, "Why do  
8 you now need to use force in order to get disarmament?  
9 You need now to see whether this new regime is actually  
10 going to give the cooperation which the United Nations  
11 has been asking for for ten years".

12 SIR LAWRENCE FREEDMAN: So the political circumstances could  
13 have led you in a sense to go to the Prime Minister  
14 rather urgently and say, "In the light of what has  
15 happened, just hold on a moment"?

16 RT HON LORD GOLDSMITH QC: Yes, that could have happened.

17 SIR LAWRENCE FREEDMAN: Can I just quote to you from the  
18 Foreign and Commonwealth Office document which is  
19 essentially the legal basis for the use of force on  
20 17 March?

21 RT HON LORD GOLDSMITH QC: Yes.

22 SIR LAWRENCE FREEDMAN: It states obviously largely the line  
23 of analysis that you have been giving us today.

24 In the final paragraph, 12, you, after saying that  
25 what is needed is consideration, said:

1            "That consideration has taken place regularly since  
2            the adoption of Security Council Resolution 1441. It is  
3            plain, including from UNMOVIC statements to the Security  
4            Council, its 12th quarterly report and the so-called  
5            Clusters document that Iraq has not complied as required  
6            with its disarmament obligations."

7            Was that statement checked with UNMOVIC before it  
8            was made?

9    RT HON LORD GOLDSMITH QC: This is not my document. This is  
10           a Foreign Office document. It is perfectly true that it  
11           was largely drafted in my office. I think the first  
12           draft of it was actually -- from what I have seen in the  
13           files -- was actually produced by Sir Michael Wood, and  
14           it was a document which Jack Straw wanted to put to the  
15           Foreign Affairs Committee.

16           I didn't disagree with the legal points that were  
17           made, and in that sense one can say that I approved it,  
18           but the factual issues which were there were really  
19           a matter for the Foreign Secretary, and I don't want to,  
20           you know, dodge this in any way, but I would think that  
21           the Foreign Secretary was in an extraordinarily good  
22           position, having been in the Security Council and having  
23           had all the discussions that he had, to know whether or  
24           not that statement was true.

25    SIR LAWRENCE FREEDMAN: But we know from Dr Blix that he was



1 not in favour of calling a halt to inspections at this  
2 time. I mean, this is a very definite statement about  
3 the implication of everything that UNMOVIC had said.  
4 Would you be concerned, as the Attorney General, that  
5 a document as important as this was relying on a claim  
6 that had not been checked?

7 RT HON LORD GOLDSMITH QC: I understand the statement that  
8 is made to be accurate. The statement that is being  
9 made is that Iraq has not complied as required, with its  
10 disarmament obligations. I don't believe that Dr Blix  
11 was saying that it had. At the meeting on 7 March, no  
12 other states said that it had.

13 There is a separate question as to whether or not,  
14 even though it hasn't, they should be given more time.  
15 But that they had not complied I think is a factual  
16 statement, but further than that, I think it is a matter  
17 for Mr Straw.

18 SIR LAWRENCE FREEDMAN: It then goes on to say:  
19 "It therefore follows that Iraq has not taken the  
20 final opportunity and remains in material breach."  
21 But it could also be reworked to say that Iraq may be in the  
22 process of taking the final opportunity, which I think  
23 might be what Dr Blix might have said.

24 RT HON LORD GOLDSMITH QC: Well, I think you would still  
25 say, if one is being accurate about this, that they had

1 not taken the final opportunity. The question then  
2 becomes, do you wish politically to give them more time?  
3 SIR LAWRENCE FREEDMAN: It doesn't say in this, and I'm not  
4 sure if it says in any other document at this time, that  
5 the Prime Minister has confirmed that Iraq is in  
6 material breach?  
7 RT HON LORD GOLDSMITH QC: No. As I have explained, that is  
8 not a sort of legal requirement for the revival  
9 authority. The legal requirement is the interpretation  
10 of 1441 and the fact of failure. I was pushing for the  
11 reasons, Sir Lawrence, you put to me, this point  
12 specifically to the Prime Minister for his confirmation.  
13 But it is not a legal requirement in any way and  
14 therefore I am not surprised that it doesn't appear  
15 here. This was a statement by the Foreign Secretary of  
16 what the factual position was.  
17 SIR LAWRENCE FREEDMAN: But you did seek on 14 March  
18 confirmation that it was unequivocally the  
19 Prime Minister's view that Iraq had committed further  
20 material breaches of 1441?  
21 RT HON LORD GOLDSMITH QC: Yes.  
22 SIR LAWRENCE FREEDMAN: When did you get that confirmation?  
23 RT HON LORD GOLDSMITH QC: I had had it orally already, as  
24 I think David Brummell said yesterday. But I thought it  
25 was important to have it in writing, and so I asked for

1       it, or he asked for it on my behalf -- I'm not sure  
2       whether we have got the document -- and it was -- it has  
3       been referred to in the Butler Report. We got the  
4       confirmation -- the written confirmation on the 15th --  
5   SIR LAWRENCE FREEDMAN: This came, I think, in an email from  
6       Baroness Morgan.  
7   RT HON LORD GOLDSMITH QC: No, the confirmation came in  
8       a letter from the private secretary to the  
9       Prime Minister to my Legal Secretary.  
10   SIR LAWRENCE FREEDMAN: When was that?  
11   RT HON LORD GOLDSMITH QC: 15 March. May I mention the  
12       name? Matthew Rycroft.  
13   SIR LAWRENCE FREEDMAN: Yes, his name has been mentioned.  
14       Just finally, this question of the Prime Minister's view  
15       was not, therefore, particularly relevant in terms of  
16       the advice you were giving to CDS, or was it important  
17       in terms of the advice you were giving to CDS?  
18   RT HON LORD GOLDSMITH QC: It was part of the issue that  
19       I had had the oral confirmation already.  
20   SIR LAWRENCE FREEDMAN: Because you gave the advice the day  
21       before.  
22   RT HON LORD GOLDSMITH QC: I understand that, but I had had  
23       the oral confirmation that that was the Prime Minister's  
24       view.  
25   SIR LAWRENCE FREEDMAN: So you were confident?

1 RT HON LORD GOLDSMITH QC: Yes.

2 SIR LAWRENCE FREEDMAN: Thank you very much.

3 THE CHAIRMAN: I think it is time for our last break now.

4 If we could come back for quarter past four?

5 RT HON LORD GOLDSMITH QC: Yes.

6 THE CHAIRMAN: Thank you.

7 (4.04 pm)

8 (Short break)

9 (4.12 pm)

10 THE CHAIRMAN: Thank you. We are a bit ahead of time, which

11 is good news. Let's resume and Baroness Prashar will

12 take up the questioning.

13 BARONESS USHA PRASHAR: Thank you, Chairman.

14 Lord Goldsmith, we have been talking about the

15 development of your legal advice.

16 Now, I want to turn to the question of discussion or

17 otherwise of your advice in Cabinet and the presentation of

18 it.

19 RT HON LORD GOLDSMITH QC: Yes.

20 BARONESS USHA PRASHAR: Now, yesterday, a document was

21 declassified, which is a record of your discussion with

22 the Foreign Secretary --

23 RT HON LORD GOLDSMITH QC: Right.

24 BARONESS USHA PRASHAR: -- which took place on 13 March and

25 it says -- and I'll read it out to you:

1           "The Attorney General said to the Foreign Secretary  
2           that he thought he might need to tell the Cabinet when  
3           it met on 17 March, that the legal issues are finely  
4           balanced. The Foreign Secretary said that he needed to  
5           be aware of the problems of leaks from the Cabinet. It  
6           would be better surely if the Attorney General  
7           distributed the draft letter from the Foreign Secretary  
8           to the Foreign Affairs Committee as the basic standard  
9           text of his position and then made a few comments. The  
10          Attorney General agreed."

11           Is that your recollection?

12   RT HON LORD GOLDSMITH QC: It isn't actually. There wasn't  
13           any question of distributing the longer FAC document as  
14           my opinion. That wasn't at all what I was going to do.

15   BARONESS USHA PRASHAR: But the significant point is that  
16           you wanted to tell the Cabinet how finely balanced the  
17           arguments were, but you were persuaded by the Foreign  
18           Secretary that it would be better to present to the  
19           Cabinet the text of your Parliamentary question and answer.

20   RT HON LORD GOLDSMITH QC: No, I mean, I don't think the  
21           conclusion you were drawing from that really is right.  
22           I came to. (Handed). Thank you very much indeed.

23   THE CHAIRMAN: Do you want a moment just to skim through it?

24   RT HON LORD GOLDSMITH QC: May I just look at it? (Pause).

25           Right. I think I saw this yesterday, but I hadn't

1       seen this before. It is not a record that came to me at  
2       any stage.

3           I came to Cabinet ready to answer any questions  
4       which were put to me and to explain my advice.  
5       Certainly the view I took was that producing my answer  
6       to Parliament would be a good framework for explaining  
7       to them what the legal advice was, and I would have been  
8       happy to answer the questions which were put to me.  
9       I was ready, fully briefed, ready to debate all these  
10      issues.

11          What actually happened was that I started to go  
12      through the PQ, which had been handed out as this  
13      framework. Somebody, I can't remember who it was, said,  
14      "You don't need to do that. We can read it". I was  
15      actually trying to use it as a sort of framework for  
16      explaining the position, and there was a question that  
17      was then put.

18          I do recall telling Cabinet, "Well, there is another  
19      point of view, but this is the conclusion that I have  
20      reached", and then the discussion on the legality simply  
21      stopped, and Cabinet then went on to discuss all the  
22      other issues, the effect on international relations,  
23      domestic policy and all the rest of it.

24          So the way that it took place was that I was ready  
25      to answer questions and to deal with them and in the

1 event that debate did not take place.

2 BARONESS USHA PRASHAR: Okay. So you were ready to answer

3 the questions, but that debate didn't take place?

4 RT HON LORD GOLDSMITH QC: That's right.

5 BARONESS USHA PRASHAR: Earlier, you were saying that you

6 firmed up your advice because there was a request from

7 the armed forces and the civil forces --

8 RT HON LORD GOLDSMITH QC: I answered a slightly different

9 question.

10 BARONESS USHA PRASHAR: That's one point, but the point I'm

11 driving at for me is the missing piece of the jigsaw:

12 why did the Cabinet not take the opportunity to discuss

13 the finely based arguments that you had been looking at?

14 Because you were at the Cabinet meeting twice, once

15 in January and it didn't get discussed.

16 RT HON LORD GOLDSMITH QC: No.

17 BARONESS USHA PRASHAR: But this time, what was presented

18 was the document being developed over the weekend and

19 you were there to discuss, but no discussion took place?

20 RT HON LORD GOLDSMITH QC: Yes.

21 BARONESS USHA PRASHAR: As far as you can tell, was the

22 weight of the risk, the political responsibilities of

23 ministers discussed at this Cabinet meeting?

24 RT HON LORD GOLDSMITH QC: I don't quite understand the last

25 point, but you are asking me why wasn't there more of

1 a debate?

2 BARONESS USHA PRASHAR: Yes.

3 RT HON LORD GOLDSMITH QC: Obviously, there were a number of  
4 Cabinet ministers there who had actually seen -- I knew  
5 had seen the whole of the minute, for example, of  
6 7 March, although things, as you rightly say, had moved  
7 on.

8 Obviously this was a matter that was of particular  
9 concern. There had been different opinions circulating.  
10 As I said, I think, earlier, to my recollection, all  
11 Labour members of Parliament, perhaps all members of  
12 Parliament, had received a rather long opinion arguing  
13 that it would be unlawful without a second resolution.  
14 So these issues were very well-known, but they didn't  
15 want to debate it.

16 Now, thinking about it afterwards, I mean, I could  
17 sort of understand that. I could understand that for  
18 this reason: that actually debating the legal question  
19 with the Attorney General was a slightly sterile  
20 exercise. It may be thought to be a slightly sterile  
21 exercise because they could have put to me, "What about  
22 this and what about that?" and I would have answered  
23 them, but what mattered, I thought, was that they needed  
24 to know whether or not this had the certificate, if you  
25 like, of the Attorney General. Was it lawful? That was



1 a necessary condition. Then they would need to consider  
2 whether it was the right thing to do.

3 That's what they then went on to debate, and I sat  
4 and listened as they went through the issues of the  
5 effect on the domestic community, the effect on  
6 international policy, how would this -- what would this  
7 do in terms of the United Nations and so forth.

8 So they were looking at the much bigger question of  
9 "Is it right?" not just, "Is it lawful?"

10 BARONESS USHA PRASHAR: But I think in her book Clare Short  
11 talks about a letter that she wrote to you.

12 RT HON LORD GOLDSMITH QC: After the event?

13 BARONESS USHA PRASHAR: After the event.

14 RT HON LORD GOLDSMITH QC: Yes.

15 BARONESS USHA PRASHAR: I think you sort of dismissed what  
16 she was suggesting about the breach of the  
17 Ministerial Code.

18 Do you want to give any observations on that?

19 RT HON LORD GOLDSMITH QC: Yes, I think the  
20 Ministerial Code, which talks about providing the full  
21 text of the Attorney General's opinion is actually  
22 dealing with a quite different circumstance. That's  
23 dealing with the circumstance where a minister comes to  
24 Cabinet and says, "I have got clearance from the  
25 Attorney General. He says this is all right, or she

1       says this is all right". In those circumstances, the  
2       Ministerial Code requires that the full text should be  
3       there rather than just the summary. You can summarise  
4       it, but you need to produce the full text as well.

5           I was there. I was therefore in a position to  
6       answer all questions. I was in a position to say that  
7       my opinion was that this was lawful. I did manage to  
8       say -- I did say that there was another point of view,  
9       but they knew that very well in any event, and I know  
10      that subsequently the complaint of breach of the  
11      Ministerial Code was dismissed by those who have  
12      responsibility for the Code.

13   BARONESS USHA PRASHAR: But you would say there was never  
14      a full discussion in Cabinet about your opinion which  
15      was caveated and was finely balanced?

16   RT HON LORD GOLDSMITH QC: I think -- you say "caveated".  
17      I think it is -- it is caveated in one respect and there  
18      is another important point. It takes the central issue  
19      of the interpretation of 1441 and identifies that there  
20      are two points of view, and then I have come down in  
21      favour of one of them.

22      The Cabinet, I'm sure, knew that there were two  
23      points of view because that had been well-travelled in  
24      the press. The caveat was you need to be satisfied that  
25      there really has been a failure to take the final

1 opportunity. That, of course, was something which was  
2 right in the forefront of Cabinet's mind, I have no  
3 doubt, and I'm sure was mentioned by the Prime Minister  
4 and the Foreign Secretary and others in the course of  
5 the debate. I would expect so.

6 So I think that issue was well understood.

7 BARONESS USHA PRASHAR: Thank you. Can I move on to the  
8 arrangements for the presentation to Parliament?

9 RT HON LORD GOLDSMITH QC: Yes.

10 BARONESS USHA PRASHAR: There has been much discussion of  
11 the relationship between the advice you gave on 7 March  
12 and the Parliamentary answer on 17 March.

13 RT HON LORD GOLDSMITH QC: Yes.

14 BARONESS USHA PRASHAR: That you presented. I think you  
15 said in an answer, a written answer to Lord Lester on  
16 6 November 2003:

17 "The 17 March statement was a summary of my view of  
18 the legal position rather than a detailed consideration  
19 of the legal issues. The statement was consistent with  
20 my detailed legal advice."

21 Can you sort of explain what the relationship  
22 between the two documents is, and is it consistent with  
23 what you were saying on the 7th and the summary that you  
24 presented on the 17th?

25 RT HON LORD GOLDSMITH QC: I believe it is, because, on

1       the 7th, I was saying there is a green light for  
2       military action because there is a reasonable case for  
3       saying that the revival argument operates in these  
4       circumstances on the interpretation of Resolution 1441.

5           By 17 March, I was saying, "Actually, and what's  
6       more, that's the better view, that it does in fact give  
7       rise to a revival of authority".

8           So I think they were consistent in that sense,  
9       definitely.

10   BARONESS USHA PRASHAR: But in one you were saying there was  
11       a reasonable case and on the 17th you were saying that  
12       it was fine.

13   RT HON LORD GOLDSMITH QC: I was saying that was --  
14       absolutely, that was my view, having reached the  
15       conclusion, having to come down one side or another  
16       and -- I know I have made this point before, but I do  
17       want to underline it. The question, "Is it lawful or  
18       not?" only admits ultimately of the answer "Yes" or "No".  
19       It could not be a little bit lawful, and having reached  
20       the conclusion that the better view was that it was  
21       lawful, that was my view.

22   BARONESS USHA PRASHAR: Thank you.

23   THE CHAIRMAN: Martin?

24   SIR MARTIN GILBERT: Yes, my first question this morning was  
25       about the No Fly Zones --

1 RT HON LORD GOLDSMITH QC: Yes.

2 SIR MARTIN GILBERT: -- including the targeting issue.

3 In February 2003, you were given a briefing on military

4 objectives --

5 RT HON LORD GOLDSMITH QC: Yes.

6 SIR MARTIN GILBERT: -- with regard to the potential

7 campaign in Iraq.

8 RT HON LORD GOLDSMITH QC: Yes.

9 SIR MARTIN GILBERT: Can you tell us in broad terms what

10 were the issues and concerns you raised at that

11 briefing, particularly with regard to targeting,

12 proportionality and also possible allegations that might

13 be made in the International Criminal Court?

14 RT HON LORD GOLDSMITH QC: Yes, I haven't been able to see

15 in the files I was able to go back to precisely what the

16 detailed briefing was, but I do recall that I did

17 receive a briefing -- I can't remember the precise

18 date -- as to what the proposed targeting was.

19 Two particular points are striking to me. One was

20 I was shown what some of the early targets were. Now,

21 these were legally important to look at, because there

22 was a decision that what are known as the command and

23 control centres should be targeted at an early stage,

24 and the difficulty about that was that some of the

25 command and control centres I think were in places like

1 presidential palaces. So there was an issue about  
2 whether these were legitimate targets, and I wanted to  
3 understand from the targeters and the military people  
4 that they genuinely were right that this is where the  
5 opposition to a military invasion would be run from. If  
6 they were, these were legitimate targets.

7 There were questions -- I can't recall at this  
8 stage, but certainly there were questions at some stage  
9 about whether or not -- if I may say this, I'm afraid  
10 that Saddam Hussein and his sons were legitimate targets  
11 as well, which depended really upon whether or not they  
12 were part of the military command or simply part of the  
13 political apparatus. So that I recall.

14 The second thing I recall very specifically was  
15 I was told about the precautions that were going to be  
16 taken to protect armed forces against possible attack by  
17 chemical and biological warfare and what precautions  
18 were going to be taken in the event that the targeting  
19 actually hit a stockpile of weapons of mass destruction  
20 and what was going to be done in those circumstances.

21 SIR MARTIN GILBERT: Were you satisfied with the assurances  
22 you got with regard to these rather complicated and  
23 difficult targeting issues?

24 RT HON LORD GOLDSMITH QC: I was satisfied. I went at it,  
25 as I always did, with great care. I asked questions.

1 I wanted to be satisfied about the basis of the  
2 decisions that had been made, but I was satisfied.

3 SIR MARTIN GILBERT: I believe that in April, after the  
4 military action had begun, that you were again -- you  
5 again examined this question, particularly of targeting.  
6 What conclusion did you come to then? I believe you  
7 presented your conclusions in some form to the Cabinet?

8 RT HON LORD GOLDSMITH QC: I don't recall that. I became,  
9 at that stage, after the military intervention had  
10 started -- I became a member of what was colloquially  
11 called the War Cabinet. It wasn't strictly that. We  
12 met for a period of time every morning, and I'm sure  
13 there was discussion on occasions of particular  
14 targeting.

15 The one incident I remember particularly well was in  
16 relation to a possible assault on a particular city,  
17 when I was unhappy from what I had heard about the  
18 proposal, and I actually blocked it and said it could  
19 not take place with British participation. That was  
20 a matter that I had to discuss with the Prime Minister  
21 but I stood my ground and it didn't happen.

22 SIR MARTIN GILBERT: You were unhappy because there might be  
23 significant Iraqi civilian casualties?

24 RT HON LORD GOLDSMITH QC: Yes, I was not happy with the  
25 legal basis for it, in the sense of: did it actually

1           involve a legitimate military objective and were the  
2           risks to civilian casualties so great that it was not  
3           a justified attack?

4   SIR MARTIN GILBERT: Your legal advice prevailed --

5   RT HON LORD GOLDSMITH QC: I stood my ground and said this  
6           could not happen. It didn't happen. That particular  
7           place, things happened in relation to it at a later  
8           date, but at that particular point I blocked it.

9   SIR MARTIN GILBERT: Thank you very much.

10   THE CHAIRMAN: Usha, back to you?

11   BARONESS USHA PRASHAR: Thank you. I want to talk about the  
12           duties and responsibilities of occupying powers.

13   RT HON LORD GOLDSMITH QC: Yes.

14   BARONESS USHA PRASHAR: When were you first asked for advice  
15           on military action and duties and responsibilities of an  
16           occupying power. At what stage was that advice sought?

17   RT HON LORD GOLDSMITH QC: It was after the military  
18           intervention had started and I recall that it arose as  
19           a result --

20   BARONESS USHA PRASHAR: It was rather late in the day?

21   RT HON LORD GOLDSMITH QC: It was rather late in the day  
22           and --

23   BARONESS USHA PRASHAR: You made that clear to them?

24   RT HON LORD GOLDSMITH QC: I'm not sure I did make it clear.  
25           I mean, I dealt with the request at that stage. I was,



1       frankly, somewhat surprised. I didn't know if there was  
2       any difficulty about what the rights of occupying powers  
3       would be. After all, we had been in that position in  
4       relation to Afghanistan, in relation to Kosovo.<sup>2</sup> I would  
5       have thought it was well-travelled ground, but it became  
6       apparent that there was an issue in relation to it.

7       I was asked to advise. I did.

8   BARONESS USHA PRASHAR: What were the main issues in play?

9   RT HON LORD GOLDSMITH QC: I think the main legal issue that  
10       I was asked about was the extent to which --  
11       fundamentally, to what extent was it necessary for there  
12       to be a further United Nations Resolution.

13       This is quite a complicated area, but the basic  
14       point is that an occupying power has certain  
15       responsibilities and certain powers in relation to the  
16       occupied territory, but it does not become, because it  
17       is occupying, the government of the country. So there  
18       are things that it can't do.

19       Certainly it can do humanitarian aid. It can do  
20       things, it can change things, which are necessary, but  
21       unless absolutely prevented, it should obey the laws  
22       and, as it were, the structures in place. So there was  
23       an issue about the extent to which reform and  
24       restructuring in Iraq could take place without  
25       a United Nations Resolution.

---

<sup>2</sup> The witness subsequently added that he meant that, in the sense that UK forces had been engaged in post-conflict activities in another country where there had been issues about UN cover, he assumed the issue would have been considered before now. He said that strictly UK forces were not occupying powers in fact in either of them and to that extent the comment is too broadly expressed.

1 BARONESS USHA PRASHAR: What was their response to the  
2 advice and issues that you raised before them?

3 RT HON LORD GOLDSMITH QC: The response was to accept the  
4 advice. I know that the government worked to get the  
5 United Nations Resolution, which subsequently it  
6 obtained. It became apparent to me that there was  
7 something happening on the political level as well,  
8 because the Development Secretary plainly took the view  
9 that in some way more should be done -- I'm not quite  
10 sure what -- or she had been promised more and  
11 subsequently relied upon the advice I had given as  
12 a reason for her resignation.

13 BARONESS USHA PRASHAR: But did you actually have concerns  
14 in relation to -- I think with the Organisation for  
15 Reconstruction and Humanitarian Assistance --

16 RT HON LORD GOLDSMITH QC: Yes.

17 BARONESS USHA PRASHAR: -- that we would be jointly  
18 responsible for that, and did the US plans cause any  
19 particular concerns for you in terms of deployment of  
20 our own staff?

21 RT HON LORD GOLDSMITH QC: Well, it was quite difficult.  
22 There were a number of areas, and I was concerned that  
23 some of the things that it became apparent that the  
24 United States administration wanted to do probably did  
25 go beyond the powers of an occupying force. Therefore,

1        what was necessary was United Nations Security Council  
2        cover for that.

3            That's really then what Resolution 1483 and then  
4        subsequent resolutions were designed to attain.

5        BARONESS USHA PRASHAR: Did you actually look at concerns of  
6        DFID in terms of how they could get involved in  
7        reconstruction and maybe some of the MoD staff in  
8        relation to human rights issues, and were there specific  
9        issues to do with different departments?

10       RT HON LORD GOLDSMITH QC: There were specific issues.

11       I remember there was a specific issue that was raised by  
12       the Treasury about what could be done about the Iraqi  
13       currency. There was a problem about that because of  
14       a lack of supply, and there was a concern that this  
15       might look like economic restructuring and would that go  
16       beyond the powers that an occupying force has.

17       The Development Secretary certainly raised issues  
18       about what DFID can do. I don't believe I was ever  
19       asked to advise on whether the concerns that were being  
20       expressed could, in fact, have been overcome without  
21       a United Nations Resolution.

22       BARONESS USHA PRASHAR: What about the MoD and anything to  
23       do with human rights issues?

24       RT HON LORD GOLDSMITH QC: I don't recall specifically.

25       There were other issues in relation to our

1 responsibilities, which really meant soldiers'  
2 responsibilities towards Iraqi detainees or members --  
3 civilian members; for example, did the European  
4 Convention of Human Rights apply to activity or at least  
5 some activity in relation to Iraq? It is not a part of  
6 Europe, but that was a question which I did have to  
7 advise, and then we got on to the question of treatment  
8 of detainees.

9 Fundamentally, my advice was that the obligations  
10 about the proper treatment of people, which are  
11 contained in the European Convention, did apply in  
12 relation to detainees, and, subsequently, I became  
13 involved in issues where there were allegations that  
14 detainees had not been treated properly, and, indeed,  
15 I authorised certain prosecutions as a result and was  
16 concerned --

17 BARONESS USHA PRASHAR: But initially, you had given advice  
18 on these issues before the specific cases arose?

19 RT HON LORD GOLDSMITH QC: I'm not sure that's right.

20 I gave advice on -- I have to recollect this: I gave  
21 advice on the application of the European Convention to  
22 certain aspects of the conduct, advising those standards  
23 did need to be complied with. Subsequently, a specific  
24 issue arose, when it came apparent -- this is quite  
25 a long time later -- that methods of treatment had been

1       used in relation to certain detainees which actually  
2       were methods which had been outlawed by -- I think by  
3       the Heath government in 1972, arising from Northern  
4       Ireland. I was surprised that those methods were being  
5       used. The prosecution was authorised. We still have  
6       not got to the bottom of who it was that apparently said  
7       such methods were legitimate. I most certainly did not.

8   BARONESS USHA PRASHAR: The other area is the basis on which  
9       we invaded was to actually disarm.

10   RT HON LORD GOLDSMITH QC: Yes.

11   BARONESS USHA PRASHAR: Obviously, that restricted what we  
12       could or couldn't do, because the idea was to disarm,  
13       and eventually no weapons of mass destruction were  
14       found. What were the implications of that as an  
15       occupying power?

16   RT HON LORD GOLDSMITH QC: Well, the Iraq Survey Group got  
17       on with its job, which was to find the evidence that was  
18       there, large country, as I was being told, and a lot of  
19       searches to be done. What I can't recall is the precise  
20       chronology of when the search, as it were, seemed to  
21       have been given up.

22       I think it must have been the case that by that  
23       stage the United Nations had passed a series of  
24       resolutions which then provided a quite different basis  
25       for the presence of coalition forces in Iraq, including

1 eventually being there at the request of what had become  
2 a legitimate, if perhaps interim, Iraqi authority.

3 BARONESS USHA PRASHAR: I mean we got Resolution 1483. Did  
4 other issues arise after that? You were there for some  
5 time.

6 RT HON LORD GOLDSMITH QC: Yes, I can't remember precisely  
7 what the issues were, but certainly one of the things  
8 about Resolution 1483 was that it was a sort of amalgam  
9 of confirmation of the authority that the coalition  
10 forces had as occupying powers and, as I recall, part of  
11 the framework of that was that there was a letter that  
12 was produced explaining what the coalition forces  
13 believed they were entitled to do, which effectively got  
14 the approval of the Security Council by the way it was  
15 referred to in the resolution.

16 Then the process of assisting the Iraqis to produce  
17 their own government came about. I know there was an  
18 issue, for example -- I had a concern that the Iraqi  
19 people were entitled to free  
20 self-determination, and, therefore, it wasn't really for  
21 anybody to tell them how to do that, and that created  
22 something of an issue about how to get to the point that  
23 they had their own government.

24 BARONESS USHA PRASHAR: I mean my final question really is  
25 that you did say earlier that they left it a bit late.

1 Do you think that if they had thought this through and  
2 the planning was done earlier in terms of getting legal  
3 advice on being an occupying power, it would have ironed  
4 out some of these difficulties earlier?

5 RT HON LORD GOLDSMITH QC: My experience of the government  
6 and military people and Civil Service is that they get  
7 to the point, even if they start late, and that they  
8 achieve through the hard work that they do and the  
9 skills that they have got, to which I pay a huge tribute  
10 there, even if it started late. I was surprised.

11 I think it would have been better to have  
12 appreciated in advance that there was going to be an  
13 issue in relation to what could be done. I think it  
14 would have been better, therefore, to have focused on  
15 those issues at that stage, so that the plan would have  
16 been clear what needs to be done, if it could be, or at  
17 least what the options were, rather than it happening  
18 after the event.

19 BARONESS USHA PRASHAR: Thank you.

20 THE CHAIRMAN: Lord Goldsmith, I think we are coming to the  
21 final part of this hearing today. I have a small number  
22 of questions myself and then one or two of my colleagues  
23 might want to finally wrap up before you may want to say  
24 what you would like to finish on.

25 I suppose the first one -- and some of these are

1       just nailing down what we have heard in the course of  
2       today's hearing -- my first question related to  
3       timeliness, how in a fast-moving, fast-developing,  
4       political, diplomatic, military situation, as the Iraq  
5       venture was, how you fold in, in a timely way, the legal  
6       advice, both at the level of the law officers but also  
7       in departmental terms.

8               Looking back on it, I think you weren't content that  
9       it was perfect. With hindsight, nothing is. But in  
10      general, what's your judgment about how the legal issues  
11      were folded into the developing policy questions?

12   RT HON LORD GOLDSMITH QC: I think in the event that did  
13      happen. As you have heard, on two occasions I insisted  
14      on offering a view, even though it wasn't being asked  
15      for, to make sure the policy, as it were, took account  
16      of that. The one area that perhaps wasn't was one we  
17      discussed earlier, which was the detailed consideration  
18      of the resolution as it was going through. That may be  
19      frankly impossible to achieve a greater involvement of  
20      the law officers in that.

21   THE CHAIRMAN: Yes. You have drawn our attention to the  
22      fact that on more than one occasion, when your advice  
23      had not been sought you nonetheless felt bound to give  
24      it.

25   RT HON LORD GOLDSMITH QC: Yes.



1 THE CHAIRMAN: But there was, to a degree, a discouragement  
2 from ministers, the Prime Minister's office, wanting to  
3 receive formal legal advice until really it became  
4 absolutely essential because of a stage reached.

5 Is that a fair description? Because it carries the  
6 implications that there may not be a full understanding  
7 that legal advice will change, even as a legal  
8 diplomatic military process changes. So what may be  
9 formal advice at one point early or middle on may have  
10 to change itself. So people shouldn't be frightened of  
11 taking that advice.

12 RT HON LORD GOLDSMITH QC: You are absolutely right that  
13 this is what may happen. I mean, I have some sympathy  
14 with the view -- and it would arise in other contexts as  
15 well -- that you don't ask for the Attorney General's  
16 formal opinion until it is necessary to have it.

17 That did give rise to a question of what needed to  
18 be known during the policy process and that's why --  
19 I mean, I was kept informed. There were discussions  
20 that took place and I did offer advice, or give advice  
21 on -- even when I wasn't being asked for it.

22 THE CHAIRMAN: Associated with this, you have just told us  
23 a little in answer to Baroness Prashar, at the final  
24 Cabinet meeting which you were present at and explained  
25 your legal advice, does a procedure like that -- and

1 again, looking ahead to lessons learned as well as  
2 backwards to what happened -- does it enable Cabinet  
3 ministers, by no means all of them with legal  
4 qualifications, perhaps none of them have been exposed  
5 to this kind of issue before, does that process enable  
6 them sufficiently to understand, as a Cabinet, with  
7 collective responsibility for whatever is decided, to  
8 understand the inwardness, the significance of the legal  
9 advice that the government -- you said your client was  
10 essentially in this case the Prime Minister -- is  
11 receiving?

12 RT HON LORD GOLDSMITH QC: Yes. I have seen in the context  
13 of this Inquiry one suggestion that it would have been  
14 helpful, indeed the request was made, to form, as it  
15 were, a subcommittee as a War Cabinet even before that.

16 I have to say I can see huge merit in that, because  
17 it would have provided a forum for formal  
18 discussion, or at least structured discussion, with  
19 a small group of people and that's something in which legal  
20 advice could have been involved and discussed.

21 THE CHAIRMAN: I'm grateful for that because machinery and  
22 process is clearly something we have to look at, so  
23 thank you.

24 It may or may not be a very small point, and it may  
25 be a layman's mistake but you have used it at different

1 times, the expression "the better view" as between the  
2 two explanations, and yet, the better view does not  
3 correspond with what you also describe as the safest  
4 course or the safer course. Could you just unpack for  
5 me how that distinction can be forced?

6 RT HON LORD GOLDSMITH QC: By saying the safest course, that  
7 is, as it were, advice as to what it would be better to  
8 do, in that sense better, and that was to say, "Don't  
9 give up on trying to get a second resolution. Indeed,  
10 really work very, very hard to get a second resolution,  
11 because that would put the position beyond doubt".

12 Now, in the absence of a second resolution -- and  
13 you have to interpret Resolution 1441 -- the question  
14 then is balancing all the arguments, it is a common  
15 process for lawyers, there will be arguments both ways,  
16 which is the better view, and that means which is,  
17 therefore, the more correct legal view, and given that  
18 it can't be a little bit lawful, the better view is then  
19 either it is lawful or it is not lawful.

20 THE CHAIRMAN: Thank you. I have only got two more, but one  
21 of which I hope you will allow. Yesterday, we took  
22 evidence from Elizabeth Wilmshurst.

23 RT HON LORD GOLDSMITH QC: Yes.

24 THE CHAIRMAN: She found herself in a position where, for  
25 professional reasons, she felt bound to resign. You

1       have spoken to us today both about the heavy burden that  
2       is borne by the Attorney General in a situation like  
3       this, but also that you did not feel part of that burden  
4       was, as it were, a wider duty to the policy, the  
5       political side. It was a burden that rested on the  
6       legal advice that you needed to give.

7             Did you at any point find in your own mind that it  
8       might get too difficult to give advice that would be  
9       acceptable, in which case you might have had to say,  
10      "I'm sorry, I can't go on"?

11   RT HON LORD GOLDSMITH QC: You phrase that in terms of too  
12      difficult to give advice which might be acceptable.

13   THE CHAIRMAN: Yes.

14   RT HON LORD GOLDSMITH QC: It cannot be the job of a lawyer  
15      to decide that you can't decide to give advice, and it  
16      was not a question, as far as I was concerned, of giving  
17      advice that was acceptable. It was a question of giving  
18      advice which was correct, and if the question is: did  
19      I ever think this is all -- the pressure -- that  
20      I should resign? No, I didn't.

21   THE CHAIRMAN: It wasn't that, actually. I am afraid it was  
22      probably too speculative. It was: had your client, had  
23      the government, decided not to follow your advice in any  
24      significant sense, where does that place the  
25      Attorney General?

1 RT HON LORD GOLDSMITH QC: Ah, that is a different point.

2 THE CHAIRMAN: Yes.

3 RT HON LORD GOLDSMITH QC: If the government -- if I had

4 given advice -- for example, if I had given advice that

5 a course of action was not lawful and notwithstanding

6 that, the government goes against it, then that creates

7 a very important moment of constitutional crisis and the

8 Attorney General, at least if it is an important matter,

9 would, in those circumstances, resign, and that would

10 then force, I would think, a constitutional crisis on

11 the government, and that is ultimately where the

12 authority of the Attorney General comes from.

13 THE CHAIRMAN: And it is right to remember that, when taking

14 evidence from Jack Straw as Foreign Secretary, he said

15 that if he had found himself, in policy terms, in

16 a position of not being able to go along, that would

17 have forced the crisis as well. But in the legal sense,

18 if the Attorney General is in that position, it does

19 similarly force the crisis.

20 RT HON LORD GOLDSMITH QC: Yes.

21 THE CHAIRMAN: Thank you. Only two lesser questions in a

22 way, not lesser perhaps to those closely involved, but

23 a few days ago we received the report of the Dutch Iraq

24 Inquiry, an independent Parliamentary inquiry there.

25 Just to be read out for the record -- you will be

1 familiar with it, I think -- at number 18 of its  
2 conclusions they said:

3 "The Security Council Resolutions on Iraq during the  
4 1990s did not constitute a mandate for the US/British  
5 military intervention in 2003. Despite the existence of  
6 certain ambiguities, the wording of Resolution 1441  
7 cannot reasonably be interpreted as authorising  
8 individual member states to use military force to compel  
9 Iraq to comply with the Security Council's resolutions  
10 without authorisation from the Security Council."

11 Looking at that with all the benefit of hindsight,  
12 does that change your judgment at all?

13 RT HON LORD GOLDSMITH QC: No, it does not. This is -- and  
14 I strongly suspect will continue to be -- an issue of  
15 intense debate, politically and academically. I did  
16 look at what is an unofficial translation of those  
17 parts. I was not persuaded. If I may very respectfully  
18 say so, they appeared to doubt the revival argument as  
19 a matter of principle, which, of course -- whereas the  
20 United Kingdom has taken a firm view on that, and  
21 I don't think they paid enough attention to the context  
22 in which the resolution was passed, and I -- again, with  
23 respect, I thought that what was said about the  
24 explanations of vote was not accurate and they didn't  
25 see that there could at least be a difference between

1       automaticity in the sense of second decision and  
2       automaticity in the sense in which I believe it was  
3       being used of simply a second stage.

4   THE CHAIRMAN:   Right.   Thank you.   I'm going to invite you,  
5       if I may, in a moment, given that we are a lessons  
6       learned inquiry, to offer us your reflections,  
7       particularly with the lessons that are to be learned.

8       Just before I do, can I ask my colleagues if they  
9       have any final questions.   Lawrence?

10   SIR LAWRENCE FREEDMAN:   Well, actually, it just follows on  
11       from that.   You explained to me earlier how, if members  
12       of the Security Council were unhappy that they had  
13       a view that they should be in a position to decide and  
14       they weren't given that opportunity, that they shouldn't  
15       have voted for 1441?

16   RT HON LORD GOLDSMITH QC:   Yes.

17   SIR LAWRENCE FREEDMAN:   Now, you have also told us today how  
18       you reached your conclusions at the end of a very  
19       intensive process of deliberation.

20   RT HON LORD GOLDSMITH QC:   Yes.

21   SIR LAWRENCE FREEDMAN:   And for the first months after the  
22       passage of 1441 your view also inclined to the position  
23       that a second resolution was needed, and that  
24       consideration meant a decision, and you only changed  
25       this view after intensive discussions with key players.

1           Now, those sort of discussions are not available to  
2           most people, whether they are academics, jurists or  
3           indeed other governments, and it was these discussions  
4           that you have explained changed their view. So is it  
5           unreasonable, therefore, for those who didn't have  
6           access to those discussions to stick with the view that  
7           you held at the start of your deliberations?

8   RT HON LORD GOLDSMITH QC: If you are asking me about the  
9           other Security Council members, of course they were  
10          involved in the discussions and they were in a position  
11          to do something I wasn't. I had to take the resolution  
12          as they had passed it. They were in a position to say,  
13          particularly knowing the US view -- which we know very  
14          clearly what it was -- to say, "That's not what I'm  
15          prepared to accept and in those circumstances I will not  
16          vote for that." That wasn't open to me.

17          The second point that I would make about that is  
18          that the principal point that I have been seeking to  
19          make today is what the negotiations demonstrate is  
20          really two things, first of all that a central issue was  
21          was there going to be a decision or not, and ultimately  
22          you then look back to the wording of the resolution,  
23          which everyone can do, and see -- and some people would  
24          see it as simply as this -- it does not say that. It  
25          does not say that there should be a decision and that is



1 something that they can see and that other people could  
2 see.

3 SIR LAWRENCE FREEDMAN: But it is fair to note that  
4 from November to early February you saw it in  
5 a different way to how you later saw it.

6 RT HON LORD GOLDSMITH QC: You are absolutely right. On the  
7 provisional basis -- I'm sorry, I said there were  
8 two things. One is that that was the central issue and  
9 that was something that hadn't really perhaps come home  
10 as much to me as it should have done. The second was  
11 the red lines which the United States administration  
12 had, which made it, frankly, extremely unlikely that all  
13 these experienced negotiators in Washington and New York  
14 could actually have allowed themselves to concede  
15 something which was beyond the red line, the one red  
16 line that President Bush had.

17 SIR LAWRENCE FREEDMAN: We have heard in these hearings  
18 before about laws of unintended consequences, and it is  
19 not inconceivable that in a negotiation that could  
20 happen.

21 RT HON LORD GOLDSMITH QC: It is very, very unlikely. So  
22 far as we were concerned, the United Kingdom, that is  
23 one thing. We -- in a sense, because we needed  
24 a resolution if we were going to act at all, we might  
25 have found ourselves having to accept language which we

1        didn't really want. If the United States view was, as  
2        it was, that they could take action then and there --  
3        they had been persuaded to ask the United Nations for  
4        its view but it the United Nations hadn't been prepared  
5        to give it in the terms that the United States wanted --  
6        the United States could have said, "Well, we have tried  
7        and we have failed and we are just going to do what we  
8        think is right."

9        SIR RODERIC LYNE: But would you concede that other people  
10       also had red lines, including the French, which they  
11       subsequently were able to argue that they too had not --

12      RT HON LORD GOLDSMITH QC: We have had this debate,  
13      Sir Roderic.

14      SIR RODERIC LYNE: I know we have but you have just restated  
15      one side of it.

16      RT HON LORD GOLDSMITH QC: And I really don't agree -- I  
17      don't agree with that because, as -- I'm sorry to keep  
18      repeating it, but as we know, I believe, from what  
19      happened subsequently and what was told and what I have  
20      subsequently seen on the record, if the French red line  
21      was that there should be a decision, they did not obtain  
22      that. They certainly obtained a second stage. They  
23      were able to say that the United Nations Security  
24      Council would still be involved. They were able to say  
25      that the United States cannot send its forces in the day

1           after Resolution 1441 has passed. To that extent, they  
2           succeeded, but I don't accept they had a red line.

3   SIR RODERIC LYNE: I refer back to our earlier discussion  
4           and I won't pursue it further now.

5   RT HON LORD GOLDSMITH QC: Yes, of course.

6   SIR LAWRENCE FREEDMAN: Just finally, the Foreign Office  
7           lawyers also were not persuaded along the lines that you  
8           chose. The point is that it remained, even within the  
9           British Government and therefore, not surprisingly,  
10          within the Security Council, a controversial view.

11   RT HON LORD GOLDSMITH QC: Forgive me. I mean, I make  
12          one observation. I know what the view of Sir Michael  
13          and Elizabeth Wilmshurst was, although I did not have  
14          any discussions with Elizabeth Wilmshurst, even at the  
15          time of her resignation, though I offered some. I don't  
16          criticise her at all for not giving me that opportunity  
17          to speak to her. I don't know really what the position  
18          was of others and perhaps it doesn't really matter.

19                If, Sir Lawrence, the question is, was this  
20          a difficult issue, on which there were different views,  
21          of course, and we wouldn't have spent today debating it  
22          if that were not the case.

23                The point I was making was really responding,  
24          I think, to the question, well, other members wanted  
25          something else, and I'm simply say saying, well, they

1       were involved in the negotiations and the discussion and  
2       they should have -- sorry, it sounds a hard way of  
3       putting it. They were in the position to insist on  
4       something different or not to sign up.

5       SIR LAWRENCE FREEDMAN: I will leave it there.

6       THE CHAIRMAN: Thank you.

7               Lord Goldsmith, it has been a long day and we have  
8       been asking a lot of questions. You will have things  
9       perhaps that you would like to say that we either  
10      haven't covered, or observations you would like to offer  
11      us, recalling that we are a lessons learned inquiry  
12      looking ahead from the experience of the past.

13      RT HON LORD GOLDSMITH QC: Yes.

14             On the lessons learned, I think I have touched on  
15      three things which may be worthy of your consideration.  
16      One is whether the -- this is a big topic, which is  
17      whether or not the United Nations structure,  
18      international procedures and law really is as effective  
19      as it should be to deal with these critical questions of  
20      international peace and security, and indeed one could  
21      extend it to and human rights as well, and therefore  
22      what can one do about that. To end up having a debate  
23      about language in the way that we have done doesn't  
24      ultimately show the institution to the greatest credit.

25             Secondly, a degree of formality and discipline in

1 the way one gets to a conclusion. Perhaps a War Cabinet  
2 subcommittee, that might have been a helpful process.

3 And, thirdly, were some elements of planning from  
4 the legal side -- I say nothing about other elements of  
5 planning, which I know the Inquiry is considering --  
6 where I think it would have been at least better  
7 practice to have looked at those at an earlier stage.  
8 I hope my colleagues will not think I'm criticising any  
9 of them in saying this but I'm simply responding to your  
10 request.

11 THE CHAIRMAN: Thank you very much, Lord Goldsmith, and  
12 thanks to everybody who has sat here through --

13 RT HON LORD GOLDSMITH QC: Forgive me, Sir John, may I just  
14 add a further word if I may?

15 THE CHAIRMAN: Yes, of course.

16 RT HON LORD GOLDSMITH QC: Because I just really wanted to  
17 say this, if I may.

18 To date, I have kept my own counsel on most of these  
19 matters, despite the criticisms of my integrity and  
20 professional judgment. But today, with a tribunal which  
21 has had access to all the documents, I have had the  
22 opportunity to deal with those questions, to explain the  
23 events and my part in them.

24 Whether or not the military intervention was, as  
25 a matter of policy, right or wrong, I don't think is for

1 me to judge, but so far as the legality is concerned,  
2 I did reach the view then, and still am of the opinion,  
3 that it was lawful.

4 I stand by that advice, and I have tried to explain  
5 today that it was an opinion which I reached  
6 independently, having considered all the arguments and  
7 the evidence and that it was my genuine view. That  
8 is the basis upon which I have given legal advice as  
9 a professional lawyer for over 35 years. And it was the  
10 basis on which I reached this conclusion in March 2003.

11 THE CHAIRMAN: Thank you very much.

12 Thanks again to our witness and to all those who  
13 have been here through a long day, and with that I will  
14 close today's session.

15 We have no sessions tomorrow but on Friday at 9.30,  
16 not 10 o'clock, we take evidence from the former  
17 Prime Minister, Tony Blair.

18 Thank you all.

19 (5.00 pm)

20 (The Inquiry adjourned until 9.30 am on Friday,  
21 29 January 2010)

22

23

24

25

RT HON LORD GOLDSMITH QC .....1