

## IRAQ INQUIRY

### Statement by Sir Michael Wood

*This statement describes my role and responsibilities between 2001 and February 2006. It also sets out, briefly, my views on the following matters:*

- *the legal position on the use of force against Iraq before UNSCR 1441*
- *the legal position on the use of force against Iraq after UNSCR 1441*
- *the duties and responsibilities of Occupying Powers and UNSCR 1483*
- *how the process for obtaining legal advice and decision making worked.*

### **My role and responsibilities between 2001 and February 2006**

1. I was the Legal Adviser to the Foreign and Commonwealth Office (FCO) between December 1999 and the end of February 2006. I had been an FCO lawyer since 1970. Between 1991 and 1994 I was posted to the United Kingdom Mission to the United Nations in New York (UKMis New York).
2. During the period that I was the head of the FCO Legal Advisers, there were about 27 lawyers based in the FCO in London, and another nine or so working outside the FCO. Two were posted to UKMis New York, and others were posted in Brussels, Geneva, Bridgetown and The Hague. As had been the case for many years, a senior FCO lawyer was seconded to the Attorney General's Office (then known as the Legal Secretariat to the Law Officers – LSLO). From May 2003, an FCO lawyer was posted in Baghdad, initially working with ORHA/CPA and the UK Representative in Baghdad, then in the British Embassy.
3. The lawyers were (and are) members of HM Diplomatic Service. As the head of the FCO Legal Advisers, I had overall responsibility for the legal advice given within the FCO, with direct access to Ministers and when necessary the Attorney General. I was responsible for the management of the team of lawyers based in the FCO, and for overseeing their work. In practice, I shared these duties with other senior lawyers. I dealt directly with some legal issues, for example when acting as Agent for the UK in international litigation. During 2002-2003, in addition to Iraq, I was dealing with the negotiations with Libya over Lockerbie; two arbitral cases between Ireland and the UK over the Sellafield MOX Plant; and the International Criminal Court (including the election campaign for the British judge). I was abroad for at least six weeks of

official meetings or court hearings in 2002-2003, during which time a Deputy Legal Adviser was in charge of the Legal Advisers.

4. FCO Legal Advisers work on the whole range of legal matters relevant to the FCO. These include public international law, on which FCO lawyers often assist other government departments. The work also includes European Union law; international human rights law; the constitutional and other law of the British overseas territories; and UK law relevant to the work of the FCO (such as employment law, data protection, freedom of information, official secrets). During this time, the FCO was increasingly involved in litigation, before the English courts as well as before international courts and tribunals.
5. Legal advice is given within the FCO and to other government departments both orally and in writing. But even written advice rarely takes the form of a formal legal opinion, such as a barrister in private practice might give. Legal advice is usually fully integrated into the development of policy. Any policy submission raising legal issues will be based on, and where necessary include, legal advice. Advice often takes the form of commenting on drafts prepared by policy colleagues; such advice may be given in the form of textual changes or oral comment. Much advice is given in the course of meetings with Ministers and officials, or by email or phone. A huge volume of papers is copied to the Legal Advisers, which enables them to volunteer advice where necessary, without waiting to be asked.
6. Iraq was naturally a high priority for FCO Legal Advisers; at a rough estimate I would say that it took up about 10% of my time during 2002-2003, and much of the time of a number of other lawyers, both senior and more junior. We worked together as a team.
7. Given the importance and difficulty of the issues, a considerable number of FCO lawyers worked on various aspects of Iraq. While the emphasis changed over time, the issues included UN sanctions; enforcement of the No-fly Zones; the use of force (*jus ad bellum*); the application of the laws of war, including targeting and rules of engagement (*jus in bello*); and post-invasion matters, such as the responsibilities and duties of belligerent Occupants; constitutional developments within Iraq; and trials in Iraq, including the trial of Saddam Hussein. On many of these issues, FCO lawyers worked closely with lawyers in the Ministry of Defence, and with the Attorney General and his officials.
8. The Attorney General is the Government's chief legal adviser, including on public international law. The usual procedure by which the Government obtains legal advice from the Attorney General was described in the Butler Report<sup>1</sup>.

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<sup>1</sup> HC 898, at paragraphs 368 to 373. An account of the development of the Attorney General's advice on the legality of the use of force against Iraq in 2003 is given in the Disclosure Statement prepared by the LSLO which forms Annex 6 to the Information

The close relationship between FCO lawyers and the Attorney General and his officials is an important part of the machinery for ensuring that HMG comply with their legal obligations, including those under public international law. The Attorney General's support for the FCO lawyers, and their assistance to him or her, are key parts of this relationship. For reasons that I have set out elsewhere,<sup>2</sup> I agree with the Joint Committee on the Constitutional Renewal Bill, which concluded - in 2008 - as follows:

“We have carefully considered the evidence we have received and the recommendation of the House of Commons Justice Committee. We recognise that there are different and strongly held views on this issue. On balance, however, we are not persuaded of the case for separating the Attorney General's legal and political functions. We therefore support the current arrangement which combines these functions, and support the retention of the Attorney's present status as a Government Minister.”<sup>3</sup>

### **Legal position on the use of force against Iraq before UNSCR 1441**

9. The starting point is the fundamental rule of international law that all States must refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state<sup>4</sup>. Under the Charter of the United Nations, there are two exceptions to the prohibition on the use of force. The use of force is prohibited unless: (i) it is in exercise of the inherent right of individual or collective self-defence, recognised in Article 51; or (ii) it is authorized by the Security Council acting under Chapter VII. In addition, HMG has taken the position that, exceptionally, a limited degree of force may be used to avert an overwhelming humanitarian catastrophe.
10. Self-defence requires an actual or imminent attack. There must be more than a 'threat'. Talk in some quarters of a right of pre-emption, in so far as it suggests a right going beyond self-defence, has no basis in international law. On the information available in the summer of 2002, there was no basis for the UK to exercise the right of self-defence against Iraq. Nor was it suggested that the conditions for an exceptional right to use force to avert an overwhelming humanitarian catastrophe were met.

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Commissioner's Enforcement Notice of 22 May 2006, available on the Information Commissioner's website.

<sup>2</sup> Memorandum to the Joint Committee on the Draft Constitutional Renewal Bill, HL Paper 166-II, HC Paper 551-II, Evidence, pp.433-435.

<sup>3</sup> Joint Committee on the Draft Constitutional Renewal Bill, HL Paper 166-I, HC Paper 551-I, Report, para. 84.

<sup>4</sup> Article 2(4) of the Charter of the United Nations. I shall not refer further to the Charter prohibition on the threat of force, the application of which raises difficult issues.

11. The question of a possible revival of the Security Council's authorization to use force given in Security Council resolution (SCR) 678 (1990) (the "all necessary means" resolution prior to Operation Desert Storm in 1991) was more complex. In the UK's view, a breach of Iraq's obligations which undermined the basis for the cease-fire laid down by the Security Council in SCR 687 (1991) could revive the authorization to use force in SCR 678. The critical element was that it was for the Security Council itself (not for individual states) to determine whether or not the Council's authorization should be revived. As the cease-fire was proclaimed by the Council in SCR 687, it was for the Council to determine whether such breach had occurred. What was needed was a clear indication that the Council did so determine, if the revival of the authorization to use force was to provide a proper legal basis.
12. In the UK view, the authorization to use force in SCR 678 had been revived in this way on earlier occasions. For example, when Iraq refused to co-operate with the United Nations Special Commission (UNSCOM) in 1998, a series of SCRs condemned this as unacceptable. SCR 1154 stressed that any violation of Iraq's obligations to accord immediate, unconditional and unrestricted access to UNSCOM and the IAEA would have severest consequences for Iraq. In SCR 1205 the Council recalled that the effective operation of UNSCOM and the IAEA was essential for the implementation of SCR 687, and condemned Iraq's decision to cease cooperation with UNSCOM as a flagrant violation of SCR 687 and other relevant resolutions. In the UK view, SCR 1205 had the effect of reviving the authorization to use force in SCR 678; this provided the legal basis for Operation Desert Fox in December 1998.
13. Military action in 1998 (and on previous occasions) followed from specific decisions of the Security Council. By 2002 there had not been any significant decisions of the Council since 1998. The UK interpretation of SCR 1205 was in any event controversial. Many others did not think the legal basis was sufficient, as the authority to use force was not explicit. Reliance on SCR 1205 in 2002 would have been unlikely to have received any support.
14. It is important to stress (as the Attorney General did in the final paragraph of his advice of 7 March 2003), that even where the use of force has a sound legal basis, the extent of the use of force is crucial to its lawfulness. Force may only be used if and to the extent that it is necessary and proportionate to achieve the objective for which the legal basis exists, in the present case, to ensure compliance with the WMD provisions of the SCRs.

## **Legal position on the use of force against Iraq after UNSCR 1441**

### *Summary*

15. I considered that the use of force against Iraq in March 2003 was contrary to international law. In my opinion, that use of force had not been authorized by the Security Council, and had no other legal basis in international law.
16. I therefore did not agree with the position, stated in the Parliamentary Answer of 17 March 2003 and the paper of the same date entitled “Iraq: Legal Basis for the Use of Force”, that SCRs 678, 687 and 1441, read together, amounted to such authorization. Nor did I agree with the view expressed in the advice of 7 March 2003 “that a reasonable case can be made out that resolution 1441 is capable of reviving the authorisation in 678 without a further resolution” (paragraph 28).

### *Detail*

17. The Security Council, acting under Chapter VII of the Charter of the United Nations, may authorize the use of force. The question was whether it had done so. The legality of the use of force in March 2003 turned on the interpretation of a series of SCRs. Either that use of force had been authorized by the Council, or it had not.
18. While international law has developed rules for the interpretation of treaties (codified in the Vienna Convention on the Law of Treaties of 1969), there are no similarly authoritative rules for the interpretation of SCRs. Some guidance may be found in the Vienna Convention rules, but account needs to be taken of the differences between SCRs and treaties. Given the way SCRs emerge, and that for the most part they are intended to be political documents, one should not expect them to be drafted with the same attention to legal detail and consistency as is usual in the case of a treaty or Act of Parliament.
19. The Vienna Convention distinguishes between a general rule of interpretation and supplementary means of interpretation (including recourse to the negotiating history). This distinction is perhaps less significant in the case of SCRs than in the case of treaties, given the importance of the historical background for the interpretation of SCRs. In any event, any serious attempt to interpret an SCR needs to have regard to the available preparatory work (*travaux préparatoires*); to the circumstances of the resolution’s adoption; to the Council’s practice; and to subsequent developments.
20. The series of resolutions at issue in relation to the use of force against Iraq in 2003 were complex. Their interpretation was not straightforward. I agreed with

most of what was said in the Attorney General's advice of 7 March 2003. I agreed with his statement of the possible legal bases for the use of force (paragraphs 2 to 5); that the Security Council's authorization of the use of force given in SCR 678 could be 'revived' by the finding by the Security Council of a material breach of SCR 687 (paragraphs 7 to 11); that there were precedents for this dating from 1993 and 1998 (paragraph 8); and that (contrary to the US Government's view) such 'revival' could not be based on the views of individual members of the Council (paragraph 9).

21. I also agreed with much of the analysis of the material and the arguments about the effect of SCR 1441 (paragraphs 11 to 25). Where I had a different view was on whether a 'reasonable case' could be made for saying that, by adopting SCR 1441, the Security Council had already made a finding of material breach which had the effect of reviving the authorization in SCR 678 for some future use of force, without the need for a further decision by the Council. In other words, I did not consider that the Council, by adopting SCR 1441, had left to individual States the decision whether at some point in the future a material breach had occurred sufficient to revive the authorization to use force. I reached this conclusion after considering the wording of SCR 1441, its negotiating history, the circumstances of its adoption, subsequent developments in the Council, and the Council's practice<sup>5</sup>.
22. The key provisions of SCR 1441, for present purposes, were paragraphs 4, 11, 12 and 13. In paragraph 4 the Council decided that false statements or omissions in Iraq's declarations and "failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution shall constitute a further material breach of Iraq's obligations and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below". In paragraph 11, the Council directed UNMOVIC's Executive Chairman and the IAEA Director-General "to report immediately to the Council any interference by Iraq with inspection activities, as well as any failure by Iraq to comply with its disarmament obligations, including its obligations regarding inspections under this resolution". In paragraph 12, the Council decided "to convene immediately upon receipt of a report in accordance with paragraphs 4 or 11 above, in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security". And in paragraph 13 the Council recalled, "in that context" (i.e., in the context of paragraph 12), that it had repeatedly warned Iraq "that it will face serious consequences as a result of its continued violations of its obligations".
23. My reading was that the Council had decided in paragraph 12 to convene upon a certain event (the submission of a report) for the purpose of considering certain

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<sup>5</sup> A good deal of relevant material is described in Professor Sean Murphy's article "Assessing the Legality of Invading Iraq", 92 *The Georgetown Law Journal* 173-257 (2004).

matters (the situation and the need for full compliance with all relevant SCRs). Paragraph 4 spoke of a material breach being referred to the Council ‘for assessment’. In my view, the ordinary meaning to be given to the terms of these provisions in their context was that the Council would consider the situation, and assess the nature of any breach. Paragraph 12 made no express mention of subsequent Council action. But neither did it clearly indicate that no such action was needed before the Council’s authorization of the use of force revived. In my view, the natural reading of the provisions in question, in context, was that the purpose of Council consideration and assessment was for the Council to decide what measures were needed in the light of the circumstances at the time. Among such circumstances, as it turned out, was the ongoing work of UNMOVIC and the view strongly held by many that the inspectors should be given more time. A strong hint of what might come was given in paragraph 13. This reading of the text was not, in my view, contradicted by anything in the preparatory work of the resolution. If anything it was reinforced by the preparatory work. And many statements made in connection with the adoption of SCR 1441 pointed towards this view set out in the present paragraph<sup>6</sup>.

24. One factor underlying the differing views on the effect of SCR 1441 may have been different perceptions of its negotiating history<sup>7</sup>. I did not think that much weight could be given to the recollections of informal discussions or to differences between successive versions of elements of the draft resolution that were exchanged among Council members. The negotiating record of an international instrument is rarely clear; it rarely points in one direction. Negotiators often convince themselves - they genuinely believe - that the outcome of a negotiation meets their objectives. But that does not mean that they are right, or that a court would agree.

### **The duties and responsibilities of Occupying Powers and UNSCR 1483**

25. From the commencement of the occupation until the adoption of SCR 1483 on 22 May 2003, the UK and USA had the duties and responsibilities of belligerent

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<sup>6</sup> See S/PV.4644.

<sup>7</sup> The Attorney General spoke with some of those directly involved in the negotiations, in the FCO, at the UK Mission to the United Nations, and with American officials in Washington (paragraphs 1 and 28 of the advice of 7 March 2003). See, for example, paragraph 28: “having regard to the information on the negotiating history which I have been given and to the arguments of the US Administration which I heard in Washington, I accept that a reasonable case can be made that resolution 1441 is capable in principle of reviving the authorisation in 678 without a further resolution.”

occupants (Occupying Powers). Thereafter they also had additional authorities granted by the Security Council.

26. As Occupying Powers, the UK and USA were bound by the rules of international law on belligerent occupation, which are set out in the 1907 Hague Regulations (articles 42 to 56) and the Fourth Geneva Convention of 1949 (articles 27 to 34 and 47 to 78) (GCIV)<sup>8</sup>.
27. The rules are complex, but the following indicates in general terms the limitations on the authority of an Occupying Power:
  - Article 43 of the Hague Regulations provides that the Occupying Power “shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety [‘l’ordre et la vie publics’], while respecting, unless absolutely prevented, the laws in force in the country’. While some changes to the legislative and administrative structure may be permissible if they are necessary for public order and safety, more wide-reaching reforms of governmental and administrative structures are not lawful. That includes the imposition of major economic reforms.
  - GCIV prohibits, subject to limited exceptions, any alteration in the status of public officials.
  - GCIV requires that the penal laws of the occupied territory must remain in force except where they constitute a threat to security or an obstacle to the application of GCIV. In addition, again with limited exceptions, the courts in the occupied territory must be allowed to continue to operate.
28. There is a close relationship between SCR 1483 and the law of occupation. In their joint letter of 8 May 2003 to the President of the Security Council, the USA and UK said that they “will strictly abide by their obligations under international law”. The Security Council noted this letter in SCR 1483, and recognised “the specific authorities, responsibilities, and obligations under applicable international law” of the USA and the UK “as occupying powers under unified command (the “Authority”)”.
29. SCR 1483 conferred a clear mandate on the Coalition working with the Special Representative of the Secretary-General (SRSG) to facilitate a process leading to the establishment by the people of Iraq, first, of an Iraqi interim administration and, subsequently, of an internationally recognised representative government. It clarified the scope of activity of the Occupying Powers and authorized them to undertake actions for the reform and reconstruction of Iraq

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<sup>8</sup> See, inter alia, the Manual of the Law of Armed Conflict, published by the UK Ministry of Defence in 2004. A draft of the Manual was available within Whitehall in 2003.

going beyond what was permitted under the Hague Regulations and GCIV. It endorsed the view that the activities mentioned in the letter of 8 May 2003 might lawfully be carried out under the law of occupation. Subsequent SCRs added to these authorities. In some cases, these actions were to be carried out in coordination with the SRSG or in consultation with the interim Iraqi administration (IIA).

### **How the process for obtaining legal advice and decision making worked**

30. Four issues may be worth considering: the relevance of the rules of international law on the use of force in circumstances such as those of March 2003; the need for timely legal advice; the strength of the legal case that should be required before something as serious as the use of force against Iraq in 2003 is undertaken; and the role of government lawyers advising on public international law.
31. It is clear that in the United Kingdom great importance attaches to compliance with the rules of international law on the use of force. Ministers frequently assure Parliament that any use of force will be in accordance with international law, and this is taken very seriously.
32. If it is to be useful and effective, legal advice needs to be timely. Within government, this usually means that lawyers should be integrated into the policy-making process, and that their views should be known throughout the process. This was the case, for example, in the period before the adoption of SCR 1441, during the conflict itself (targeting), and as regards the post-conflict phase. For example, in respect of the post-conflict phase FCO Legal Advisers regularly attended the daily FCO meetings, and kept in close touch with MOD lawyers, and with LSLO. The Attorney General's advice was sought and given on many occasions, and factored into policy as it developed.
33. The negotiation of SCR 1441 was conducted in an exceptional way, over some seven or eight weeks. Some of it took place through direct contact among Foreign Ministers; much of the debate and drafting seems to have taken place within the US Administration itself. If Ministers had needed a definitive legal view on whether the draft resolution met their political objective, the Attorney General's advice should have been sought during the negotiation and on the final draft before the resolution was adopted by the Security Council.
34. Following the adoption of SCR 1441, legal advice was given within the FCO, whenever necessary, on whether by adopting SCR 1441 the Security Council had revived the authorization to use force. In my view it had not, but it was fully understood that it was ultimately for the Attorney General, as the government's chief legal adviser, to advise on this matter.

35. The lesson I would draw is that on matters such as this it is important that Ministers seek legal advice, where necessary from the Attorney General, in a timely manner. Where the use of force is under consideration, this probably means throughout the process of policy formation.
36. Another issue is the strength of the legal case that should be required before the Government goes to war. Is a 'reasonable' legal case sufficient? A 'respectable' case? An 'arguable' case? Or should there be a higher degree of legal certainty? This is ultimately a policy question, and one that perhaps cannot be answered in the abstract.
37. The events leading to the use of force against Iraq in 2003 also raise the question of the role of government lawyers advising on public international law, in circumstances as acute as this, where the likelihood of the matter coming before an international or national court is remote. In my view, the seriousness of the matter and the absence of a court places a special responsibility on the lawyer to do his or her best to ensure that the law is upheld.

Michael Wood

15 January 2010

### **Postscript**

As the Iraq Inquiry knows, there is a convention of neither confirming nor denying whether the Law Officers have advised on an issue. I understand that the Attorney General is content for witnesses to give written and oral evidence to the Inquiry notwithstanding the convention. Thus a deliberate exception has been made to the convention for this purpose.