IRAQ INQUIRY

Third Statement by Sir Michael Wood

The present statement is provided in response to a request from the Inquiry setting out particular areas on which it would welcome further evidence. It begins with some general points regarding the negotiation of Security Council resolution (SCR) 1441, which are explained in more detail below in response to specific questions.

First, it was not clear to me that the negotiators of SCR 1441 were under instructions that the resolution itself had to authorize the use of force without a further decision of the Security Council. That may have been a desirable objective, but it was not, so far as I was aware, a United Kingdom 'red line'.

Second, FCO legal advisers kept the Attorney General informed both as to the course of the negotiations, and as to the advice we were giving on the draft as it developed. This was both to ensure that he could question our advice if he disagreed with it, and to ensure that he was in a position to give advice to Ministers and to the negotiators at any time, either on request or as he saw fit, whether or not his advice was formally sought.

Third, the negotiation of SCR 1441 was wholly exceptional, with Washington firmly in the lead and key negotiations taking place directly between foreign ministers, and often on the telephone. The negotiating process was quite different from that for other SCRs, such as SCRs 1154, 1205, the 'second' resolution in early 2003, and subsequent resolutions on Iraq adopted in 2003/04.

Fourth, the Legal Counsellor and First Secretary (Legal) posted to UKMis New York, like all other members of UKMis, work for and report to the UK Permanent Representative to the UN. This they must do if they are to operate effectively as members of the New York team. The work of a legal adviser overseas is quite different from that of a lawyer in London, having large policy and representational elements, albeit with a high legal content. While it is important that the links between an overseas legal adviser and the FCO legal advisers be maintained, it would not be appropriate for the Legal Counsellor or Legal Adviser (First Secretary) at UKMis New York to report directly to, and effectively work under, the FCO Legal Adviser in London.

1. Advice of Carl-August Fleischhauer

The Inquiry is aware of the advice of Carl-August Fleischhauer, Legal Counsel to the Secretary General of the UN, given in August 1992 on the Authorisation to Use Force Against Iraq. The advice, as explained in a lecture given by his then Deputy Ralph Zacklin, takes the position that the authorisation to use force in UNSCR 678 is capable of being revived and

identifies the precondition that the Security Council is in agreement that there is a violation of the ceasefire, and that the Security Council considers the violation sufficiently serious to destroy the basis of the ceasefire.

a) Were you aware of the Fleischhauer advice in 2002/2003?

Yes. I was fully aware of the UN Legal Counsel's advice[1] in 2002/2003. I was already aware of the advice in the early 1990s, probably at the time of Presidential statements following the serious incidents of 8 and 11 January 1993, when I was Legal Counsellor at the UK Mission to the United Nations in New York.[2]

b) In your view, what status in international law does the advice have?

The Secretary-General has been described as 'the guardian of the Charter'.[3] Dr. Fleischhauer's advice may be viewed as an element in United Nations practice (just as a national legal adviser's advice may be an element of State practice).

That apart, advice such as this does not, in my view, have any particular 'status' in international law.[4] The advice in question was of course significant, since it recorded the considered legal position of the Legal Adviser to the United Nations on the effect of acts of a principal organ of the United Nations. Dr Fleischhauer was, moreover, an experienced and distinguished public

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[1] The substance of Dr. Fleischhauer's advice was subsequently made public in Ralph Zacklin's Hersch Lauterpacht Memorial Lectures of January 2008, and is now reproduced in the book based on those lectures: R. Zacklin, *The United Nations Secretariat and the Use of Force in a Unipolar World: Power v. Principle* (Cambridge University Press, 2010). The Fleischhauer advice is described at pp. 18-20, and its application discussed at pp. 20-22 and 145-146.

[2] There was a further legal opinion of the Legal Counsel, in January 1993, which concluded that the Presidential statements of 8 and 13 January 1993 made it clear on balance that the serious consequences included all necessary means (see Zacklin, *loc. cit* at n.1 above). As Zacklin goes on to note, the semi-official 1996 'Blue Book' cited the Presidential statements as the basis for the airstrikes (*The United Nations and the Iraq-Kuwait Conflict 1990-1996* (1996) XI): *ibid.*, pp. 20-22.

[3] In his Foreword to the Zacklin book at n.1 above, former Secretary-General Kofi Annan wrote: "in the eyes of the public at large and in the view of the Secretariat, the Secretary-General is the guardian of the Charter and the principles it enunciates and represents.": *ibid*, p. xii. For a general indication of the role of legal opinions of the UN Office of Legal Affairs, see Zacklin, *ibid.*, pp. 4-6.

[4] Zacklin, referring to an opinion of the UN Legal Counsel on SCR 688, says "[t]his legal opinion was not, and did not purport to be, an authoritative interpretation of the resolution and had no binding effect on Member States as regards their own conduct.": *loc. cit.* at n. 1 above, p. 15. Later, discussing the no-fly zones, he records that "when pressed he [the Secretary-General] or his spokesman would state that the interpretation of Security Council resolutions was a matter for the Council which alone was competent to determine whether its resolution provided a lawful basis for the zones." (*ibid.*, p. 16)

international lawyer, who later served as a judge of the International Court of Justice.[5] By 1992, he had been UN Legal Counsel for about 10 years. He had previously been for many years the Legal Adviser to the Foreign Office of the Federal Republic of Germany. His opinion on this matter carried considerable weight.

Mr. Ralph Zacklin, who was the Deputy Legal Counsel throughout the relevant period, has described the legal status of the 1992 Fleischhauer opinion as follows:

> "The legal opinions of August 1992 and January 1993 did not constitute authoritative interpretations of Security Council resolutions but they had considerable significance in terms of the Secretariat's interpretation of the inter-play of the decisions to authorize use of force and the establishment of the cease-fire. They came to be seen, even in 1993, as the basis for the argument that a resumption of the use of force could not be automatic. Not everyone agreed, and the United States in particular did not share the interpretation, but many Council members did."[6]

c) What relevance do you consider it has to the basis on which the UK relied in using military force in March 2003?

The Fleischhauer advice adopted the 'revival' argument in essentially the same terms as those adopted by successive British Attorneys General. Like them, Dr Fleischhauer took the position that the authorisation to use force in SCR 678 was capable of being revived and identified the precondition that the Security Council must agree that there was a violation by Iraq of its obligations under SCR 687 sufficiently serious to withdraw the basis for the ceasefire and reopen the way to a renewed use of force. The important thing was that there needed to be an institutional finding of the Security Council acting as a collective organ. The assessment could not under any circumstances be left to individual Member States.[7]

My recollection is that already in the early 1990s, British Government lawyers had come to essentially the same view as regards the 'revival' argument, including on the key precondition. Knowledge of the Fleischhauer advice was important in so far as it confirmed our view of the 'revival' argument.

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[5] See G. Burci, N. Schrijver, "Carl-August Fleischhauer: His Life and Work", 19 *Leiden Journal of International Law* 693-698 (2006).

[6] R. Zacklin, *The United Nations Secretariat and the Use of Force in a Unipolar World: Power v. Principle* (2010), p. 22.

[7] This follows the language used by Zacklin in describing the opinion, *ibid.*, pp. 19-20. At p. 146 he puts it perhaps even more clearly: for the authorization to use force in SCR 678 to revive "two steps would be necessary. The Council must determine that Iraq had violated the cease-fire in a manner that was sufficiently serious as to negate its basis, and the Council would have to make clear its view as an organ that Member States were justified in using all necessary means, up to and including armed force, to bring Iraq into compliance with 687."

By 2002/2003, when SCR 1441 was under negotiation, and when consideration was being given to the legal position following its adoption, the revival argument, including the conditions, was a long-established part of the British Government's legal thinking. This was so even though we were of course aware that the argument was controversial, and that careful consideration had to be given to whether 'revival' could still be effective in view of the length of time that had elapsed since 1991/1992.

The significance of the Fleischhauer advice in 2002 is accurately reflected in paragraph 9 of the Attorney General's opinion of 7 March 2003.[8] We regarded the Fleischhauer advice as supporting our view of 'revival' rather than that of the United States. It supported, but was not the basis for, our position on 'revival'.

d) How widely known within government was this advice, and the conditions there specified?

The Fleischhauer advice, including the conditions there specified, was well known to Government lawyers dealing with the use of force against Iraq, that is to the Attorney General and lawyers in his office and the legal advisers in the FCO and UKMis New York dealing with the matter. It was, for example, referred to in the Attorney General's advice of 7 March 2003 (paragraph 9).

As explained above, the substance of the advice, including the conditions, was very much part of the advice that had been given to the British Government over the years, and should have been known to all concerned. But policy clients would not necessarily always have known of the Fleischhauer advice as such, which - as indicated above - was regarded by the lawyers as supportive rather than the basis of our position.

[8] Para. 9 of the Attorney General's advice of 7 March 2003 reads: "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. That view is supported by an opinion given in August 1992 by the then UN Legal Counsel, Carl-August Fleisch[h]auer. However, the UK has consistently taken the view (as did the Fleisch[h]auer opinion) that, as the cease-fire conditions were set by the Security Council in resolution 687, it is for the Council to assess whether any such breach of those obligations has occurred. The US have a rather different view: they maintain that the fact of whether Iraq is in breach is a matter of objective fact which may therefore be assessed by individual Member States. I am not aware of any other state which supports this view. This is an issue of critical importance when considering the effect of resolution 1441."

e) **Do you consider that the two parts to Fleischhauer's precondition were always understood and kept in mind by those advising on and developing the UK's policy on Iraq?**

Yes, and they were reflected in the drafting of SCR 1441.

The conditions for 'revival' were certainly kept in mind by the lawyers advising on the development of the UK's policy on Iraq, since they were an essential part of our legal position. They underlay and as necessary were reflected in any legal advice on the matter.

I am not able to say how far the conditions were kept in mind by others, though they were certainly reminded of them as necessary. As explained above, this would normally have been done as part of the description of the UK's own legal position, and in our own language, rather than by reference to the Fleischhauer opinion. An example is the Attorney General's minute to the Prime Minister of 30 July 2002, copied to the Foreign and Defence Secretaries.[9]

2. Arrangements for providing legal advice to those negotiating UNSCR 1441

The Inquiry has heard considerable evidence on the arrangements for providing legal advice to UKMIS during the negotiation of UNSCR 1441. We have also seen a number of notes of legal advice from John Grainger of FCO legal advisers and from you that advise on the effect of the various drafts. The Inquiry would welcome your comments on that evidence and in particular on the following questions:

a) **Did the FCO legal advisers in London working on UNSCR 1441 hold a common view of the effect of the various drafts of 1441 during its negotiation and on adoption? How was that view arrived at?**

The FCO legal advisers in London working on SCR 1441 during its negotiation, and thereafter, were Elizabeth Wilmshurst (Deputy Legal Adviser), John Grainger (Legal Counsellor) and myself. Each of us had served as Legal Counsellor at UKMis New York. At the relevant time, John Grainger was legal adviser both to Middle East Department and to United Nations Department. He was very experienced, and I had full confidence in his judgment. I was aware of all the advice that John Grainger was giving, usually after discussion with me, and agreed with it.

[9] Minute of 30 July 2002, para. 10, citing advice given on 14 November 1997 by the then Attorney General and Solicitor General.

I do not recall differences between us, certainly not on anything significant. This common view no doubt reflected the fact that we were all very familiar with previous 'use of force' matters, including the use of force against Iraq based on the 'revival' argument.

It was in November 2001 that FCO legal advisers, for the first time since 9/11, addressed in some detail the legal aspects of the possible use of force against Iraq. This was because of a public statement by President Bush From then until shortly before the invasion in March 2003 Elizabeth Wilmshurst, John Grainger and I worked closely together as a team on all matters concerning the use of force against Iraq. Except where one or other of us was away from the Office, we would meet pretty much on a daily basis, sometimes more often. My recollection is that virtually all significant pieces of written legal advice were a cooperative effort.[10] We routinely copied all advice to each other.

This practice applied equally to legal advice in connection with the negotiation of SCR 1441. We shared, and usually discussed in advance, all written advice on the drafts of SCR 1441. I frequently discussed with John Grainger draft elements of what became SCR 1441.

b) What were the respective roles of John Grainger and you in advising on 1441? Why did you not take a greater role in what was a very significant issue for FCO?

Please see the answer to question 2 (a) above. John Grainger, as the legal adviser both to Middle East Department and United Nations Department, was the first port of call for those Departments. He was the lawyer to whom they would turn for day-to-day advice. He was the lawyer who would attend the daily meetings on the subject, discuss drafts with United Nations Department, clear draft instructions to New York, and advise day-by-day orally and in writing. This was not only entirely appropriate, but also essential, in order to allow the work of the FCO Legal Advisers to function properly on matters other than Iraq.

As explained above, I ensured that I was consulted by the team of lawyers on all significant legal questions concerning Iraq, and I gave my own written advice whenever I was asked directly by Ministers or senior officials, or saw the need to address them directly. I would do so after talking to John Grainger and Elizabeth Wilmshurst.

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[10] This includes, for example, the annex entitled "Iraq: Legal Background" attached to the Cabinet Office "Iraq Options paper" of 8 March 2002; two minutes from John Grainger of March 2002 on regime change; John Grainger's legal paper for the FAC of April 2002; his letter to David Brummell of 23 July 2002. Each was prepared by John Grainger, in close consultation with either or both of Elizabeth Wilmshurst and me. Similarly, my minute to the Foreign Secretary of 15 October 2002 on the practical consequences of acting illegally was, as indeed it says, drafted with the assistance of Elizabeth Wilmshurst and John Grainger.

Throughout, and regardless of who actually put their name to a piece of paper, the advice reflected the views of all the legal advisers dealing with the matter.

I consider that I played a full role in what was of course a very significant issue for the FCO. While I had other important matters to deal with during this period, Iraq was a top priority throughout.

I have noted that Mr Stephen Pattison begins his Witness Statement of January 2011 by saying that he will 'focus on how FCO policy officials understood the resolution at the time of its drafting'.[11] He then gives his views on the interpretation of SCR 1441.[12] It is clear that these views were not based on FCO legal advice. He and others would have been well aware of the advice given by FCO Legal Advisers.

Later in his Statement, Mr. Pattison makes a number of references to the role of FCO legal advisers in the negotiation of SCR 1441. While these points are perhaps not of any great significance to the Inquiry, I feel I should offer the following comments. As already explained, it was normal practice that the Legal Counsellor advising United Nations and Middle East Departments, rather than me, should attend Mr. Ricketts' meetings. And in so far as Mr. Pattison may be suggesting a difference of style between me and the Legal Counsellor in our approach to the negotiation, he is, I believe, mistaken. In any event, our roles were different. It was the Legal Counsellor who attended most of the meetings and cleared the instructions. He did so usually after talking to me. I would intervene directly only when we considered that necessary, particularly to get a point across to Ministers.

c) **How were the legal views communicated to those in London and in New York who were negotiating UNSCR 1441?**
d) **What contact did you personally have with Iain MacLeod and Sir Jeremy Greenstock during the negotiation of UNSCR 1441?**
e) **Did you know at the time that Iain MacLeod took a different view from yours of the effect of UNSCR 1441? If so, how did you become aware of that view?**

Legal advice was folded in to the day-by-day instructions to UKMis New York.[13] These instructions were drafted by United Nations Department, cleared with FCO legal advisers and

[11] Witness Statement of January 2011, para. 1. Since it rather affects the overall impression, I would note that at various places in his Statement Mr. Pattison claims to be describing the views of other, unspecified officials – see, for example, paras. 1, 36.
[12] *Ibid.*, paras. 1-26. I shall not seek to comment on these views.
[13] The process is well described by Iain MacLeod in his (written) Statement of 24 June 2010, paras. 6 and 7. See also Mr. Pattison's Witness Statement of January 2011, paras. 27-29.

others, and, presumably, submitted to Ministers as necessary. They would be conveyed to UKMis by telegram, fax or on the phone. This was standard practice for the drafting of SCRs.

In addition to reflecting the legal advice in the instructions to New York, there were occasions when written legal advice was copied directly to UKMis New York. This was the case, for example, with John Grainger's minutes of 4 and 11 October 2002 and my submission to the Private Secretary of 6 November 2002.

It is worth giving an example of the interchange and common understanding between the FCO and UKMis New York at what I believe was a crucial stage in the drafting of the text of SCR 1441. This was the emergence of what became operative paragraph (OP) 12 between 16 and 21 October 2002. On 16 October 2002, 'new American compromise language' for what was then OP10 (later OP12) was handed over in New York by the US Permanent Representative to the UK Permanent Representative.[14] There does not seem to have been a difference between London and UKMis as to its interpretation. At the meeting at which the new American language was handed over, the UK Permanent Representative informed his American colleague that the Foreign Secretary had made it clear to Colin Powell that we needed a second resolution and that it was extremely unlikely we could find a legal basis without it. Sir Jeremy went on to say that if the new formula made its way through to the Council the explanations of vote were likely to make it unequivocally clear that there needed to be a second resolution. Early the next morning (17 October) the Foreign Secretary ran through the new OP10 with the French Foreign Minister, saying in this context that the US could not accept any language requiring a further Security Council resolution but that they accepted that a further meeting implied a second SCR whether moved by them or other members of the Council. Subsequently, on 21 October 2002 instructions were sent to UKMis New York referring to the latest US draft of the resolution, saying that our view of OP 1 *bis* was that, like OP1, it could not be read as authorizing the use of force, taking into account the draft resolution as a whole, including OP10, which gave a clear indication that further action would be for the Council.[15] The paragraph as handed over by the Americans on 16 October remained virtually unchanged throughout the rest of the negotiation and became OP12 of SCR 1441.

I do not think that, during the negotiation of SCR 1441, Iain MacLeod had a radically different view of the essential legal position from that of the lawyers in London. Indeed, as was the case between me and the Attorney General[16], we shared a common understanding of the 'revival' doctrine. We also were both clear that SCR 1441 in itself did not authorise the use of force. A

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[14] According to the UKMis New York reporting telegram of 17 October 2002, the 'new American compromise' read: "OP10. Decides to convene immediately, upon receipt of a report in accordance with paragraph 9 above, in order to consider the situation and the need for full compliance with all the relevant Security Council resolutions in order to restore international peace and security".

[15] FCO telno 602 to UKMis New York (confidential, marked 'personal', now declassified)

[16] Paras. 20 and 21 of my first written Statement.

second stage was needed. The only question was what precisely was needed at that second stage, which only crystallized as a major issue following adoption of the resolution.

I do not recall discussing the negotiation of SCR 1441 with Sir Jeremy Greenstock or Iain MacLeod, though we were of course seeing many of the same papers. Direct contact was not necessary since, as explained, legal advice was fully incorporated into the instructions and reporting between London and New York. Lawyers in London and New York played quite different roles. In the case of the lawyer in New York this was as part of Sir Jeremy Greenstock's inner negotiating team.

Nor in my view would it have been appropriate for Iain MacLeod and me to have conducted some sort of 'back channel' discussion among lawyers on the course of the negotiations and the ever-changing texts. It would have short-circuited the regular process for feeding in combined policy and legal considerations into the instructions sent to New York. And, in the particular circumstances of this negotiation, it would have risked crossing wires, and might even have been seen as interfering in matters of great political sensitivity.

As regards the Attorney's views it should be borne in mind that, given the convention that neither the advice of the Law Officers nor the fact that they had advised was to be disclosed, there was a general practice to the effect that their advice should not be sent to posts overseas.

It needs to be borne in mind that the negotiation of SCR 1441 was at crucial times conducted at various levels more or less simultaneously. Some of the key decisions, even on specific wording, were taken in the course of telephone conversations, including between Foreign Ministers. It was, therefore, not always easy for anyone, including the lawyers, to follow the negotiations blow-by-blow, and to feed in considered and timely advice in the usual way.[17] In addition, the United States was in the lead in drafting the text.[18] Overall, the negotiation of SCR 1441 may be contrasted with that of the so-called 'second' resolution, which proceeded in a more regular way.[19]

f) Were Iain MacLeod and Sir Jeremy Greenstock aware, during the course of the negotiation, of your view that the various drafts then in contemplation did not revive the authorisation to use force in UNSCR 678 without a further

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[17] A similar point was made by Lord Goldsmith in his Statement of 4 January 2011, para. 1.13.

[18] My first written Statement of 15 January 2010, para. 33; Iain MacLeod, (written) Statement of 24 June 2010, para. 28.

[19] *Ibid.*, para. 28. Other examples which the Inquiry will have seen were the negotiation of SCR 1205 in 1998, and SCR 1483. For the way in which SCRs are usually drafted, see M. Wood, "The Interpretation of Security Council Resolutions", (1997) 2 *Max Planck Yearbook of United Nations Law*, p. 73, at pp. 80-82.

determination by the Security Council? How would they have become aware of your view?

Please see the answers to questions c) and d) above.

The telegrams of instructions from London incorporated the views of legal advisers on the effect of the various drafts, though as was normal practice within the Office without necessarily directly referring to legal advice.

g) If the discrepancy between the two views was at that time recognised, what steps were taken to attempt to resolve the differences between those two views?
h) If the discrepancy was not then recognised, how had this situation arisen?

As indicated above, I do not believe that there was a significant discrepancy between the legal views in London and New York during the negotiation of the resolution. Such differences as there may have been seem to have arisen when it came to interpreting the resolution as adopted, in light of the preparatory work (*travaux préparatoires*) and of the surrounding circumstances.

i) In your view, what were the consequences of failing to resolve these differences at that time?

Given (i) the limited nature of such differences as there may have been, (ii) the fact that what mattered at the end of the day was the Attorney General's opinion, not those of lawyers in the FCO or in UKMis New York, and (iii) the nature of the negotiations, I do not consider that there would have been any significant change in the course of the negotiation, or the wording of the eventual resolution.

j) Did you identify any lessons from this situation at the time?
k) What lessons do you identify now as a result of this series of events?

The negotiation of SCR 1441 was conducted in a wholly exceptional manner, described by the UK Permanent Representative as an extraordinary eight weeks of negotiation. He has also said that he had never seen senior Ministers engaged more intensively or for so long a period over a detailed textual negotiation.[20]

In the light of the nature of the negotiations, is it is difficult to identify lessons for the future concerning legal input. In this regard, I agree with Iain MacLeod's comment, at paragraph 34 of his (written) Statement of 24 June 2010:

[20] Also, Iain MacLeod, transcript of evidence 30 June 2010, p. 73, lines 3-10.

"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."[21]

As indicated above, I consider that there was no significant difference on the legal position between the FCO legal advisers and UKMis New York during the course of the negotiations. The differences emerged after the adoption of SCR 1441, when the time came to interpret the resolution in light of the negotiating history and the circumstances of its adoption.

There is, however, one conclusion that I would draw from the negotiation of SCR 1441. If policy-makers wish to get the best out of their legal advisers, they need to inform them clearly as to their objectives and involve them fully at all stages.

3. Arrangements for involving the Attorney General in advising on the negotiation of UNSCR 1441

The Inquiry has heard evidence from Iain MacLeod that the involvement of Lord Goldsmith in advising on UNSCR 1441 was less than that of Lord Morris in advising on UNSCRs 1154 and 1205, and from Cathy Adams that Lord Goldsmith's involvement in advising on UNSCR 1441 was less than that in relation to the draft 2nd resolution. In his witness statement to the Inquiry, Lord Goldsmith stated that his views were not sought in the period between his meeting with the Prime Minister on 22 October and his telephone call with Jack Straw on 7 November 2002. He drew particular attention to the fact that he was not asked to advise on the insertion of the words "for assessment" in OP4. He annexed to his statement a note from John Grainger to David Brummell dated 4 November 2002 in which that wording was first proposed. The covering note reads "I expect Michael Wood to be in touch." The Inquiry would welcome your comments on the evidence and in particular on the following questions:

a) **You had written to Lord Goldsmith's office on 24 September and 18 October seeking his advice on the drafts of UNSCR 1441 then in contemplation. Why did you not write to seek his advice on later drafts?**

[21] Also, Iain Macleod, transcript of evidence 30 June 2010, p. 72, lines 8-20, and p. 73, lines 3-10.

b) What discussions did you have with his office in relation to the words "for assessment" in OP4?

What was in my view more important than a formal request for advice was for FCO legal advisers to keep the Attorney General's Office as fully informed as they could throughout the negotiations.[22] This we did. We sent to his Office anything we saw that was legally significant as soon as we received it, and we kept him informed of the advice that we were giving. We wished to ensure that the legal advice we were giving within the FCO and beyond on a matter of such importance did not differ from his own views.

The Attorney's advice was in fact obtained during the negotiation of 1441, but not at every stage (which would have been impractical, given the complexity of the negotiations and the manner in which they were being carried out). His views on the 'revival' argument, and the kind of language that was needed in any resolution if it was of itself to authorise the use of force, were well known.

The main consequence that I see from the fact that the Attorney did not give advice at the later stages of the negotiation was that there was inevitably some uncertainty as to his views on the meaning of the resolution, which made it difficult for FCO legal advisers to advise Ministers. It is far from clear that having his further views during the negotiation would have made a significant difference to the course of the negotiations or to the terms of the eventual resolution.

As those FCO legal advisers dealing with the matter saw it, it was open to the Attorney at any time to inform us through his office that he disagreed with the advice we were giving. We were also very conscious of the need for the Attorney to be in a position to advise swiftly as and when requested to do so, and indeed to volunteer advice as and when he saw fit.

In normal circumstances, FCO legal advisers seek the Law Officers' advice as and when they need it for their work. We were careful to make it clear to senior officials in the FCO, on a number of occasions, that the Attorney's advice should be sought on the draft, pointing out that in the past his predecessors had emphasised the need for a clear statement from the Council if the authorisation to use of force was to be revived.[23]

There were a number of occasions during the negotiations and thereafter when FCO legal advisers made it clear to the Attorney and his office, formally or informally, that we needed his advice.[24] And we were of course available to respond at any time to questions that he might

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[22] See Cathy Adams, transcript of evidence 30 June 2010, p. 9, line 19 to p. 12, line 11.

[23] John Grainger to Peter Ricketts of 4 October 2002; my minute to PS/PUS of 14 October 2002.

[24] See, for example, my letters to of 24 September and 18 October 2002; John Grainger's note to David Brummell of 4 November 2002.

have. I did not receive a reply to my letter of 18 October 2002 to the Attorney's office, although the Attorney did speak to the Foreign Secretary after receiving the letter. John Grainger noted when he sent to the Attorney the draft text of 4 November 2002 that he expected that I would be in touch. I was, and there followed a meeting with the Attorney on 5 November 2002 - just three days before the adoption of SCR 1441 - at which we expressed concerns that assumptions were being made by Ministers about his eventual advice, and that therefore in our view early advice from the Attorney was desirable. As I recall, the Attorney's response was to the effect that he would give his advice when it was requested by Ministers, but that in any event we knew his views. Following that meeting, on the same day John Grainger wrote to the Attorney's office with our views on certain points he had raised.

In any event, neither my recollection nor my examination of the documents indicates the precise course of the negotiation in the period after 18 October.[25] Much of the negotiation seems to have been conducted by telephone directly between Foreign Ministers. It was far from easy for anyone not directly participating in the negotiations to follow matters blow-by-blow. Drafts of specific elements would have been appearing, from various quarters, all the time. The texts under consideration were constantly changing.

It has also to be borne in mind that, while it is now the focus of attention, the 'revival' aspect was only one part of the negotiation. For most of the time, the negotiating effort was mainly devoted to the provisions concerning the enhanced inspection regime (paragraphs 3, 5, 6 and 7 of SCR 1441 as adopted).

I do not recall being aware that it was a 'red line' (as opposed to a highly desired objective) for the United Kingdom that SCR 1441 must authorize the use of force without a further decision of the Council. Nor do I recall seeing instructions to UKMis New York to that effect.[26]

As of mid-September, we were pressing for a resolution, (a) describing Saddam as in "material breach" of his obligations, (b) setting out the demand on Saddam to allow unconditional UNMOVIC entry, and (c) using the strongest language the Security Council market would bear on the consequences in the event of non-compliance. In short, we were seeking to secure in the first resolution as much as possible of the wording required, and were keeping an open mind on whether a second resolution would be required.

I was not aware that these objectives changed in the course of the negotiation. What I thought we were seeking to achieve was the toughest resolution we could get, especially as to the

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[25] I was abroad from 19 October to 1 November 2002, representing the United Kingdom before an international arbitral tribunal in The Hague, and attending the annual 'legal advisers' week' of meetings at the United Nations.

[26] See, however, Mr. Blair, (uncorrected) transcript of evidence 21 January 2011, p. 54, line 12 - p. 57 line 10.

inspection regime but also on the use of force in the event of non-cooperation with the inspectors. The United States, on the other hand, with whose UN Mission UKMis had 'a close working relationship', may well have regarded it as a 'red line' that SCR 1441 should not require a further Council decision before force was used, not least because their legal position - unlike ours - was that 'earlier resolutions authorized the use of force to bring Iraq into compliance ...'.[27] In their view, the use of force would have been authorized without SCR 1441.[28] Whether or not they succeeded in not crossing their red line depends of course upon a proper, objective interpretation of the resolution, not upon what the negotiators thought they had achieved.

c) Was there a responsibility to ensure that Lord Goldsmith's ongoing advice was obtained during the negotiation of 1441? Where did that responsibility lie?

There were no formal or other rules on seeking the Attorney's advice during the negotiation of SCRs, either in general or in exceptional circumstances like 1441. It all depends on the circumstances. For example, it may be much easier in practice to seek the Attorney's advice where a draft resolution is relatively short, and the negotiations are relatively straightforward, as was the case for example with SCRs 1154 and 1205.[29] That was far from being the case with SCR 1441.

In the normal way, FCO legal advisers seek the Law Officers' advice as and when they need it for their work, though on anything with political significance Ministers would usually be aware that we were doing so and sometimes are asked to agree that we should do so. As explained above, FCO lawyers made it clear throughout to the policy clients, including Ministers, that it was highly desirable to seek the Attorney's advice, and in particular that the Attorney's advice would be needed before military force was used.

d) In your view, what consequences arose from the fact that Lord Goldsmith's advice was not obtained during the negotiation of 1441?

e) What lessons do you identify as a result of this series of events?

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[27] William H Taft IV in: M. Scharf, P. Williams (eds.), *Shaping Foreign Policy in Time of Crisis. The Role of International Law and the State Department Legal Adviser* (2010), p. 131. See also *ibid.*, pp.131-133 for the US lawyers' view of the negotiation of SCR 1441, and the Attorney's visit to Washington in early 2003.

[28] See, for example, M. Matheson, *Proceedings of the American Society of International Law 1998*, cited in R. Zacklin, *The United Nations Secretariat and the Use of Force in a Unipolar World: Power v. Principle* (2010), p. 145; W. Taft, T. Buchwald, "Preemption, Iraq, and International Law", 97 *American Journal of International Law* 557 (2003) (an article written by the then Legal Adviser and a Deputy Legal Adviser to the State Department, without the usual disclaimer that it was written in a personal capacity); and the work cited in the preceding footnote.

[29] Described by Iain MacLeod, (written) Statement of 24 June 2010, paras. 14-16.

Please see the answers to questions 2(j) and (k) above.

As indicated in those answers, my perception is that the negotiation of SCR 1441 was wholly exceptional, and it may therefore be difficult to draw general conclusions.

However, one lesson could be that, if it is foreseen that the Attorney's advice on the interpretation of a document could become crucial, it makes sense to seek that advice, and for that advice to be given even if it is not formally sought, before the end of the negotiation.

4. Interpretation of UNSCR 1441

As a preliminary comment, I should point out that it is not easy for me to distinguish between my view of the law in 2002/3 and in 2011. The positions I took then were when matters were fresh in my mind; my views now are no doubt influenced by what I have read and learnt since then, not least as a result of this Inquiry. Nevertheless, I do not believe that my basic view on the interpretation of SCR 1441 has changed.

Since the questions below relate to specific terms such as 'all necessary means', 'serious consequences' and 'material breach', it may be worth recalling that a Security Council resolution has to be interpreted as a whole and the terms used have to be read in context. Particular terms may have different meanings in different contexts. For example, even the words 'all necessary means' or 'necessary measures' do not invariably import the use of armed force.[30]

- **meaning of "serious consequences"**

On 24 September 2002 you wrote to Cathy Adams enclosing an early draft of UNSCR 1441 which at that stage contained the formulation that "any such breach authorises the member states to use all necessary means to restore international peace and security in the area". In your letter you advised that if a resolution could be achieved that contained an amended version of the then OP10 with "serious consequences" language rather than "all necessary means", it would be an adequate legal basis for the use of force, subject to any action being necessary and proportionate to remedy the particular breach.

[30] For example,paragraph 6 of SCR 1739 (2007) of 10 January 2007, in which the Security Council authorized the United Nations Mission in Côte d'Ivoire (UNOCI) 'to use all necessary means to carry out its mandate'. While one or two elements of the detailed mandate set out in paragraph 2 of the resolution might from time to time involve a limited use of force, most clearly do not. See also paragraph 6 of SCR 1643 (2006) of 15 December 2005, in which the Security Council decided that States shall take 'the necessary measures to prevent the import of rough diamonds from Côte d'Ivoire'.

a) **On what basis did you advise that "serious consequences" would provide an adequate legal basis for the use of force if it was not possible to secure agreement to "all necessary means"?**

By 2002, there was in my view sufficient practice, in the context of Iraq, to show that a threat by the Council of 'serious consequences' or similar wording, following a finding by the Council of material breach of the ceasefire resolution conditions, included the use of force. In this context, 'serious consequences' was well understood by Council members as 'a euphemism for use of force'[31]: see, for example, the Presidential statements of 8 and 11 January 1993.[32] See, to the same effect 'severest consequences' in SCR 1154 (1998), prior to Desert Fox.[33]

b) **What is your view of the effect of the use of "serious consequences" rather than all "necessary means" in the drafting of UNSCR 1441 as eventually adopted?**

Given the practice referred to in the reply to question a) above, I do not consider that this had any decisive legal significance. On the other hand, following SCR 678, the use of 'all necessary means' in the Iraq context might have been even clearer, especially to a non-lawyer, and therefore potentially more effective politically on Iraq.

c) **In your view, is there any distinction to be drawn between an authorisation to use "all necessary means" which is directed to the States seeking to use force, and a threat of "serious consequences" which is directed at Iraq?**

The two formulations have different addressees, the one being a direct authorisation addressed to the States that use force; the other a warning to Iraq. But in the context of Iraq, each implied an authorization to use force. The 'serious consequences' formulation was usually conditional ('there will be serious consequences if you do not do such-and-such'); the all necessary means' formulation might or might not be conditional. .

In the Iraq context, an authorisation to use all necessary means was clear and uncontroversial. Following a determination by the Council of a threat to international peace and security, and an indication that the Council is acting under Chapter VII of the Charter, such words clearly authorised the use of force against Iraq by the States or entities concerned. The legal

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[31] R. Zacklin, *The United Nations Secretariat and the Use of Force in a Unipolar World: Power v. Principle* (2010), p. 139.

[32] And see the UN Legal Counsel's opinion of January1993, described in R. Zacklin, *The United Nations Secretariat and the Use of Force in a Unipolar World: Power v. Principle* (2010), pp. 20-21. While I was not aware of this opinion until I saw Mr. Zacklin's lectures, we attached considerable importance to the fact the Secretary-General said publicly at the time, and later in the 1996 Blue Book, that the use of force in early 1993 was authorized by the Council.

[33] SCR 1154 (1998) was recalled in SCR 1205 (1998).

significance of a threat of serious consequences for Iraq, following a finding by the Council of a material breach, was based on the practice referred to under (a) above.

- **effect of OP4 "predetermination" of further material breach**

Lord Goldsmith placed considerable emphasis in his evidence on the effect of the words in OP4 "Decides that false statements or omissions in the declarations...and failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution shall constitute a further material breach of Iraq's obligations". He told us that in OP4 "the Security Council had already pre-determined that a failure to meet the requirements in the resolution constituted itself a material breach."

a) **Do you agree that in OP4 the Security Council had already determined that a failure to meet the requirements of UNSCR 1441 would automatically amount to a further material breach?**
b) **Jack Straw told the House of Commons on 25 November 2002 that "material breach means something significant: some behaviour or pattern of behaviour that is serious". How would the seriousness of a breach be judged if the Security Council had predetermined what would constitute a further material breach?**

I consider that what Mr. Straw said, on 25 November 2002, about 'material breach' was correct in law, not least in the context of OP4 of SCR 1441. That paragraph embodied the Council's view that "failure at any time to comply with, and cooperate fully in the implementation of, this resolution" would constitute "a further material breach of Iraq's obligations". The words "failure ... to comply ... and cooperate" must, on any reasonable interpretation, imply some degree of significance. A technical or other minor breach would not be a further 'material' breach.

What the Council was doing was to warn Saddam in advance that, in all the circumstances (not least Saddam's past history of prevarication), failure to comply with his obligations under the enhanced inspection regime provisions would be regarded as a material breach that would be referred to the Council.

- **meaning of "for assessment"**

a) **What legal advice was provided to those negotiating UNSCR 1441 on the effect of the insertion into OP4 of the words "and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below"?**
b) **What is your view of the meaning of the words in OP4 "and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below"?**

The words "for assessment" appeared at a late stage in the negotiations (2 November 2002, so far as I can tell from a review of the papers). These words were proposed by the US Secretary of State, in response to a French request, and agreed by him directly with the British and French Foreign Ministers, without, so far as I am aware, legal advice being sought.

While the addition of the words "for assessment" may have somewhat strengthened the case for saying that a further decision of the Council was needed before the use of force would be authorized, in my view they did not fundamentally alter matters since without them the wording of the resolution already pointed clearly to the need for a further decision. This was clear from the crucial OP 10 (later OP 12) which had emerged in the period 17 to 21 October 2002 and which remained unchanged thereafter (see answer to questions 2 (c) and (d) above).

I therefore consider that the addition of the words "for assessment" merely confirmed that one of the purposes of reporting to the Council Iraq's failure to comply under paragraph 11 or 12 was that the Council should assess such failure. Such consideration was part of its consideration of "the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security."

c) In your view, is there a distinction to be drawn between the determination by the Security Council of the existence of a further material breach, and the determination that the Security Council considers the violation sufficiently serious to destroy the basis of the ceasefire?

Yes, both in the context of the revival argument in general, and SCR 1441 particular.

Paragraph 4 of SCR 1441 referred to 'material breach', while paragraph 13 recalled, in the context of the consideration under paragraph 12, that the Council had repeatedly warned Iraq that it would face serious consequences as a result of its continued violations of its obligations. The effect of paragraph 13 was discussed in my letter to the Attorney's office of 9 December 2002.

5. <u>Request for Attorney General to advise on UNSCR 1441</u>

You drafted instructions for Lord Goldsmith to advise on the effect of UNSCR 1441 and in particular on "whether a further decision by the Security Council would be required before force could lawfully be used to ensure Iraqi compliance with its disarmament obligations". You circulated these for comment to interested parties within FCO before sending to the Attorney General's Office indicating that "No advice is required now."

a) What comments did you receive on the draft instructions? From whom?

I wrote to the Attorney's office on 9 December 2002 concerning the interpretation of SCR 1441. In preparing that letter, I received extensive comments from UKMis New York, conveyed to me by Iain MacLeod and as I understood it reflecting Sir Jeremy Greenstock's views. These essentially concerned the alternative arguments to which they attached importance, based in part on the negotiating history of the resolution.[34] As I recall, I incorporated all or virtually all of UKMis's suggestions into my letter. In addition, I no doubt received comments and assistance from John Grainger and Elizabeth Wilmshurst. I do not recall receiving comments on the draft from other quarters.

I was instructed (either by Private Office on behalf of the Foreign Secretary, or directly by the Foreign Secretary in manuscript on the draft) that the Foreign Secretary was content for me to send the letter provided that I did not include in the letter a statement of my own view of the law; and provided that I made it clear in the letter that no advice was needed at present.[35] I was not happy with these instructions. But my overriding concern at the time was to place the background and the arguments before the Attorney so that he was in a position to advise as and when advice was required, either in response to a request or when he himself considered it necessary.

There are broadly two ways for a departmental lawyer to consult the Attorney: by setting out the different possibilities, without expressing a view; or, and this is much more common and usually more helpful, by setting out the differing possibilities and giving a view. In the present case, I was instructed to do the former, though the Attorney was anyway well aware of my views.

Mr. Pattison, in his Witness Statement, has suggested that "[w]ith hindsight, the letter [that is, my letter of 9 December 2002] to his [the Attorney's] office probably steered him in a particular direction. Although it set out competing interpretations of SCR 1441, it was loaded in favour of one."[36] This is not so. I set out the arguments as fairly as I could, taking full account of extensive comments from UKMis New York.[37]

b) From where did the view come that no advice was required at that time? Did you share that view?

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[34] See Iain MacLeod, (written) Statement of 24 June 2010, para. 25; Iain MacLeod, transcript of evidence 30 June 2010, p. 62, lines 4-13, 21-24..

[35] My oral evidence of 26 January 2010, p. 38, lines 11-15; Lord Goldsmith's Statement of 4 January 2011, para. 1.12.

[36] *Ibid.*, para. 35.

[37] See Iain MacLeod's (written) Statement of 24 June 2010, para. 25. In his oral evidence, Iain MacLeod described my letter as "a perfectly fair, balanced description of the arguments" and "a good letter": Ian MacLeod, transcript of evidence 30 June 2010, p. 62, lines 12-13 and 24.

From the Foreign Secretary (please see answer to question (a) above).

I did not agree with that view. While it may not have been essential to have advice at that time, it was in my view highly desirable as I have previously described. As the Inquiry will have seen, FCO legal advisers were in a very uncomfortable position in the period following the adoption of SCR 1441. We were having to advise on whether SCR 1441 authorized the use of force without a further decision of the Security Council without the benefit of the Attorney's advice.[38] It would have been possible for the Attorney to have given advice on the meaning of SCR 1441 soon after its adoption, since all the relevant considerations were then known, though that advice would no doubt have had to be kept under review in the light of developments.

In March Lord Goldsmith submitted to the Prime Minister the advice for which you had given him instructions. The Foreign Secretary was not copied into that advice, although he did subsequently see a copy. Lord Goldsmith told the Inquiry that he considered that the Prime Minister was ultimately his client. Lord Wilson said that he would expect the Secretary of State for the lead department to seek the Attorney's advice and report to the Prime Minister and Cabinet on the advice that he had received. Lord Turnbull told the Inquiry that he thought that he, as Cabinet Secretary, and Michael Boyce, as CDS, were the clients.

a) You provided the instructions to the Attorney General to advise. Did you expect that advice to be submitted only to the Prime Minister?

No. But since my letter of 9 December 2002 did not ask for advice, neither did I necessarily expect his advice to be conveyed to me as would be usual. And I knew the content of his advice to the Prime Minister, and received a copy within a couple of days.

b) What precedents are there as to how the Attorney General's advice should be provided in a situation like this one where more than one department has an interest in the advice?

The normal procedure would be for both the request for advice and the reply to be copied to all interested departments. But this was hardly a normal case. I have no doubt that there are other cases, particularly with very sensitive matters such as the use of force, where the Attorney's advice is given a very limited ('need-to-know') distribution.

6. <u>The status of the UK as a joint occupying power with the US</u>

[38] At a meeting with the Attorney General as late as January 2003, I explained that my position within the FCO was becoming very difficult, since I was still having to advise the Foreign Secretary and others without being able to refer to the Attorney's advice (even though I was aware of his thinking at that time).

The Inquiry has seen a note from Huw Llewellyn dated 8 May 2003 which states that the drafting of the letter of 8 May 2003 from Jeremy Greenstock and John Negroponte to the Secretary General of the UN "is important to be consistent with our position that the UK is not an Occupying Power throughout Iraq (through the Coalition) but only in the area(s) where UK forces have established authority."

The preamble to UNSCR 1483 recognised the US and the UK as "occupying powers under unified command". On 5 June 2003 Jack Straw reported Lord Goldsmith's advice to the effect that the UK was jointly liable for all decisions of the Coalition Provisional Authority.

In your supplementary statement to the Inquiry you note that the UK and US were regarded as Occupying Powers, while other countries, (e.g. Norway) which provided troops after the military action were not regarded as Occupying Powers. The Inquiry is aware that Australia had initially sought to be a co-signatory to the proposed MOU between US, UK and Australia on joint decision making for the CPA and subsequently ORHA as it was concerned about its obligations as an occupying power, although Australia was not then named as an occupying power in UNSCR 1483.

a) **What involvement did you and your team have in advising on the question of whether the UK would be considered a joint occupying power with the US over the whole of Iraq?**
b) **What discussion was there in advance of the adoption of UNSCR 1483 as to what the UK's position should be in that regard?**

In February 2002, before the invasion of Iraq, I expanded the Iraq team within FCO Legal Advisers to cover post-conflict issues. Elizabeth Wilmshurst and John Grainger assisted until March, when Elizabeth left and John moved to other matters.

From March, Huw Llewellyn (Legal Counsellor) was the head of this new team, which quickly built up to include also some four or five Assistant Legal Advisers, who spent much of their time on post-conflict legal matters. Huw and or one of the Assistant Legal Advisers attended the daily (or twice daily) Iraq policy meetings (normally chaired by Mr. Ricketts), and would report to me afterwards, keeping me fully in the picture. The members of the legal team working on post-conflict matters had their own fields, such as security issues including security sector reform, constitutional developments, transitional administration of justice, economic reforms (including the introduction of a new currency, and privatization), oil etc. I continued to discuss all matters with them on a daily basis. Huw Llewellyn and other legal advisers also took part in a series of tripartite video conferences with US and Australian lawyers and policy officials, to try to form common views on particular occupation legal issues, including the proposed Memorandum of Understanding (MOU). From a very early stage there was an FCO legal

adviser working within the Coalition Provisional Authority (CPA) Legal Counsel's Office in Baghdad.

For a brief account of international law on occupation, please see my Second Statement of 28 January 2010 (on the rights and responsibilities of Occupying Powers). For the purpose of the present series of questions, Article 42 of the Hague Regulations of 1907 Respecting the Laws and Customs of War on Land is crucial. Article 42 reads:

> "Territory is considered occupied when it is actually placed under the authority of the hostile army.
>
> The occupation extends only to the territory where such authority has been established and can be exercised."

Under international law, the status of occupying power follows from the fact of actual authority over territory.[39] It is not a matter of choice.

Throughout the period of occupation (which ended on 28 June 2004), FCO legal advisers were concerned that, consistent with Article 42 of the Hague Regulations, the UK should be understood to have the rights and responsibilities of an occupying power only in the area or areas of Iraq where UK armed forces had established authority and could actually exercise it.

I have seen Mr. Straw's recent evidence on the question of 'joint occupation',[40] as well as Lord Goldsmith's answer to question 10 in his written Statement of 4 January 2011.[41] Neither appears to distinguish between the rights and responsibilities of the United Kingdom as an occupying power in its area or areas of Iraq and its possible joint responsibility with the United States for acts and omissions of the CPA (or at least some of them). Nor does their evidence seem to take account of the legal advice that was given over the months following the adoption of SCR 1483.

The matter was far from clear. From the outset of the occupation, US military commanders started making declarations to the Iraqi people, in the name of the 'Coalition', that were not properly (or at all) cleared with the United Kingdom. They soon established the 'Coalition Provisional Authority', an entirely American creation in respect of which the United Kingdom had some (variable) influence, but no control. There was thus the appearance of a joint occupation throughout Iraq, despite the fact that that the United Kingdom had no actual authority outside the South East. On policy grounds such appearance may have been welcome, consistent with our position as the leading partner of the Americans in the American-led coalition. Among

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[39] See *The Manual of the Law of Armed Conflict*, UK Ministry of Defence (2004), chapter 11, para. 11.3.

[40] Mr. Jack Straw, transcript of evidence 2 February 2011, p. 127, line 24 - p. 134, line 7.

[41] Mr. Straw referred to the Attorney's "decision and the letter that followed": transcript of evidence 2 February 2011, p. 131, lines 4-5. I do not recall such advice from the Attorney General at this time, but perhaps I did not see it.

other things it may have been thought to give the United Kingdom greater influence with the US across a range of post-conflict matters, such as the transitional arrangements and the role of the United Nations.

As a matter of law, however, there was a distinction between (i) the rights and responsibilities of the United Kingdom as an occupying power in the area of Iraq under the actual authority of UK armed forces, and (ii) the potential liability of the United Kingdom for acts or omissions of the CPA. This distinction was a real one, notwithstanding that the CPA was an instrument through which the occupying powers sought to exercise certain of their respective rights and responsibilities (including as extended in due course by the Security Council).

As to (i), there was a proper concern that the UK might be regarded as being a joint occupying power throughout the whole of Iraq, *inter alia* because of the CPA. It was clear that the UK was an occupying power within MND(SE), that is, the area within which UK forces were principally operating in Iraq and within which UK forces were responsible for controlling the security situation, but the concern was that this might go wider.

As to (ii), it was considered likely that, if the matter were ever tested, the CPA could be found to be a body constituted by the US and the UK for which the two States had a degree of joint responsibility. But this did not necessarily mean that the UK was responsible for every act or omission of every official working within the CPA structures. So far as I recall, the question whether the CPA, despite its name, was in reality a emanation of the United States, not of 'the coalition' as such (US, UK and possibly others), was an unresolved issue throughout its existence.

FCO legal advisers were concerned to avoid the UK being held jointly responsible for acts or omissions of the CPA, without a right to consult and a right of joint decision. A particular concern was if those acts went beyond the powers of an occupying power under the general law of occupation or under the SCRs. In accordance with Article 42 of the Hague Regulations of 1907, the UK was properly regarded as an occupying power only in Basra and the South East of Iraq - the sector where UK troops were exercising actual authority. The fulfilment of the UK's responsibilities under occupation law would then be under UK control. The aim was to have matters such as the territorial extent of the UK's occupation rights and responsibilities, the extent of its potential responsibility for acts and omissions of the CPA, and the UK's role within the CPA (especially joint decision-making) set out in a Memorandum of Understanding (MOU) with the Americans (concluded directly with Washington or in theatre), or at least clarified by way of a unilateral letter. Efforts to this end were conducted bilaterally with the Americans, and in the tripartite video conferences between UK, US and Australian lawyers and policy officials. These

efforts continued well beyond the adoption of SCR 1483,[42] but ultimately seem to have run into the sand. These matters were, in fact, never fully clarified before both the occupation and the CPA came to an end on 28 June 2004.

c) **Was there a change from the position that the UK should only be an occupying power in the area in which it had established authority, to the position that it was a joint occupier throughout Iraq?**
d) **Was that a deliberate decision? Who took that decision?**

Please see the answer to a) and b) above. I do not recall any such decision. As indicated above, occupation is question of fact, not a matter for the choice by the occupying power. The position remained unclear throughout the occupation. Attempts to clarify matters were unsuccessful. Neither the US/UK letter to the United Nations of 8 May 2003, nor resolution 1483 was in any way decisive of the matter.

e) **Would it in your view have been possible for the UK to have confirmed in UNSCR 1483 that it was an occupying power in the area in which it exercised authority, or was it inevitable that the UK would be considered under international law to be a joint occupier of the whole of Iraq?**

As set out in a) above, our advice was that, consistent with Article 42 of the Hague Regulations of 1907, the UK should be regarded as the occupying power only in Basra and the South East of Iraq, where UK troops were exercising authority. It was not inevitable from the legal point of view that the UK would become a joint occupier of the whole of Iraq with the US. Nor was joint occupation prescribed by SCR 1483. Both legal advisers and policy officials continued to maintain, before and after the adoption of SCR 1483, that the UK was an occupying power only in the South East, which was under its actual authority, and did not have the rights and responsibilities of an occupying power throughout Iraq. It was not accepted that the UK and the US were in joint occupation of the whole of Iraq, or that 'the coalition' was somehow an occupying power.

7. **<u>Any further points you would like to add to the issues addressed by the Inquiry since you gave evidence in January 2010, or the matters raised above</u>**

Since I appeared before the Inquiry on 26 January 2010, its members have heard a good deal about the handling of legal issues, from a range of witnesses, and have seen many further

[42] For example, a draft of a letter from the British Chargé in Washington to the US Secretary of State was sent to No. 10, but it does not seem to have ever been sent forward by No. 10..

documents. It is not my intention to comment on all of that evidence. Nothing that I have seen since leads me to modify my written and oral evidence.[43]

There are just three further points that I wish to add:

(i) In his evidence on 2 February 2011, Mr. Straw said:

> "... Iain Macleod was by no means the only Foreign Office lawyer who took a different view from Elizabeth Wilmshurst and Michael Wood. Indeed, he has authorised me to give you his name in private, one [former][44] Foreign Office lawyer has told me he certainly took the same view as Iain Macleod. His view was that a significant number of Foreign Office lawyers also took the same view.
>
> I am not for a moment suggesting that Elizabeth Wilmshurst's claim that all foreign lawyers were the same was made other than in good faith, but my information is different from hers."[45]

It is not obvious what significance this has for the Inquiry. But I ought to set out the position as I saw it. The 'Foreign Office lawyer' referred to by Mr. Straw cannot have been one of 'the FCO Legal Advisers dealing with the matter'.[46] And it seems unlikely that an FCO legal adviser not dealing with the matter would have felt able to reach a considered view, or the need to do so.

The only time that I raised the legal position under SCR 1441 with most of the lawyers in the FCO was in the week of 17 March 2003 when - in my management role as head of the Legal Advisers - I went to each of the FCO lawyers who were then in the Office to speak to them individually about Elizabeth Wilmshurst's decision to leave. None indicated disagreement with the legal position that those of us dealing with the matter had taken.

(ii) At the end of my first written Statement I mentioned one or two lessons that might be drawn.[47] I should like to endorse one further point, well made by Iain MacLeod in his written Statement:

> "... 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:

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[43] Oral evidence on 24 November 2009 and 26 January 2010; written statements of 15 and 28 January 2010.

[44] The uncorrected transcript has 'one from the Foreign Office lawyer'.

[45] Uncorrected evidence, 2 February 2011, p. 66, lines 13-16.

[46] Oral evidence of Elizabeth Wilmshurst, 26 January 2010, p. 6, note 1.

[47] Written Statement 15 January 2010, paras. 35-37.

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."[48]

(iii) Finally, and further to my written statement of 15 January 2010, I should draw attention to the further guidance on the interpretation of Security Council resolutions given by the International Court of Justice at paragraph 94 of its *Kosovo* advisory opinion of 22 July 2010.[49]

Michael Wood

Michael Wood

15 March 2011

[48] Iain MacLeod, (written) Statement 24 June 2010, para. 33; Iain Macleod, transcript of evidence 30 June 2010, p. 69, line 23 - p. 71, line 21.

[49] *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion*, 22 July 2010, para. 94.