IRAQ INQUIRY

Statement by Iain Macleod

1. This statement describes my role and responsibilities between August 2001 and August 2004, in particular in the period from September 2002 until March 2003. It also sets out briefly my views on the issues identified as of interest to the Inquiry in Margaret Aldred's letter to me of 2 June 2010.

My role and responsibilties as legal counsellor at the UK Mission to the UN

2. I was the legal counsellor at the UK Mission to the UN in New York ("UKMis") from 14 August 2001 until 11 August 2004. The post of legal counsellor at UKMis is an FCO diplomatic post, traditionally filled by one of the legal advisers in the FCO. Since about 1994, the legal counsellor has been assisted by a first secretary, also a member of FCO legal advisers on posting.[1]

3. The work of the legal counsellor at UKMis is varied, and the content of the work changes depending on the agenda of the UN and the demands on the UKMis. Part of the work involves providing legal advice to the Permanent Representative and his staff on a range of legal issues, including international and EU law and UN practice and procedures (in the Security Council, the General Assembly and ECOSOC). But the bulk of the work involves handling issues or dossiers in the UN like any other member of UKMis, though these tend to have more of a "legal content". The legal counsellor is, for example, the UK representative on the UN General Assembly's Sixth (Legal) Committee; sits as UK representative on the Charter Committee, the Host Country Relations Committee and the General Committee; and also handles Law of the Sea issues at the UN in New York. For the past few years, the legal counsellor has also been the principal desk officer dealing with international tribunals, such as the ICJ, the ICC, ICTY, ICTR and the Sierra Leone Tribunal.

4. Some of the main areas of work during my three years included:

- ***September 2001*** onwards: terrorism, including UNSCRs 1368 and 1373, and the attempt to negotiate a comprehensive UN Convention on Terrorism, and the work of the Counter-Terrorism Committee established under UNSCR 1373;
- ***mid 2002***: the International Criminal Court, and especially US attempts to block peacekeeping operations until they obtained an "exemption" from the ICC, leading to the adoption of UNSCR 1422;
- ***August 2002 onwards***: Iraq – the negotiation of UNSCR 1441 and in early 2003, the attempt to draft a second resolution;
- ***October 2002***: running the election campaign for Sir Adrian Fulford, UK candidate as ICC judge;
- ***mid 2003 onwards***: developing and running a policy on "Justice and the Rule of Law", leading eventually to a report by the Secretary General on the subject.

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[1] The work of the legal advisers at the New York UN Missions is well described by Michael Wood in "The Role of the Legal Advisers at Permanent Missions to the United Nations", in "The International Lawyer as Practitioner", Wickremasinghe, BIICL, 2000.

5. All this took place against the background of the usual annual cycle of UN activity: the General Assembly and its Committees from September to December; regular elections to bodies such as the ILC, the ICJ, the tribunals; and the regular work of the Security Council.

Route and process for receiving instructions

6. In my time there, instructions to UKMis in principle came in the form of a "telegram" in the name of the Foreign Secretary (usually drafted and issued by the lead policy department or unit in FCO). In practice, instructions on more routine issues came by letter, e-mail or fax from the lead policy department. The lead department on almost all issues I dealt with was the FCO's UN Department; and my principal point of contact for instructions was the relevant desk officer in that department (not FCO Legal Advisers). This was so even on issues with a high "legal content" such as the international tribunals. Policy on these issues was not led by Legal Advisers, but by UND, and the instructions came from or through UND.

7. It is of course true that in reality the input of FCO Legal Advisers on some issues was key, especially on matters on the agenda of the Sixth Committee. But direct contact with FCO Legal Advisers was not commonplace; and on major negotiations such as that of UNSCR 1441, the situation was as described by Sir Michael Wood on pages 10 and 11 of the transcript of his evidence to the Inquiry on 26 January 2010: direct contact between FCO Legal Advisers and the legal counsellor in New York was "pretty rare". The legal advice and input came through the process he describes. FCO Legal Advisers provided comments and advice to the policy department in London on the developing negotiations. This legal input was incorporated into or taken into account in formulating instructions to UKMis; and the outcome was a set of instructions which came to UKMis by telegram (or letter or phone call from the lead policy contact in London). There was only ever one set of authoritative instructions to UKMis on any given issue. There might occasionally be specific guidance on legal points, complementing or supplementing the general instructions. But there was never a set of "policy" instructions and a separate set of "legal" instructions.

Relationships between FCO Legal Advisers, UKMis Legal Section and the Attorney General's Office during the relevant period

8. The legal counsellor and the first secretary were members of the UK Mission to the UN. The legal counsellor was line managed by the Deputy Permanent Representative and reported ultimately to the Permanent Representative. There was no line of reporting, direct or indirect, to the FCO Legal Adviser in London, and the UKMis legal counsellor was not a member of Legal Advisers for administrative or management purposes while on posting. Nor was there any routine process of weekly reporting on legal issues or anything of the sort. (In this, the UKMis legal counsellor post was similar to other FCO posts typically occupied by legal advisers, for example the First Secretary (Legal) post at UK Rep Brussels, where I was posted from 1991 until 1995. There too the ultimate reporting authority was the head of mission, not the FCO Legal Adviser).

9. I am not able to comment on the extent of contacts between the Attorney's Office and FCO Legal Advisers. Except as described in paragraph 26, there was no contact between the Attorney's Office and UKMis.

UNSCR 1441

Instructions

10. I received from London no instructions in relation to the negotiation of UNSCR 1441 beyond or in addition to those received by Sir Jeremy Greenstock and UKMis.

Contact with FCO Legal Advisers during the negotiation of UNSCR 1441

11. With the exception of a few minutes or e-mails, there was little direct contact between UKMis legal section and FCO Legal Advisers about the negotiation of UNSCR 1441, and none at all with the Attorney's Office. This recollection is borne out by the written record I have seen.

Involvement in negotiations on UNSCR 1441

12. I was closely involved in the negotiations on what became UNSCR 1441 from an early stage, as a member of Sir Jeremy's team. I knew what we were trying to achieve and attended the majority of the negotiating sessions at the Security Council, formal and informal, and also many of the P5 discussions, including Ministerial discussions and discussions with the Secretary General. Occasionally, I noted and reported the discussion, but on the whole my role amounted to a watching brief. I was not responsible for the drafting of the resolution, and my recollection is that the UKMis had a relatively limited role in that process. The main components of the draft came to us from Washington via London. On some key points, Sir Jeremy had a crucial input, and I was involved in the drafting and discussion of proposals within the Mission.

The position of the French, the US and other members of the Security Council

13. I have little to add on this, beyond what is publicly known or has been disclosed to the Inquiry. But I am clear that all Security Council delegations, but especially those of France and Russia, understood what we and the US were attempting to achieve in negotiating the resolution. Much of the history of the negotiation – the points of difficulty and the proposals for amendment of the text - makes little sense otherwise. Our intentions were explained in detail.

The significance of UNSCR 1205 to 1441

14. During the negotiation of what became UNSCR 1205, I was a member of the Legal Secretariat to the Law Officers (as the Attorney General's Office was then known). My role was similar to that of Cathy Adams in 2002/2003. I supported and advised the Attorney General and the Solicitor General on international, EU and ECHR issues including the legality of the use of force especially in relation to Kosovo and Iraq.

15. FCO Legal Advisers consulted the Attorney at two broad stages in relation to UNSCR 1205. In late 1997, advice was sought on whether (as FCO Legal Advisers contended) the revival argument remained in principle valid and whether in particular a further finding of material breach by the Security Council itself was necessary. The Law Officers agreed with the FCO legal view on both points, and that general approach formed the basis for subsequent advice on specific resolutions in 1998 (and of course in 2002 and 2003).

16. The second broad phase of consultation of the Law Officers came in 1998, as Iraqi failure to co-operate with the inspection regime became more pronounced and military action by the UK and the US became more likely. The Law Officers were consulted first in early 1998 about what became UNSCR 1154, both during and after the negotiating process. The letter of 6 March 1998 (referred to by Sir Michael Wood in his letter of 9 December 2002 to Cathy Adams) recorded the Law Officers' view that that resolution, as drafted and in its context, did not revive the authorisation to use force in UNSCR 678. Later in the year, the Law Officers were consulted about the draft which became UNSCR 1205. They agreed with FCO Legal Advisers that the authority to use force contained in UNSCR 678 had indeed been revived by that resolution. In relation to both of these UNSCRs, therefore, and in relation to the general question of the validity of the revival argument, FCO Legal Advisers had

extensive and regular discussion with the Attorney about the drafting of the resolutions, including the formulation of operative paragraphs and also the terms of the UK's Explanations of Vote. The Law Officers relied on the advice and views of FCO Legal Advisers, as regards the significance of the wording of the resolutions and the negotiating history at the UN. UKMis were not directly involved in these discussions: drafts under discussion in New York, and the Attorney's views on them, were transmitted to and fro through FCO Legal Advisers and the policy leads in FCO.

17. UNSCR 1205 seems directly relevant to the negotiation and interpretation of 1441 in two main ways.

18. The significance for the Whitehall process is that the revival argument received express endorsement from the Law Officers (and FCO Legal Advisers) in 1998. Its contours were therefore well known to UK Ministers, policymakers and lawyers in FCO and New York in 2002. The parameters set by UNSCR 1205 were the framework in which 1441 was negotiated; and progress in negotiating what became UNSCR 1441 was assessed against the text and context of UNSCR 1205. The conclusion reached by the Attorney General – that UNSCR 1441 was in some respects a significantly stronger text than UNSCR 1205 in support of the revival argument – was one I (and I think the New York team as a whole) shared.

19. Second, as regards New York and the Security Council, the negotiation of UNSCR 1205, and the UK and US interpretation of that resolution, were fresh in the memory of delegations in New York, as Sir Jeremy makes clear in his evidence. This meant that no-one around the Security Council or indeed the wider UN could reasonably have been in any doubt about what the UK and US were attempting to achieve in 2002, about the significance of references to "material breach" or about the legal argument they would derive from what became UNSCR 1441. Whatever others outside the UN have made of the revival argument, it was common currency in New York in 2002 and 2003.

20. In summary: UNSCRs 1205 and 1441 are part of the Security Council's attempts to deal with Iraq, going back to 1991. They have to be understood and interpreted in that context. And the revival argument is a key legal component of the picture. It was part of the UK's legal doctrine since 1991, endorsed explicitly by successive Law Officers and FCO Legal Advisers through until 2003. It was endorsed by the UN Legal Counsel in 1992. It was relied on by the UK, the US and France at various points during the Council's dealings with Iraq, and also endorsed by several other non-permanent members.

Whether UNSCR 1441 required a further decision of the Security Council

21. I do not think UNSCR 1441 required a further decision of the Security Council to revive the authority to use force implicit in the "material breach" finding earlier in the resolution, essentially for the reasons given by the Attorney General (in his advice of 7 March 2003; his written answer to a PQ in the House of Lords on 17 March 2003; and his evidence to the Inquiry).

My advice to Sir Jeremy Greenstock

22. Sir Jeremy knew the legal framework as well as I did, having negotiated UNSCR 1205 as well as 1441. I think we had a shared understanding of what London's instructions required and a shared assessment of what the final text meant. I did not have to offer lengthy written advice: my views were simply fed into the negotiating process, along with those of the rest of the team. At no time during the negotiation of UNSCR 1441 or the failed second resolution was there opposition to or questioning of views I expressed, and nor was I put under any pressure to advise in any particular direction (by Sir Jeremy or anyone else).

The Failed Second Resolution

Instructions

23. Instructions on what became the failed second resolution were received in the same way as instructions on what became UNSCR 1441. There were no separate instructions to me, from FCO or elsewhere, during this process. FCO Legal Advisers wrote to me in late January 2003 setting out the legal parameters for the negotiation of a second resolution and that letter was based on advice from the Attorney. UKMis was not involved in the process of seeking the Attorney's advice on this issue, and overall, the process for obtaining instructions and legal advice followed the normal pattern.

Contact with FCO Legal Advisers and the Attorney's Office during negotiation of the second resolution

24. There was more direct contact between UKMis legal section, FCO Legal Advisers and the Attorney's Office after the negotiation of UNSCR 1441 and during the negotiation of the second resolution than there had been during the negotiation of UNSCR 1441. This was to help brief the Attorney General as he prepared to advise on whether a second resolution was needed in order to authorise the use of force.

25. First, Michael Wood minuted the Head of UND in November 2002, attaching a draft letter to LSLO and specifically seeking my comments from the UKMis New York point of view. UKMis commented extensively on the draft, with the aim of ensuring that the UKMis understanding of the resolution was fully represented to the Attorney. These comments reflected the view of the whole UKMis team, not just my views. I infer that that draft became the letter of 9 December 2002 to Cathy Adams.

26. Second, I recall conversations with Cathy Adams at LSLO in the early part of 2003 in which we discussed the Attorney's developing thinking as to the meaning of resolution 1441. Sir Jeremy had been asked to meet the Attorney to ensure that he had a full picture of the negotiation of UNSCR 1441, and as I recall it, my phone calls with Cathy Adams were in that context. We no doubt discussed the legal position in general terms. I think I also suggested that the Attorney should talk to US lawyers about their understanding of the resolution, but others had no doubt made that point too.

Position of the FCO Legal Advisers and the Secretary of State

27. We in UKMis became more fully aware of the FCO Legal Advisers position on the need for a second resolution from about November 2002. The divergence of view about the meaning of UNSCR 1441 became clearer as the Attorney was consulted on the need for a second resolution and as a further resolution was sought. Like the rest of UKMis, I also became aware that the Secretary of State disagreed with the FCO legal view, but I did not personally brief or advise him on the legal issues. He may have known that the UKMis view differed from that of FCO Legal Advisers: all of the New York team had, I believe, the same understanding of the effect of UNSCR 1441. But it was always accepted that the final view on the legality of the use of force would be for the Attorney General.

Role in the negotiations and advice to Sir Jeremy Greenstock

28. As with the earlier resolution, my advice to Sir Jeremy on the draft second resolution text was fed in as the negotiations developed. The situation differed from the first resolution in several ways. First, we, and not the US, were in the lead in drafting the text. Second, the framework of the negotiation was far more fluid: we made increasingly desperate efforts to secure a text which might command support in the Council, preparing and discarding several

different models. I advised and assisted Sir Jeremy throughout that process, as did others in the UKMis team, seeking instructions from London as necessary. There was no difference of view between London and New York on the handling of the attempts to achieve a second resolution.

29. The question of whether as a matter of law there had to be a second resolution before the use of force could be authorised was not I think at the forefront of minds in UKMis during this period. It had been decided that a second resolution should be sought and all our efforts went into trying to draft and negotiate something which stood a chance of being adopted. It was in any event recognised by everyone that the final word on whether a second resolution was needed would be with the Attorney. In parallel to the negotiations, we were however engaged in the process of briefing the Attorney as he considered what his advice should be, and Sir Jeremy met the Attorney in London for that purpose.

Role in preparing the arguments for Parliament

30. The Secretary of State asked that officials should help brief the Attorney over the weekend of 15/16 March 2003 to prepare arguments and lines for Parliament the following week. I returned to London for a meeting at the Attorney's Office that Sunday. My role was to ensure that a full picture was available to the Attorney of the negotiating perspective from New York. There seems to me nothing especially odd in this. Although this was the only occasion on which I returned to London from New York, in my time in Brussels, it was very common indeed for lawyers from UKRep Brussels to return to London to attend meetings and briefings, to help ensure that the Brussels view was fully taken into account in deliberations in London.

31. My recollection is that the meeting at the Attorney's Office was attended by the Attorney, the Solicitor General (I think), David Brummell, Cathy Adams, Michael Wood, John Grainger, Professor Chris Greenwood and Patrick Davies. We worked on drafts of the Attorney's statement and supporting material.

General Comments

32. The advice on the legality of the action against Iraq has been severely criticised by some, and the revival argument dismissed out of hand. But given the pedigree of the revival argument in the UN system and in the UK (see paragraphs 18 to 20) this criticism seems unduly harsh. All the FCO lawyers involved in 2002 (and 1998) who knew the background and context thought (at least at that time) that the revival argument was a valid legal construct and it was the framework for their advice on the legality of the use of force against Iraq. It had the endorsement of successive Law Officers, the UN Legal Counsel, and senior UK practitioners and academics. Its essential elements had support from foreign ministry legal advisers in the US but also in several other countries. In the end the difference between those who thought UNSCR 1441 authorised the use of force and those who disagreed with that view is very fine, and turns on the interpretation of a few words of text.

33. Second, there is a question whether it was right to place on the Attorney General the onus of explaining the legal position publicly, so that he became perceived as the arbiter of whether the war should take place or not. The general practice on other legal issues is that the Attorney does not present the Government's legal position: that is left to the Minister with policy responsibility for the issue under discussion. That is what was done in relation to Kosovo or Iraq in 1998.

34. Third, whatever conclusions are reached about how the bureaucracy operated in this particular instance, the process for instructing UKMis on legal issues seems in theory sound. The authoritative legal advice can only be obtained in London, consulting the Law Officers as

necessary, and it has to be folded into the policy instructions which are transmitted to posts such as UKMis. If a divergence begins to emerge between what is being negotiated and London's understanding of the legal position, the onus is on those providing instructions to clarify the legal position and give clear instructions to post.

35. Finally there is an implication in some of the evidence sessions that Government legal advisers should take a different approach to legal advice depending on whether the issue is justiciable before a court or not. In my experience however Government lawyers (whether in FCO, the Home Office, the Northern Ireland Office, Treasury Solicitors or elsewhere) take their professional responsibility extremely serious at all times. They are scrupulous about the legal advice they give, and about seeking to ensure that the Government acts within the law whether the issue can be brought before a court or not. That has certainly always been my approach.

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24 June 2010