

Iraq Inquiry

Statement by the Rt Hon Lord Goldsmith QC

I am making this statement following a request from the Inquiry for further evidence from me. As requested, I have repeated the questions that I have been asked and, where it has been provided, the comment from the Inquiry which introduces and provides a context for those questions.

1. Involvement of Lord Goldsmith in advising during the negotiation and drafting of what became UNSCR 1441

Iain MacLeod and Cathy Adams both gave evidence to the Inquiry that Lord Goldsmith's involvement in advising on the negotiation and drafting of what became UNSCR 1441 was limited, and that this was in contrast both with the practice that had prevailed in 1998 in relation to UNSCRs 1154 and 1205, and later in relation to the failed Second Resolution.

Please comment further on your involvement in advising on the drafting process and successive drafts of UNSCR 1441 in the light of the evidence of Mr MacLeod and Ms Adams, and your experience of advising on subsequent UN Security Council Resolutions.

- 1.1. I have read the evidence of Cathy Adams and I am happy to agree with her recollection concerning my involvement during the period that resolution 1441 was being negotiated.
- 1.2. I was not aware in 2002/3 of the practice that prevailed in 1998 when resolutions 1154 and 1205 were negotiated. In his written evidence to the Inquiry Mr Macleod has explained that FCO Legal Advisers had extensive and regular discussion with the Attorney about the drafting of those resolutions, including the formulation of operative paragraphs and also the terms of the UK's Explanations of Vote. This was not my experience of the process concerning the negotiation of resolution 1441. While I was in fact consulted by the FCO in the early stages of the process that led to the adoption of resolution 1441, my views were not sought in the period between my meeting with the Prime Minister on 22 October 2002 and my telephone call with Jack Straw on 7 November 2002, when the text of the resolution was all but agreed. During that period, as I explain below, important changes occurred
- 1.3. I was shown an early draft of the proposed resolution on 12 September 2002. At that stage the text had not been shared with the USA. Then on 24 September 2002 Michael Wood wrote to my office with the text that was to be proposed by the USA and the UK. I met him on 27 September 2002 and gave him my views concerning a number of possible scenarios that might occur in the forthcoming negotiations. I was copied in on succeeding versions and on 14 October 2002, negotiations having now begun, I had a meeting with David Manning and Sally Morgan at which I believe I discussed the latest position. On 18 October 2002 Michael Wood sent my office the current version of the text and stated that he would be grateful for any advice that I might wish to give. I expressed my view that day to Jack Straw, and subsequently on 22 October 2002 to the Prime Minister, that the text did not authorise the use of force. After that point, though my office was kept informed of many of the developments in the negotiations, I was no longer actively consulted.
- 1.4. Preparations for the drafting of a second resolution began towards the end of January 2003. On 27 January 2003, I was asked for my advice on three different

options for achieving authority by the Security Council for the use of force. I understood that the purpose of my involvement at this stage was to inform the approach of the UK negotiators to the draft resolution prior to it forming the basis of discussions with the US. Thereafter, I was consulted on a number of occasions concerning different formulations of the text that it was intended to propose, culminating in a letter of advice from my office on 20 February 2003. Once the text was tabled and negotiations began, my involvement was limited. While my office was provided with a number of communications relating to negotiating tactics, my advice was not sought in relation to these.

Please indicate what effect you consider your greater involvement in advising on UNSCR 1441 could have had.

- 1.5. If my advice had been provided to the negotiating team at key points in the later stages of the negotiation, I think that this may well have influenced the negotiations and the statements that were made about the resolution after its adoption.
- 1.6. It is impossible to say what difference this would have made but the text did change after my meeting with the Prime Minister and my advice on it was not sought. Some of those changes were in my view significant and featured in my eventual advice. In particular in the final version, OP2 said that Iraq was being given a "final opportunity" to comply with its obligations; OP4 contained the words "for assessment"; and OP13 recalled that the Council had repeatedly said that there would be "serious consequences" as a result of Iraq's continued violation of its obligations.
- 1.7. Of those changes, the most important was to the text of what became OP4 in the final version. This provision made clear that Iraq would be in material breach if it made false statements or omissions or otherwise failed to comply with and cooperate fully in the implementation of the resolution. The wording of the paragraph stopped there at the time of my discussion with the Prime Minister on 22 October 2002, and was clear. However, the wording was complicated by the further wording, added at a late stage by the UK or US delegation, that in those circumstances there would be a report to the Security Council "for assessment". There is a manuscript reference to that amendment on a memo and enclosure from John Grainger to David Brummell of 4 November 2002, which I attach, though it is not clear when that manuscript note was made. In any event I do not believe that I saw it and there was no request to advise on the effect of the words. I feel reasonably confident that if I had been asked about those words I would have said that they were problematic and would have argued for their removal. In the event, when I came to advise on the text after it was adopted, the words became of central importance and caused me much difficulty. A lot of the discussion in my draft advice of 14 January 2003 concerned their meaning and impact.

Please indicate what the impediments were to your greater involvement in advising on UNSCR 1441

- 1.8. There were a number of difficulties that prevented me from being more actively engaged.
- 1.9. First, as Cathy Adams pointed out in her evidence [30 June, page 10], we were being sent some but not all the telegrams which were reporting on the negotiation process in New York. We were on the general distribution list but not the more restricted list which recounted some of the most critical discussions that had been taking place. I was not in fact provided with a full set of the telegrams until December 2002, some weeks after the resolution was adopted.

- 1.10. Secondly, I was not being sufficiently involved in the meetings and discussions about the resolution and the policy behind it that were taking place at Ministerial level. I made this point on a number of occasions. As the note of my telephone call with Jack Straw on 18 October 2002 records, I asked that "if there were any further meetings between the Prime Minister, the Foreign Secretary and others at which decisions on the use of force were to be made" I should be present. In my meeting with the Prime Minister on 22 October 2002 I said that it would be important for me to be kept closely informed of developments and I made clear that I was available for a further meeting with him at any time. In fact no further meetings between me and Ministers or officials of the FCO on this issue took place prior to adoption of the resolution.
- 1.11. Next, there was an inconsistent approach within government about the level of engagement that was expected from me. I was asked by the FCO on the two occasions to which I have referred, 24 September 2002 and 18 October 2002, for my advice, and I provided it, but thereafter no further requests came. Indeed, as Cathy Adams pointed out in her evidence [30 June, page 14], the FCO legal advisers were not pressing for advice before the resolution was adopted. I recall, in fact, that at some point after the meeting on 22 October 2002 Cathy Adams expressly informed me that my advice was not being sought and that documentation was being provided for my reference only.
- 1.12. Even after the adoption of the Resolution, I was expressly advised by the Foreign and Commonwealth Office, in their instructions to me of 9 December 2002 that "no advice is required now." I was told that this was the view of Jack Straw and it was repeated at the meeting I had with Jonathan Powell, David Manning and Sally Morgan on 19 December 2002.
- 1.13. It is fair to say too that there was a view within my office that I should not provide a running commentary on the drafts as they emerged. It was thought to be difficult for me to be properly engaged with the detail of the drafting during the negotiations. I was not part of the team and heard only at second hand what had been agreed, without knowing what other options had been discussed or what practical alternatives were available. It is difficult to understand the dynamics of the negotiation if one is not there. I was not part of the negotiating team and only saw what were effectively snapshots provided to me for information purposes. The view of my officials was that my role was to provide advice upon the legal effect of the final, agreed wording. To me, this seemed to be a valid position and indeed I understood it to be consistent with the role adopted by my predecessors. I must have had this in mind when I said at the meeting with the Prime Minister on 22 October 2002 that it would not be possible to give a final view on the legal effect of the resolution until it had been adopted. I went on to say that unless the Council's intent was crystal clear from the text (which seemed unlikely) it would have to be assessed in the light of all the circumstances, in particular any statements concerning the effect of the resolution made by Council members at the time of its adoption.
- 1.14. It is not impossible for an Attorney General in London to give advice throughout the process of negotiations, and clearly Jack Straw was himself engaged to a much greater degree than I was, as it seems from Iain Macleod's evidence was my predecessor in 1998. But for that to work, I would have to have been given much more information and to have been included to a far greater extent. My recollection is that the advice I was given within the office was that I would not be in a position to give a definitive view without all the materials being made available to me. That was not happening during the negotiation process itself.

In evidence to the Inquiry, Lord Goldsmith stated "some drafts [of UNSCR 1441] were being copied to my office, but not with a request that I should advise, which was slightly unsatisfactory, because it was sort of "keep you in the picture" but not actually ask you to advise".

Please clarify your evidence that you had not been asked to advise on 1441 in the light of:

- *Simon McDonald letter to David Manning (copied to David Brummell) on 27 August 2002 stating "It will be important that the draft should provide legal cover for military action without further Council action. The Attorney General's advice will be needed on this point."*

1.15. The passage from my evidence to the Inquiry which has been cited above relates to the period after negotiations on the draft resolution had begun and not to the earlier stage with which Simon McDonald was concerned in his letter of 27 August 2002. His letter attached a rudimentary outline of the terms of a possible resolution. I was shown the letter but I am sure I would have assumed that my advice was not required in relation to that text but that instead it would be sought on a more developed draft, at the request of FCO legal advisers. This did in fact occur.

- *Michael Wood letter of 24 September 2002 concluding "I would be grateful for any advice the Attorney General may wish to give on the resolution as currently drafted, or on any of the possible outcomes mentioned above."*

1.16. This is the request for advice to which I have just referred. I was asked by Michael Wood on 24 September 2002 for advice on the text that was to be put forward by the US Government and the UK to the other members of the P5, and I gave that advice to him at a meeting on 27 September 2002. I gave him my view of the text and what would be necessary to achieve our objectives in the various different scenarios that he posed. The text at that stage provided that failure by Iraq at any time to comply and cooperate fully with the provisions of the draft resolution would constitute a further material breach and that such breach authorised member states to use all necessary means to restore international order. I believe I said that if the draft resolution were adopted with the proposed wording it would constitute a clear statement by the Security Council that member states were authorised to take measures, including the use of force, against Iraq in the event of a breach by Iraq of the terms of the resolution. I believe that I went on to say though that use of force would have to be directed towards securing compliance with Iraq's disarmament obligations and any force would have to be a necessary and proportionate response to the breach of the resolution.

- *Michael Wood letter of 18 October 2002 concluding "We would be grateful for any advice which the Attorney General may wish to give on the resolution as currently drafted and would, as ever, be happy to come over and discuss the matter."*

1.17. When I gave my evidence to the Inquiry, I had inadvertently forgotten that Michael Wood had written to me on 18 October 2002. It may be that his letter prompted my telephone call to Jack Straw, but I can no longer recall. It appears that this was the only occasion during the negotiation process when a request for advice was made, as I have explained. From examining the files, it seems that my office did not formally reply to this letter. Instead I gave advice that day to Jack Straw and then the following week to the Prime Minister, as I have stated.

2. Lord Goldsmith's discussions with Jonathan Powell on 17 October 2002 and with Jack Straw on 18 October 2002

Since Lord Goldsmith gave evidence, the Government has declassified notes of his telephone conversation with Jack Straw on 18 October 2002 that record inter alia that Lord Goldsmith was concerned by reports of conversations between the Prime Minister and the US President; that he considered that the draft resolution did not authorise the use of force without a further resolution; that he was very troubled by the way things were going; that he may need to send a further note of advice.

What were the nature of your concerns at this time?

- 2.1. I had two concerns at the time.
- 2.2. The first concerned the effect of the then current draft of the resolution, which had been sent to me on the day that I had the conversation with Jack Straw on 18th October and which was subsequently to change. Though as the note of that conversation records, I had not had an opportunity to consider the draft in detail, my view was that the draft was not sufficient as it stood to authorise the use of force, for the reasons that I gave.
- 2.3. This in turn led to my second concern, which had prompted my telephone call to Jack Straw. I had learned that the Prime Minister had indicated to President Bush that he would join the USA in acting without a second Security Council decision if Iraq failed to take the action that was required by the draft resolution. I thought that such action by the UK would be unlawful and I felt strongly that there had to be recognition within government of the constraints under which we were acting, and we should not lead the US to believe that we would take action which in my view would be unlawful. I knew too that if we boxed ourselves into a corner that would make my task when I came to advise on the effect of the resolution more difficult.
- 2.4. I believe that I made this position clear in my telephone conversation with Jack Straw on 18 October. The note of this conversation states at paragraph 4:

"The Attorney replied that he understood and endorsed the politics behind the Government's approach. It was obviously important to get Bush on side behind a UN resolution. He was not concerned about what Ministers said externally, up to a point. The Government must, however, not fall into the trap of believing that it was in a position to take action which it could not take. Nor must HMG promise the US Government that it can do things which the Attorney considers to be unlawful. The Foreign Secretary commented that he believed that Colin Powell understood the legal position."

Do the notes accurately reflect the terms in which you expressed those concerns?

- 2.5. Yes, as far as I can recall.

What was the response of Jonathan Powell in your conversation with him on 17 October, referred to in this Note?

- 2.6. The note made by Cathy Adams is the only record I have seen of my conversation with Jonathan Powell. I do not remember any further response from him other than what is recorded there.

What was the response of the Foreign Secretary?

- 2.7. Jack Straw persuaded me not to provide a note of advice reflecting my concerns until I had seen Prime Minister. The note of my telephone conversation with him reflects that position and his reasoning. A meeting with the Prime Minister did in fact take place 4 days later.

Were you dissuaded from recording your concerns in writing at this time? If so, by whom? Why did you not provide written advice at this time?

- 2.8. As I have explained, Jack Straw persuaded me not to write at that stage. The reason that he gave was that there might be circumstances in which we could proceed without a second resolution, for instance if Russia exercised a veto unreasonably. Though I was not persuaded by that example (I have never thought that the concept of an unreasonable veto has any application in international law) it did make sense to have a discussion with the Prime Minister and listen to his views before putting my advice in writing. As the Inquiry will be aware, that did happen. The meeting took place on 22 October 2002, and David Brummell, on my instructions, confirmed in writing the following day the advice that I had given at the meeting.

Did you feel that the response to your concerns was appropriate?

- 2.9. Yes. I felt that Jack Straw shared my commitment to the position that the UK would only act in accordance with international law. It was entirely appropriate that he should express his views as to the legality of action in particular circumstances, even if he and I did not agree. As I have explained, I was also content not to write at that stage for the reasons that I have given.

Given that it was a major UK objective as set out in the letter from Simon McDonald referred to above, that this resolution should authorise force without the need for a further resolution, and that your advice was that the draft resolution did not achieve that, did you offer any advice on what would have been necessary to achieve the UK's policy objectives?

- 2.10. Following the meeting with the Prime Minister on 22 October 2002 there was no occasion prior to the adoption of the resolution on which my advice was sought or given on the developing drafts of the text. I have said earlier in this statement that much of the later difficulties could have been avoided if my view had been sought on the drafts that were developed during the later stages of the negotiations, particularly bearing in mind the fact that I had not been persuaded that the early drafts achieved our objectives. I have also summarised the difficulties that prevented me being more actively engaged in giving advice.
- 2.11. I had however given advice at an earlier stage as to what was required:
- 2.12. (a) In my advice of 30 July 2002, in which I had advocated the need for a fresh resolution, I also went on to say that the resolution should involve a new determination of a material and flagrant breach. That advice was accepted and was reflected in OP1 of resolution 1441, and drafts of that resolution.
- 2.13. (b) Following my advice of 30 July, I recall that there were discussions, though I do not remember when, about the effect of imposing further requirements on Iraq as a consequence of its material breach. I expressed the view that it would be possible for the Security Council to predetermine that a particular set of circumstances would amount to a further material breach, though I cannot now recall whether that idea

originated with me. This idea was reflected in the framework of what became resolution 1441.

- 2.14. (c) When a draft of the resolution was ready to be put forward by the US and the UK to other members of the P5, it was sent to me by Michael Wood together with his letter of 24 September 2002. As I have said earlier in this statement, at a subsequent meeting on 27 September 2002 I gave him my view of the text and what would be necessary to achieve our objectives in the various different scenarios that he posed.
- 2.15. Prior to the specific consideration that we gave to the draft resolution I did also consider and advise on alternative means of achieving our objectives. I considered the case for intervention on humanitarian grounds or for use of force through self defence, in my advice of 30 July 2002, and I met John Scarlett in September 2002 in order to examine whether there was any imminent threat of attack by Iraq. On each of these occasions I concluded that the grounds were not made out.

3. Lord Goldsmith's meeting with the Prime Minister on 22 October 2002

The Inquiry has seen a briefing note from your office in advance of this meeting, with your manuscript notes for that meeting. The Inquiry has also seen David Brummell's letter to David Manning of 23 October 2002 describing your advice during that meeting, and a note of a discussion between you and Jonathan Powell on 25 October 2002 concerning that note.

Were your manuscript notes written as a speaking note in advance of the meeting or as a record of what was said in the meeting?

- 3.1. The manuscript notes were made by me prior to the meeting, as an aide memoire of the points that I wished to make. As it happened, we also discussed the legal effect of one of the other P5 members exercising a veto unreasonably.

What did you say to the Prime Minister at that meeting? What was his response?

- 3.2. The letter sent the following day by David Brummell on my behalf accurately records a summary of the conversation that I had with the Prime Minister. I approved it.

Did you feel the need to express your view in writing?

- 3.3. Yes. I felt that there should be a record of the advice that I had offered. That is why I asked David Brummell to send his letter of 23 October 2002.

What was your understanding of the purpose of Jonathan Powell's telephone call? What was your response to it?

- 3.4. Mr Powell was concerned to make the point that No 10 did not expect records of meetings to be made by other departments, especially from people who were not at those meetings. No 10 would provide the record. Furthermore, he commented that David Brummell's letter was a commentary on a draft of the resolution which no longer existed.

- 3.5. I cannot remember now what I said in response to Jonathan Powell, and his note of the conversation does not record my response. I did talk to David Brummell about the issue and he confirmed that No 10 always liked to keep the records of such meetings and that was how they worked. The fact is though that if I had not recorded

my advice through the means of the letter that was sent to No 10, I would have ensured that the same result was achieved by other means, i.e. through written advice in a note to No 10.

3.6. **The draft Resolution then in contemplation changed after this meeting before it was adopted. What, if any, impact did the changes to the resolution have on the nature of the concerns you had raised in relation to the previous draft?**

3.7. By the time of the telephone call from Jonathan Powell referred to in the previous question, the numbering of the resolution had changed. In particular OP1bis became OP4. There were also changes to the detail of the obligations imposed on Iraq in succeeding paragraphs. These changes caused Jonathan Powell to say that by the time David Brummell wrote his letter, the draft on which I had commented no longer existed. But none of these immediate changes affected the concerns that I raised. At a later stage, further changes were made which I have summarised earlier in this statement. Those changes were significant, and are discussed in detail in my advice of 7 March 2003.

In evidence to the Inquiry in relation to the period before the adoption of UNSCR 1441 you stated that you did not think you needed to put your views in writing at that stage, and that until there was a final resolution, there was not really anything further you could say. Is there anything you would like to add to your evidence in the light of the further documents listed above which the Inquiry is now asking should be declassified?

3.8. Yes. I did think it important to record the views that I had expressed at the meeting, and did so through the letter sent by David Brummell. That letter also records that a final view on the effect of the resolution could not be given until it had been adopted. It would then have to be assessed in the light of all the circumstances, in particular any statement concerning the effect of the resolution made by Council members at the time of its adoption. It was that passage of the letter that I had in mind in giving my evidence to the Inquiry that until there was a final resolution there wasn't anything more to say. I did qualify that though by saying that I was expressing concerns about the current draft of the resolution. Of course, as I told the tribunal when giving oral evidence, when I did come to consider the advice that I would give, I came to the view that it was important for me to understand thoroughly the negotiating history. I did not have full information concerning that until I had seen all the telegrams and until I had spoken to Jack Straw, Jeremy Greenstock, and those who were involved in the negotiations from the US side.

4. Unreasonable veto

In your meeting with the Prime Minister on 22 October 2002, he asked for your view on the position if, following a flagrant violation by Iraq, one of the other P5 members unreasonably vetoed a second resolution intended to authorise the use of force. In David Brummell's letter of 23 October he notes that you had advised that it was not easy to see how there would be room for arguing that a condition of reasonableness could be implied as a precondition for the lawful exercise of a veto, but that you would give it further consideration. On 5 November you met Michael Wood and John Grainger to discuss the use and effect of the veto. We are unable to find any record of your written advice to the Prime Minister before the draft advice of 14 January 2003, when you advised that you did not believe that there was room for arguing that a condition of reasonableness could be implied, and that if one of the P5 were to veto a further Council decision, there would be no Council authorisation for military action.

Did you provide oral or written advice to the Prime Minister on “unreasonable veto” before 14 January?

- 4.1. As you have noted, I provided oral advice at the meeting I had with the Prime Minister on 22 October 2002, and I confirmed that advice through David Brummell's letter of 23 October 2002. I did not provide any further advice before 14 January 2003.

If not, why did it take so long to advise on this point?

- 4.2. The issue was not an isolated one, but was one aspect of the legal advice that was to be given concerning the effect of Resolution 1441. If the resolution provided authority for the use of force without the need for a second resolution, then no issue around use of the veto arose. As I have explained in my evidence, I was being discouraged from providing my advice. In my telephone call with Jonathan Powell on 11 November 2002 I suggested that it was desirable that I advised on the legal effect of Resolution 1441 immediately, but I was told that as it was most unlikely that Iraq would not in the first instance accept Resolution 1441, this was “an issue for consideration in the longer term” (David Brummell note of telephone conversation with Jonathan Powell, Monday 11th November 2002). Mr Powell suggested a meeting some time before Christmas to discuss this further. We then met once more, on 19 December 2002, and discussed the response of Iraq to Resolution 1441 and a number of factual scenarios that could develop. I was told that I “was not being called on to give advice at this stage” but it might be helpful to discuss a legal advice paper in draft with the Prime Minister (David Brummell note of meeting at No.10, 19 December 2002). That was the context in which my draft advice of 14 January 2003 was written which dealt with the whole topic, including the issue of unreasonable veto.

- 4.3. In any event, though, I do not think that there was any doubt about my view. I had been clear at the meeting with the Prime Minister on 22 October 2002, and I provided a written record of my view, in David Brummell's letter of 23 October 2002. Although I said that I would consider the issue further, the sense that I conveyed was that I would look at the issue again to see if anything changed my mind. To that end, I did have a discussion with John Grainger and Michael Wood on 5 November 2002, and asked for further information regarding the legal effect of a P5 veto, which was provided, but after this further consideration my view remained the same. If I had reached a different view, I am sure that I would have made this known, but I didn't. I decided therefore to wrap the issue up with my advice on the whole question, which I did in my draft advice of 14 January 2003.

You had agreed to provide a draft advice on the question of whether a second resolution was necessary. Was your advice in relation to the question of “unreasonable veto” draft or definitive?

- 4.4. In one sense the whole of the advice of 14 January 2003 was draft, but I was clear on this part of it and that must have been understood by the Prime Minister.

Was the status of this part of your advice sufficiently clear to the Prime Minister?

- 4.5. I believe so.

On 15 January 2003 the Prime Minister said in the House of Commons: “We have said that a second UN resolution is preferable, because it is far better that the UN come together. We have also said that there are circumstances in which a UN

resolution is not necessary, because it is necessary to be able to say in circumstances where an unreasonable veto is put down that we would still act. That is the position that the Government have set out throughout, and it is the position that remains." On 6 February 2003 the Prime Minister told Jeremy Paxman on Newsnight: "If the inspectors do report that they can't do their work properly because Iraq is not co-operating there's no doubt that under the terms of the existing UNSCR that that is a breach of the Resolution. In those circumstances there should be a further resolution. If, however, a country were to issue a veto, because there has to be unanimity amongst the Permanent Members of the Security Council, if a country unreasonably in those circumstances put down a veto then I would consider action outside of that."

Do you consider that the Prime Minister's words were compatible with the advice you had given him?

4.6. No

Were you aware at the time that he had made these statements? If so, what was your view on them at the time? What if anything did you do?

4.7. I became aware at some stage of the statements that the Prime Minister made, though I cannot recall precisely when. I was uncomfortable about them, and I believe that I discussed my concerns with Jack Straw and my own staff, though I can find no record of a formal note of any such conversations. I understood entirely the need to make public statements which left Saddam Hussein in no doubt about our firmness of purpose. It was more likely that he would cooperate if he thought that there was a real likelihood of conflict. My concern was that we should not box ourselves in by the public statements that were made, and create a situation which might then have to be unravelled.

5. Your request to the Prime Minister

In your advice to the Prime Minister of 7 March 2003, you stated at paragraph 9: "Law Officers have advised in the past that, provided the conditions are made out, the revival argument does provide a sufficient justification in international law for the use of force against Iraq...However, the UK has consistently taken the view...that as the ceasefire conditions were set by the Security Council in resolution 687, it is for the Council to assess whether any such breach of those obligations has occurred. The US have a rather different view: they maintain that the fact of whether Iraq is in breach is a matter of objective fact which may therefore be assessed by individual Member States. I am not aware of any other state which supports this view. This is an issue of critical importance when considering the effect of resolution 1441." At paragraph 29 of the advice you said to the Prime Minister "you will need to consider extremely carefully whether the evidence of non-cooperation and non compliance by Iraq is sufficiently compelling to justify the conclusion that Iraq has failed to take its final opportunity." In David Brummell's letter to Matthew Rycroft dated 14 March 2003, he wrote "The Attorney General understands that it is unequivocally the Prime Minister's view that Iraq has committed further material breaches as specified in paragraph 4 of resolution 1441, but as this is a judgment for the Prime Minister, the Attorney would be grateful for confirmation that this is the case."

What were you asking the Prime Minister to confirm?

5.1. I was asking the Prime Minister to confirm that Iraq had submitted false statements or omissions in its declarations submitted pursuant to the resolution and had failed to

comply with and cooperate fully in the implementation of resolution 687 so that the authority to use force under resolution 678 revived.

Was it your view that the Prime Minister could decide whether Iraq was in further material breach of Resolution 1441?

5.2. No

How does this sit with the position expressed in your advice that the UK had consistently taken the view that as the ceasefire conditions were set by the Security Council in 687, it was for the Council to assess whether any breach had occurred?

5.3. Only the Security Council could decide whether or not a particular failure or set of failures by Iraq to meet an obligation imposed by the Security Council resolution had the quality of being a "material breach" of resolution 687.

5.4. Resolution 1441 contained two such determinations of material breach. The first determination was set out in OP1 of the resolution: "Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687 (1991), in particular through Iraq's failure to cooperate with United Nations inspectors and the IAEA, and to complete the actions required under paragraphs 8 to 13 of resolution 687 (1991)".

5.5. The second determination was in OP4. The background was that the Security Council had decided by OP2 to afford Iraq a final opportunity to comply with its disarmament obligations. It then said, in OP3, that to begin to comply with those obligations, Iraq should submit within 30 days a currently accurate, full and complete declaration of all aspects of its programmes to develop chemical, biological, and nuclear weapons, ballistic missiles and other delivery systems. OP 4 then stated that the Council:

"Decides that false statements or omissions in the declarations submitted by Iraq pursuant to this resolution and failure by Iraq at any time to comply with, and fully cooperate in the implementation of, this resolution shall constitute a further material breach of Iraq's obligations and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below".

5.6. OP4 thus constituted a determination in advance that if the particular set of circumstances specified in it arose, so that Iraq failed to take the final opportunity it had been given, that would constitute a further material breach.

5.7. The resolution therefore constituted authority for the use of force provided that such a factual situation had occurred, namely that Iraq had failed to comply with and cooperate fully in the implementation of the resolution. In that event a Council discussion would need to take place. I had concluded that in any such Council discussion the assessment contemplated by OP4 was not an assessment of the quality of the breaches, since the Council had already resolved that any failure on Iraq's part would constitute a material breach, but rather an assessment of the situation as a result of those breaches having occurred (see the discussion of this issue at paragraphs 17 to 20 of my advice of 7 March 2003). Accordingly, the Council did not need to conclude that breaches had taken place (though I believe that at the discussion no member of the Security Council took the view that they had not occurred). Nonetheless the authorisation in resolution 678 could not revive unless in fact breaches had occurred. We needed therefore to be satisfied that this factual situation existed, and to be in a position if necessary to justify that to a court.

That was why I said in paragraph 29 that there would have to be strong factual grounds for concluding that Iraq had failed to take the final opportunity. As I explained in giving my oral evidence (page 168) this was an issue on which I wanted the Prime Minister consciously and deliberately to focus, hence my request for written confirmation that he had reached this view.

If the Security Council made no determination of further material breach, but the Prime Minister did determine that there had been a further material breach, what legal effect would that have in relation to the use of force?

- 5.8. If the Security Council had made no determination in advance that a further material breach would arise if the particular set of circumstances in OP4 took place, then force could not have been used lawfully. My advice of 7 March 2003 proceeded entirely on that basis since I had ruled out self-defence and humanitarian intervention as grounds for the use of force in this instance.

6. A reasonable case

In your evidence to the Inquiry you said "it is very clear that the precedent in the United Kingdom was that a reasonable case was a sufficient lawful basis for taking military action...I checked this at the time because this is what I had been told by my officials – it was the basis for the action in Kosovo, it was also the basis for the action in 1998...as a matter of precedent it was standard practice to use the reasonable case basis for deciding on the lawfulness of military action."

The Law Officers' advices we have seen on use of force in relation to Iraq and Kosovo all refer to "a respectable legal argument" that force is justifiable.

Is there any significant difference between "a reasonable case" and "a respectable argument"?

- 6.1. I prefer the formulation "reasonable case" though I treated the formulation "respectable case" as amounting to the same test in practice in relation to this issue (and certainly not a higher test). When I gave evidence, I defined what I meant by a "reasonable case". I said [p.97] that it is a case that you would be content to argue in court with a reasonable prospect of success. That is the approach that I thought previous Law Officers would have taken and it is the approach that I took in this instance.

In your advice of 7 March 2003 you stated that "a reasonable case does not mean that if the matter ever came before a court, I would be confident that the court would agree with that view". In evidence you stated that "I thought I had given the green light in February, I was following precedent in giving the green light again [on 7 March], and I thought, therefore, the issue was closed, and therefore, if, politically, the decision was taken wherever it needed to be taken in the United Kingdom, and no doubt the United States, about military action, then that would be it."

Did you consider, at the time you gave the advice, that your oral advice of 27 February, and your written advice of 7 March 2003, constituted a "green light" for military action?

- 6.2. Yes.

How does your characterisation of the 7 March advice as a "green light" sit with your explanation that "a reasonable case does not mean that if the matter came before a court you would be confident that the court would agree"?

- 6.3. I was relying at this point on the precedent established in previous cases that a reasonable or respectable case was sufficient. Precedent in the Law Officers' department is commonly followed. However I was careful to explain what I meant by the phrase "reasonable case" and to highlight in my advice all the difficulties in interpreting the effect of the resolution. As the tribunal knows, however, having delivered my advice of 7 March 2003, I continued to reflect on the position and on 13 March 2003 concluded that the better view was that there was a lawful basis for the use of force without a further resolution

How does your characterisation of the 7 March advice as a "green light" sit with the number of difficulties with the argument that no further Security Council determination is needed which you identify in that advice but do not resolve?

- 6.4. I was well aware of the contrary arguments and had set them out in detail in my advice. They could not be resolved because the language of the resolution lacked clarity and the statements made on adoption revealed differences of view within the Council over the legal effect of the resolution. The issue for me therefore was to consider whether the argument that the resolution authorised the use of force was of sufficient weight to reach the threshold of certainty that my predecessors had concluded was necessary. I concluded that it was and I knew that therefore I was giving a "green light".

How does your view that a "reasonable case" is sufficient to decide on the lawfulness of military action reflect the framework of the UN Charter and the prohibition on the use of force except in self-defence or where clearly authorised by the Security Council in the circumstances set out in Chapter VII?

- 6.5. A "clear" or "certain" basis for use of force will always be preferable to a "reasonable" or "respectable" one. That is why I argued in my advice of 7 March 2003 that the safest legal course would be to secure the adoption of a further resolution to authorise the use of force, though to achieve the intended effect it did not need to be explicit in its terms. If we had achieved the second resolution that would have provided more certainty - although even then it is still likely to have been in terms relying on the revival of original 1990/91 authorisation which would not have satisfied all international lawyers. We had however previously engaged in the use of force on the basis of a reasonable or respectable case that action is authorised by a UNSCR or self defence or humanitarian intervention and my understanding was and is that this is a sufficient basis. As noted above, however, and as the Inquiry knows, having delivered my advice of 7 March 2003, I continued to reflect on the position and on 13 March 2003 concluded that the better view was that there was a lawful basis for the use of force without a further resolution.

7. Meeting with the Prime Minister on 11 March 2003

The Inquiry has seen a note made by No10 staff in advance of your meeting with the Prime Minister, Chief of Defence Staff and others that records that you and the Prime Minister had discussed the legality of the use of military force before the meeting with the other attendees. It is not clear whether the discussion took place on the telephone or in person, and there is no note of the content of the discussion.

What discussion did you have the Prime Minister on 11 March 2003 before the meeting with the Chief of Defence Staff and others?

- 7.1. I have checked my diary and see that I had a meeting with the Prime Minister at 9.30 am on 11 March 2003. I cannot recall the detail of the discussion that I had with

the Prime Minister, but this would have been my first meeting with him since I had submitted my advice of 7 March 2003. I expect that I would have gone over the main points of my advice with him.

8. The US "Red Line"

Lord Goldsmith told the Inquiry in evidence that the strongly held position of the US, as reported to him by the US lawyers, was central to his decision that no further resolution beyond 1441 was required to authorise the use of force: "It was frankly quite hard to believe, given what I had been told about the one red line that President Bush had, that all these experienced lawyers and negotiators in the United States could actually have stumbled into doing the one thing that they had been told mustn't happen...a red line means a red line. It was the only one I was told that mattered. They didn't mind what else went into the resolution, so long as it did not provide a veto, and if it required a decision then one of the Security Council members, perhaps the French, could then have vetoed action by the United States, which, up to that point, they believed they could take in any event."

Please explain your considerations on the point that the US had preserved its red line by avoiding any limitation within resolution 1441 on what they believed to be a pre-existing authority to use force, and what relevance that had as regards the different UK position that UNSCR 678 and 687 alone were not sufficient to revive the authority to use force.

- 8.1. I dealt with this question in paragraph 22 of my advice of 7 March 2003, which, for ease of reference, I set out below:

"22. The principal argument in favour of the view that no further decision is required to authorise force in these circumstances is that the language of OP12 (ie "consider") was chosen deliberately to indicate the need for a further discussion, but not a decision.

As I have indicated, it is contended that this interpretation is supported by the negotiating history. The French and Russians both made proposals to amend OP12 to include an express requirement for a further decision, but these proposals were not accepted. The US Administration insist that they made clear throughout that they would not accept a text which subjected the use of force to a further Council decision.

The French (and others) therefore knew what they were voting for. The US are confident that in accepting OPs 4 and 12, they were conceding a Council discussion and no more. The US, of course, approached the negotiation of resolution 1441 from a different starting point because, as I explained in paragraph 9 above, they have always taken the view that "material breach" is a matter of objective fact and does not require a Security Council determination. (By contrast, the UK position taken on the advice of successive Law Officers, has been that it is for the Security Council to determine the existence of a material breach of the ceasefire.)

Therefore, while the US objective was to ensure that the resolution did not constrain the right of action which they believed they already had, our objective was to secure a sufficient authorisation from the Council in the absence of which we would have had no right to act. I have considered whether this difference in the underlying legal view means that the effect of the resolution might be different for the US than for the UK, but I have concluded that it does not affect the position.

If OP12 of the resolution, properly interpreted, were to mean that a further Council decision was required before force was authorised, this would constrain the US just

as much as the UK. It was therefore an essential negotiating point for the US that the resolution should not concede the need for a second resolution. They are convinced that they succeeded."

- 8.2. Accordingly, although the starting point for the US and ourselves was different, we both attached the same importance to the true construction of OP 12 since once the US agreed to Resolution 1441, they would be as bound by it as anyone else. The Americans wished to avoid a constraint which in their view they did not have before resolution 1441 was passed.

9. UNSCR 1441

Did you ever consider or advise whether UNSCR 1441 could have acted as a *de novo* authorisation for the use of force, rather than as a necessary final step to revive the authorisation in UNSCR 678?

- 9.1. No. There is a very short reference to the possibility of a free standing authorisation in paragraph 25 of Michael Wood's letter of 9 December, where he describes "the first view is that SCR 1441, taken as a whole, *does not itself authorise the use of force*, or revive the authorisation to use force given in resolution 678 (1990)." This is the only reference of which I am aware to the possibility ever being considered. I did not consider it necessary to deal with the point in my advice, since I was clear that authorisation for the use of force depended on the authorisation in resolution 678 being revived.

10. Joint Responsibility for Actions of the Coalition as Occupying Powers

Legal advice from FCO and AGO seems to indicate that before UNSCR 1483, the UK had responsibility only for that part of Iraq which it physically occupied and over which it exercised authority (under Hague Regs Art 42). After UNSCR 1483 your advice appears to be that the UK had joint responsibility for the actions of the Coalition throughout Iraq.

Is this your understanding of the effect of UNSCR 1483?

- 10.1. Yes

Was this understood and accepted by Ministers at the time that UNSCR 1483 was negotiated and adopted?

- 10.2 I am not in a position to say since I was not involved in any Ministerial meetings reporting on the negotiations. However, I believe that it was generally understood that one reason for wishing to have a MOU with the US was to make plain that the UK was responsible as an Occupying Power only for the sectors that it occupied in fact.

11. May 2002 Meeting with Will Taft-

In evidence to the Inquiry, Lord Goldsmith indicated that, although he had been briefed in advance of the meeting on use of force issues, there was no detailed discussion of legal principles in that meeting. A note of that meeting by Michael Wood to the British Embassy in Washington, dated 30 May 2002 and copied to LSLO, records "The meeting lasted about an hour, and consisted entirely of an informal discussion, between lawyers, on legal aspects of the use of force. Will Taft explained his approach and current thinking towards the legal aspects of using force against Iraq." A letter from Lord Goldsmith to Jack Straw on 18 June 2002 entitled

Britain and the United States records "I recently had a useful meeting with Will Taft, the Legal Adviser to the State Department, in which we discussed possible use of force issues in relation to Iraq."

Can you confirm that these documents provide an accurate record of the meeting; and is there anything you would like to add to your previous evidence now that they have been brought to your attention?

11.1. My recollection remains that we had a fairly general discussion, with no detailed exchange of views or real debate and that we did not discuss the different approaches of our countries to the question whether an individual country could decide in the context of the revival argument that there had been a material breach. I doubt that it would be right to say that our discussion "entirely" consisted of a discussion even informal on the legal aspects of the use of force. We had not met before and I recall that some discussion of our respective roles took place for example. We may also have discussed issues relating to the use of force in targeting decisions. This was however over eight years ago and no detailed note of the meeting appears to have been made so I have had no opportunity to refresh my memory. What does seem clear though is that nothing that was said by Mr Taft added to our understanding of the US position, nor did our discussion do anything to bridge the gap between us on this issue.

12. Any further evidence you would like to add to the issues addressed in your evidence of 27 January 2010, or the matters raised above?

12.1. I have nothing further to add.

Signed:

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Dated:

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