(10.00 am)

RT HON LORD GOLDSMITH QC

THE CHAIRMAN: Good morning.

RT HON LORD GOLDSMITH QC: Good morning.

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

RT HON LORD GOLDSMITH QC: Good morning.

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

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

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

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

RT HON LORD GOLDSMITH QC: Yes.
THE CHAIRMAN: Now, two preliminaries which I state on every occasion: we recognise that witnesses are giving evidence based in part on their recollection of events, and we, of course, cross-check what we hear against the papers to which we have access.

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

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

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

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

RT HON LORD GOLDSMITH QC: Well, I discovered, of course, after I had become Attorney General, that he had advised -- Lord Williams had advised on the No Fly Zones, and, in short, after getting detailed assessment from others in government, principally coming from, probably, through the Cabinet Office, of the grave humanitarian risk if those areas were not patrolled, he
formed a judgment that there was a reasonable case under international law to operate the No Fly Zones on the basis that they were going to potentially avert a serious humanitarian risk.

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

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

I was being asked to advise on the lawfulness of attacking those targets and the United Kingdom's potential responsibility if it appeared to participate in that with the United States if we didn't actually agree with all the targets, but in order to reach that view, it was necessary for me to reconsider the legal basis for the No Fly Zones at all, which I did, looked at it carefully, again asked for up-to-date assessments from the Cabinet Office as to the risks if the No Fly Zones were not in operation, and agreed with the view that Lord Williams had expressed, that there was a reasonable case for the No Fly Zones.
SIR MARTIN GILBERT: So this was established by the Cabinet Office material that they were able to give you, the situation on the ground?

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

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

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

What was important to us was to know whether there were -- what I'm afraid is called collateral damage, whether civilian casualties or damage to civilian
property, and why.

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

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

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

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

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

SIR MARTIN GILBERT: Were you able, after these targets had
been attacked, to make some assessment of your own that
the concerns, say, for the loss of Iraqi civilian life, had been taken seriously, had been adequately --

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

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

RT HON LORD GOLDSMITH QC: Oh, yes. There were -- the way that the targeting would take place would be that we would be shown details of the proposed target, often I would be shown aerial photographs, I would be told from intelligence what property was believed to be. I would always be looking to see what's the potential area of impact of this particular weaponry that was being used. The Ministry of Defence had some very sophisticated modelling techniques, and they would say, "With this
weaponry, this is what is likely to be", and I would
look to see whether there were buildings within those
areas, and then, "What's your view as to what those
buildings are?"

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

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

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

RT HON LORD GOLDSMITH QC: Yes.

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

With regard to the advice that your predecessors had
given on the legal basis for military action in Iraq, is
it right to say that they had considered that
a fundamental breach of the ceasefire in UNSCR 687 could
revive the authorisation to use force in 678, depending
on the prevailing circumstances?

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

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

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

RT HON LORD GOLDSMITH QC: I don't think I formed a view at that time. I did form a view later -- and I didn't take this just for granted at all. I asked for full briefing. I got briefing from the Foreign Office. I asked the -- particularly, the Foreign Office lawyer who was seconded to my office to provide further research. I looked at legal articles and commentaries that had been written about this. I examined the history. I looked back at the advices that would be given, and eventually -- in due course, that is to say -- I formed the view that I agreed with my predecessors that the revival argument did mean that if there was a material breach of the ceasefire conditions in Resolution 687, then that revived the authority for force if the Security Council, one way or another, took the view that there was a material breach.

SIR MARTIN GILBERT: With regard also to your predecessors' views that it was for the Security Council rather than individual states to make the assessment of whether or not there had been a material breach, was this also something with which you were in agreement?

RT HON LORD GOLDSMITH QC: I didn't change that view, no. I think there could be an argument about it, and I knew that the United States took a different view, but
I stuck to the same position. I absolutely saw the argument for it. It was the view which had been expressed by the legal adviser to the United Nations. We had comfort actually -- I'm not sure we should have done, but we did have an advice which the legal adviser to the United Nations had given to the Secretary General in 1993 -- I refer to that, I think, in my 7 March note -- in which he had confirmed that the original authority to use force in Resolution 678 could revive, if there were a material breach, but said it was for the Security Council to determine.

SIR MARTIN GILBERT: Thank you very much.

THE CHAIRMAN: Lawrence?

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

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

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

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

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

RT HON LORD GOLDSMITH QC: Of course.

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

RT HON LORD GOLDSMITH QC: Well, I didn't know about the dossier -- I mean, I wasn't involved in its planning. I didn't know that the dossier was being presented, until it arrived, although, as it turned out, when -- when I saw John Scarlett and one of his very senior officials, they did say at that stage that they were producing a dossier, but I didn't know really what the purpose of it was.
May I just explain the context in which this meeting took place?

SIR LAWRENCE FREEDMAN: Please do.

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

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

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

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

Anticipatory self-defence, which happens to be the same in domestic law as well, is, if you see a threat which is imminent, which you can’t deal with other than by force, then you can, as it were, land the first punch.
At that stage, in the summer of 2002, there was growing appearance in the press of a United States argument that there was a new doctrine of pre-emption which seems -- that's why I'm distinguishing between it -- which looked as if it was saying something different from anticipatory self-defence, particularly because of the evidence of imminence.

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

SIR LAWRENCE FREEDMAN: You concluded --

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

On the self-defence, the judgment I formed was this:
that their position in relation to the chemical and
biological weapons was that they existed, but that they
would not be used, as it were, first. They would be
used in retaliation to an attack. They might be used on
Iraqi people, and certainly, that if there were an
attack, they would be used on Israel, but not that there
was an imminent threat that they were going to be used,
as it were, offensively in the first instance.

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

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

SIR LAWRENCE FREEDMAN: That's very helpful. Can you, just
to conclude this -- presumably you were aware that not
just in the United States, but in the United Kingdom as
well, there was, in terms of the description of the
threat, this so-called fusion argument, that, at some
point in the future, weapons of mass destruction, say
from a country like Iraq, could be passed over to
terrorists such as Al-Qaeda. But this was
a hypothetical threat.
So if that was going to be a justification for war,
you would find it very difficult, on what you have just
said.
RT HON LORD GOLDSMITH QC: It seemed to me that this might
be part of the policy arguments for saying that the
United Nations Resolutions in relation to weapons of
mass destruction must be enforced so as to avoid this
risk in the future. But certainly it never seemed to me
that that argument could be a justification for using
force on the basis of self-defence, because there wasn't
any imminent threat -- evidence of imminent threat, that
that was about to happen, and, therefore, we needed to
protect ourselves against it.
SIR LAWRENCE FREEDMAN: Thank you very much.
THE CHAIRMAN: Usha?
BARONESS USHA PRASHAR: Lord Goldsmith, I want to cover two
areas. One is your involvement in discussions before
8 November 2002 on the potential use of force and,
secondly, your view of the position in international law
at the time that is before 1441 was adopted. So can
I first turn to your involvement in the discussions
before November 8th?

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

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

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

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

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

RT HON LORD GOLDSMITH QC: I'm not aware of the detail of discussions. I would presume there were discussions taking place. I wasn't a part of them. I didn't attend Cabinet. This was a practice which had grown up
over quite a long period of time, that the Attorney General didn't attend Cabinet unless apparently legal advice was called for. It wasn't called for at all in that period, so I didn't attend Cabinet and wasn't a part of any other group which was discussing this.

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

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

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

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

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

RT HON LORD GOLDSMITH QC: Yes.

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

RT HON LORD GOLDSMITH QC: He had, in an interview with
Jonathan Dimbleby, I think it was, expressed himself with apparent clarity and repeatedly -- it wasn't just a single remark. I looked at the transcript and he said it several times. He was saying that there was a clear basis for military action at that stage, without any further authority. He was putting it on the basis, apparently, of self-defence, as he has explained.

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

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

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

THE CHAIRMAN: It has.

RT HON LORD GOLDSMITH QC: I know there is a bit of an
issue, which is frustrating, about what has and has not
been declassified.

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

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

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

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

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

BARONESS USHA PRASHAR: On 22 May, you and Sir Michael Wood
went to the United States State Department legal
advisers and you discussed the legal basis for
a possible military attack on Iraq. Is that right?

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

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

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

RT HON LORD GOLDSMITH QC: Not in any detail at all.
BARONESS USHA PRASHAR: You didn't form any opinion about
whether there were any differing views or was it just
about the different roles played by different officers?

RT HON LORD GOLDSMITH QC: It was -- no, I don't recall
getting any different views. I was aware from other
briefing that we had a difference of view on one issue, which was whether or not -- there was a very important difference. Whether, so far as the revival argument was concerned, an individual state could form the judgment that there was a material breach or whether it had to be the Security Council.

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

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

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

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

RT HON LORD GOLDSMITH QC: Can I, just before I say that, just explain that remark about reliance on previous resolutions? Because the revival argument depends upon two things. It depends, first of all, on the fact that
Resolution 678 authorised the use of force and that Resolution 687 suspended it on conditions, but didn't, in fact, cancel it. That remained the case throughout. But then there was the second requirement that someone has to make a demonstration of material breach.

In 1998, a determination had been made by the Security Council in Resolution 1205, actually not that there was a material breach, but that there was a flagrant violation. It sounds worse, actually it is not a legal term at all, and so it creates confusion, and I think it caused confusion at the time, but in any event, there was a question whether, could you still, in 2002, rely upon the fact that, in 1998, the Security Council had said that Iraq was in flagrant violation?

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

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

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

RT HON LORD GOLDSMITH QC: I think I spoke quite shortly at
the meeting. It was a meeting which dealt with quite
a lot. I expressed my view.

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

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

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

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

I wasn't asked for it. I don't, frankly, think it
was terribly welcome. I do believe that it may well
have been one of the contributing factors to the
Prime Minister, to his great credit, persuading
President Bush that he must go down the United Nations
route, and then, as it were, the next I saw was,
in September, President Bush went to the
General Assembly of the United Nations and said that he was going to come to the United Nations and go on the multilateral route, which was very, very welcome.

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

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

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

RT HON LORD GOLDSMITH QC: No.

BARONESS USHA PRASHAR: It doesn't?

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

So I have no idea what it is they have got, if anything. Well, I don't know what they have got, I should say, rather.
BARONESS USHA PRASHAR: Can I move on to 14 October, I think when you met with Sir David Manning and Baroness Morgan. What was the purpose of this meeting?

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

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

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

First of all, that a new resolution needed to make a clear determination that there was a material breach; secondly, that the use of force would have to still be
proportionate and necessary to what it was that was
going to be achieved; and I probably made a third point
because I certainly did during that period. I made it,
for example, in the meeting in July and in my advice
in July, that regime change was not a basis for legal --
for lawful use of force. It could be that another
lawful basis for force might lead to regime change.
Indeed, it might be the only way to achieve it, but
wanting regime change was not of itself a lawful basis
for the use of force.

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

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

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

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

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

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

So what I was anxious to do, I think, was to reach
a correct legal view. I was also -- I also had some
concerns, as I had had with the Defence Secretary, about
public statements being made about what the position would
be, although that is more after 1441 than before, lest
that be thought necessarily to be our position. Though
I did recognise -- perhaps I may make this point at this
stage -- I did recognise that it wasn't easy for
ministers, because they were engaged in a -- I'm not
going to say a game of poker, but, effectively, they
wanted Saddam Hussein to realise there was a credible
threat, and to have been very doubtful in public about
what they could do would obviously change the dynamics
of these very difficult negotiations and pressure that
was being put on his regime.

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

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

BARONESS USHA PRASHAR: Were you encouraged to put your
advice in writing?

RT HON LORD GOLDSMITH QC: No, I wasn't. There came a time when -- there came a time when it was agreed that I would.

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

RT HON LORD GOLDSMITH QC: I wasn't asked to provide any advice in writing at this stage.

BARONESS USHA PRASHAR: Were you wanting to put your views in writing --

RT HON LORD GOLDSMITH QC: No, I don't think I did need to put my views in writing at this stage. I had been very clear in July about what needed to be done, and that still stood, and what the parameters were. I think I had been very clear in my oral statements that there needed to be a clear statement of material breach and so forth. So I don't think I needed to add anything else.

BARONESS USHA PRASHAR: But you met the Prime Minister on 22 October?

RT HON LORD GOLDSMITH QC: Yes.

BARONESS USHA PRASHAR: Were you anxious that he should know your legal advice and did you tell him that you needed to express your views in writing?

RT HON LORD GOLDSMITH QC: I don't think. So I couldn't have given definitive legal advice at that stage, because the whole point was he had had the advice
in July about what needed to happen. The self-defence
didn't work, the humanitarian crisis didn't work. Put
in those terms, there wasn't a basis for military
action.

If there was going to be a basis for military
action, it had to be as a result of the new
to say there was material breach. That advice had been given.

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

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

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

There were two other issues which cropped up at
these meetings. One of them was regime change. I'm
not sure whether I needed to repeat that again in
October, but it was a constant theme. The other was the
Kosovo precedent. If I may just explain.

When action was taken in relation to Kosovo, there was essentially a new legal theory that was developed, which was that there could be military force used to avert a serious humanitarian crisis. In that occasion, there had been a veto by Russia I believe, in the Security Council.\(^1\) So United Nations authority was not present.

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

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

\(^1\) The witness subsequently added that he understood that Russia had threatened to veto a draft resolution, but the gist of the point remained the same.
ignore a veto, even if it is unreasonable.

BARONESS USHA PRASHAR: So what you were really saying is you were giving consistent advice on these issues and quite emphatically?

RT HON LORD GOLDSMITH QC: Yes.

BARONESS USHA PRASHAR: On 7 November, you met the Foreign Secretary. Was the purpose of the meeting to make clear to him that he should not take it for granted that it would be all right on the night?

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

BARONESS USHA PRASHAR: What did you mean by it wouldn't be all right on the night?

RT HON LORD GOLDSMITH QC: Well, they shouldn't take it for granted that -- I can't remember whether they got the resolution the next day, or if it was at an advanced state on, sort of, that day. They shouldn't take it for granted that, when it came to it and definitive legal advice was given, that it was going to be that we are in a position to take military action.

THE CHAIRMAN: Just for the record, it was four days later that 1441 --

RT HON LORD GOLDSMITH QC: Thank you. So the resolution probably wasn't even in its final form at that stage.

BARONESS USHA PRASHAR: So the picture I'm getting is that you were giving consistent advice. You expressed some
concerns about the statements made by some ministers,
but before I hand over to colleagues, I would like to
know now, what was your position in international law at
the time before the 1441 in relation to the use of force
in Iraq? So if you can just sort of summarise for me
what was your view before 1441.

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

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

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

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

BARONESS USHA PRASHAR: Okay, thank you very much.

THE CHAIRMAN: I would like to ask a couple of general
questions about relations between the Attorney General and his/your office and the Foreign Office legal advisers. We took evidence yesterday from Sir Michael Wood and also from your former legal secretary, David Brumell.

RT HON LORD GOLDSMITH QC: Yes.

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

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

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

THE CHAIRMAN: Again, just for the record, it was said yesterday it was the normal practice to second from the Foreign Office legal advisers' department someone with
expertise in international law to the law officers' secretariat, the law officers' department.

RT HON LORD GOLDSMITH QC: Yes, if I could, the way that the Attorney General's office worked was that with the exception of the two top officials, the legal secretary and the deputy legal secretary, now called the Director General and Deputy Director General, I think, all the lawyers present were secondees from other departments.

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

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

How far would it be normal or occasionally necessary
for the Attorney General to give advice on the
prospective effect of particular drafting changes?
RT HON LORD GOLDSMITH QC: Well, in the context of the
United Nations Security Council, it didn't seem to be
the practice to do that. As I have said, we were sort
of kept informed of drafts, but always sort of
explicitly on the basis of, "We are telling you but we
are not asking you to do anything about it".
In some other areas, the European Union, for
example, I would, from time to time, give specific
advice on a proposed Directive or something of that
sort.
THE CHAIRMAN: Just to round off on that, is 1441 a special
case, in that the prospective effect of it from the
standpoint of the British Government's policy objective,
would be to certainly reinforce the threat against
Saddam where he failed to comply, but ultimately to
justify the use of force against him, should he fail to
comply?
It was therefore a very special case and looked
further forward into the future. Was that something
that should have come under your eye at that time?
RT HON LORD GOLDSMITH QC: Well, obviously it was a special
case in the sense it was of particular importance and
significance, and later resolutions relating to Iraq in
relation to reconstruction and the interim authority, for example, also I was given some knowledge of.
I think the Foreign Office would say, well, it did come under my eye because they were keeping us informed of the state of the negotiation, even if not specifically asking for formal advice about it.

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

RT HON LORD GOLDSMITH QC: I'm not sure -- and it is a counsel of perfection and it is with hindsight -- that they worked quite as well as they could have done. Because it was a very, very important resolution. It was changing and that's the nature of United Nations negotiations.
If time had permitted (and there were other demands on my time) -- perhaps with hindsight it would have been desirable if I had been asked to be rather more involved in the detail, but I wasn't and that was the practice.

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

SIR RODERIC LYNE: I would like to go back, if I could, to
Resolution 1441 and I think, for the sake of clarity, it was actually adopted on 8 November, so your conversation that you referred to just now was, indeed, just before it was adopted.

RT HON LORD GOLDSMITH QC: Thank you.

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

RT HON LORD GOLDSMITH QC: Yes.

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

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

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

"... decides 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."

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

At the time that 1441 was adopted, and having looked at what the United States, the United Kingdom, France, Germany -- France, China, Russia, some other countries such as Mexico and Ireland, said on the record in their
explanations of vote, did you see that there was
a discrepancy between our understanding of this
paragraph and the way that other people were
interpreting it?
RT HON LORD GOLDSMITH QC: No, I wouldn't put it that way.
First of all, you know, the way I approach all legal
problems is to try to assemble all the material that
will help me reach a decision, to look at it very
carefully, to enquire, to consider other views and then
to form a judgment. So I don't read a document like
this and say, "Ah, I understand what this means", unless
it is crystal clear.
Sir Michael, I think yesterday, said that
Resolution 1441 was clear. I would have thought that
was the one thing it wasn't, but that's a difference
between us, and, therefore, you have to look at other
materials in order to resolve the ambiguities, and no
doubt we will come on to discuss how I did that.
But that was one -- the explanations of vote was one
of the matters to be taken into account in determining
what was meant in operative paragraph 12, as, of course,
the whole of the resolution. You don't interpret any
document like this just by looking at one paragraph.
You have to look at it as a whole. You have to
understand the purpose behind it and then you have to
form a view as to what it means.

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

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

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

RT HON LORD GOLDSMITH QC: I don't think this is misleading. I just would like to explain one point which seems to me important in this debate, particularly when one looks at the expression "automaticity", which crops up.

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

So there was a concern that there should be not automaticity, therefore that there should be not the ability to go in the following day, and that was
important to a number of states. That much is clear.
So the firebreak was put in, which is really operational
paragraph 2, that there is a one last opportunity to
comply. Now, that's one issue.
SIR RODERIC LYNE: Can I just pause on that issue?
RT HON LORD GOLDSMITH QC: Yes.
SIR RODERIC LYNE: Were you concerned that automaticity --
everybody said there is no automaticity there -- could
itself be interpreted in two different ways? The way
that you have just described: this means we do not go
immediately into action; or, alternatively, as meaning
that this resolution does not automatically mean that
you can go to war, time unstated, without a further
resolution.
RT HON LORD GOLDSMITH QC: I think that some external
observers have interpreted the word in that second
sense. If one looks carefully at the explanations of
vote, and certainly -- and no doubt we will come on to
this -- to the negotiating history, I don't believe the
principal players understood it in that way.
There was this second issue, which was what was
going to happen, and, actually, I think the thing that
is most significant about what was said by the French,
and indeed the joint statement that was made by the
French, the Russians and the Chinese afterwards, was
they never said, "And the Council must decide".

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

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

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

So there was a lot, just taking the British view of this, that was left unclear about what would happen. Would that be accurate?

RT HON LORD GOLDSMITH QC: I think what, with respect, would be accurate is, as I said before, the difficulty about 1441 was that it was not crystal clear, and that is what led to me particularly having to consider very carefully
which was the better interpretation of this, because at
the end of the day you can't throw up your hands and
say, "I don't really know what this means". You
actually have to reach a decision at some point which
way you go, and you weigh up all the evidence, and, as
you have said, Sir Roderic, there are elements there
which point in one direction, equally, there are
elements which point in another. That was the
difficulty.

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

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

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

RT HON LORD GOLDSMITH QC: He did say "I trust". This is
diplomatic language. There is a lot of code, I suspect, in all of this, which the diplomats understand, Sir Roderic, you amongst them.

SIR RODERIC LYNE: Very long retired.

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

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

RT HON LORD GOLDSMITH QC: They couldn't have done that.

I mean, 1441 either meant that the Security Council had to meet to consider, but no more, and there were the existing paragraphs in operative paragraphs 1 and 4 in particular, which I hope we will talk about, which meant that authority for force was revived, or they had not reached that conclusion; they had actually decided that the Security Council would have to decide. There are only two possibilities.

SIR RODERIC LYNE: They had left open the possibility that
there might be a second decision or there might not be
a second decision.

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

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

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

SIR RODERIC LYNE: The French, as you say, were very firm
that they saw this as a two-stage process. Some, at
least, within the United States administration, possibly
some within the British Government, had entered the
negotiation with a preference that there would be
a one-stage process. At the end of this negotiation, it was still not clear, from 1441, whether there had to be a second stage or not.

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

SIR RODERIC LYNE: All right.

RT HON LORD GOLDSMITH QC: It is very important.

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

RT HON LORD GOLDSMITH QC: Yes.

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

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

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

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

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

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

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

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

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

But this is not really the point I'm trying to establish at this stage. I think what we have agreed on
is it wasn't crystal clear, and it wasn't crystal clear
because there were differing views about whether or not
a second decision was going to be required.

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

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

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

RT HON LORD GOLDSMITH QC: Of course.

SIR RODERIC LYNE: -- that was debated, effectively, for
some months afterwards. But just to conclude at this
stage, did the way that 1441 come out present the
United Kingdom with a difficult decision as to whether
or not we should seek a further decision or resolution
by the Security Council before we might find ourselves
going into military action?

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

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

That's what I understand Sir Jeremy Greenstock to
mean when he talks about the word "legitimacy". That it
would have had that sort of legitimacy because it would
have been supported by the international community, and
that obviously did give rise to a problem.
SIR RODERIC LYNE: But at this stage, from a legal point of view, you were still of the view, as you have just said, I think, that the safest course would be to have a further Security Council Resolution --

RT HON LORD GOLDSMITH QC: Yes.

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

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

RT HON LORD GOLDSMITH QC: No.

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

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

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

In fact, the one that I found most important to deal with wasn't actually quite the one that he had raised, but was actually what was meant by the word "assessment" in operational paragraph 4, which came in at a late stage. I don't believe I had seen that before 1441 had
been passed. Just what did that mean? Together, no
doubt with operational paragraph 12.

As I think the Tribunal, probably the world, knows,
at one stage my provisional view was that, taking all
these factors into the balance, there wasn't enough
there. The balance came down in favour of saying, "No,
a second resolution is needed". Subsequently -- and no
doubt we will come on to it -- for good reasons, which
I will seek to explain to the tribunal, I then
ultimately reached, when I had to reach a definitive
view on this, a different view.

SIR RODERIC LYNE: I think we will come on to that after the
break. Thank you very much.

THE CHAIRMAN: Let's take a break for about ten minutes and
come back at 11.15 am.

(11.05 am)

(Short break)

(11.15 am)

THE CHAIRMAN: I think we will take another short break
before the lunch interval of an hour.

Roderic, would you like to pick up the questioning?

SIR RODERIC LYNE: Yes, I would like, if I may, just to move
on to the development of your views on the legal
position after Resolution 1441 --

RT HON LORD GOLDSMITH QC: Yes.
SIR RODERIC LYNE: -- in the period from there leading up towards your advice to the Prime Minister of 7 March 2003.

RT HON LORD GOLDSMITH QC: Yes.

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

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

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

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

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

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

SIR RODERIC LYNE: But when you decided to pick up the phone to Jonathan Powell, did that suggest that you were a bit worried that this might have been coming out of Number 10?
RT HON LORD GOLDSMITH QC: I don't know. I don't know whether I picked up the phone to him or whether it was arranged that there would be a meeting or a call. I don't know. But of course, at the end of the day, what mattered was what was the view in Number 10. You know, wherever the Chinese whispers had been coming from, what mattered was their view, and each time I did say, "I want this to be understood", the response I always got was, "Yes, that is understood", and sometimes afterwards you wondered if that's the way everyone was acting.

SIR RODERIC LYNE: But what also mattered, obviously, was your view. So you presumably reiterated your view to Jack Straw and to Jonathan Powell in those conversations?

RT HON LORD GOLDSMITH QC: I think there was an important moment after 1441, when I had a conversation with Jack Straw and I hadn't at that stage received what I would call instructions. I want to explain that word because it could be completely misunderstood.

The way that lawyers work, particularly barristers, which, of course, is what I come from, is you get instructions, which means a request to advise, and the request to advise comes through with the detail of the question and with the supporting materials, often with
views expressed that you can -- and until I had had
that, particularly the Foreign Office legal advisers'
point of view, and been able to analyse that, I wasn't
really in a position to give a definitive point of view.

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

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

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

RT HON LORD GOLDSMITH QC: Well, in a sense, it wasn't
necessary for me to give advice until it mattered, and
it wouldn't really matter until we were at the point, if
we ever came to the point -- I very much hoped we
wouldn't, but we did -- we came to the point that
a decision had to be made whether it was lawful to go to
use force, and it is not uncommon in government that the
Attorney General's advice is not asked for until it
matters.

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

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

RT HON LORD GOLDSMITH QC: Yes. Exactly so.

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

RT HON LORD GOLDSMITH QC: That is so, although I do think
there is a point here, if I may, that is worth
explaining, because I mentioned before the break the
significance of operational paragraph 4.
Now, the architecture of Resolution 1441 is extremely important. Operational paragraph 1 says that Iraq is in material breach. Operational paragraph 2 then says it is going to be given a final opportunity. Operational paragraph 4 then says very, very importantly that the Security Council determines now that any failure by Iraq to comply with the clear obligations for cooperation will constitute a further material breach.

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

What that means is such a nature of breach as entitles the other party to invoke that breach as
a ground for terminating the treaty or suspending it.

In a sense, there are two elements to that. One is: is there, in fact, a breach? And the second is: is it of the character which, you know, entitles you to suspend --

SIR RODERIC LYNE: The degree of seriousness?

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

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

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

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

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

RT HON LORD GOLDSMITH QC: Yes, of course.

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

RT HON LORD GOLDSMITH QC: Forgive me, I don't think I had
reached that view at that stage. I think what I was
saying is, at that stage -- sorry, that's why I'm trying
to distinguish between the determination of material
breach and this question of decision. I think I was saying at that stage, "Please don't take me as being optimistic that there doesn't need to be a further Security Council Resolution. That's an issue that we will have to deal with. I'm concerned that the resolution as it stands does require a further resolution".

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

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

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

RT HON LORD GOLDSMITH QC: Yes.

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

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

RT HON LORD GOLDSMITH QC: Yes.
SIR RODERIC LYNE: Can you tell us where that request came from and what meetings you might have had or discussions in December with Downing Street or the Foreign Secretary about the process whereby you were going to offer advice?

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

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

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

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

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

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

SIR RODERIC LYNE: So the request for you to produce draft
advice actually came from Jonathan Powell or from
Sir Michael Wood?
RT HON LORD GOLDSMITH QC: Well, the request came in a letter from Sir Michael Wood.

SIR RODERIC LYNE: He talked yesterday about that letter.

I can't remember now -- I'm so confused about which documents we are allowed to refer to -- whether that is a letter that's on the public record, but he described it fully as one that set out the arguments on both sides but not one in which he, himself, was making a firm recommendation. So it was essentially providing background for your subsequent advice?

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

SIR RODERIC LYNE: Setting out arguments?

RT HON LORD GOLDSMITH QC: Absolutely, yes.

SIR RODERIC LYNE: Setting out arguments for your advice.

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

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

RT HON LORD GOLDSMITH QC: No, I think there was a meeting -- it was a meeting, I believe, and there wasn't so much a request for formal advice at that stage. I explained that I was concerned about what was
meant by the expression "for assessment" in operational paragraph 4, which seemed to me to be an essential issue.

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

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

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

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

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

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

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

RT HON LORD GOLDSMITH QC: I wanted to understand principally what was meant -- what was understood by
what was meant by "for assessment", and I also wanted to
know what were the -- what the answers to a number of
other textual points that I raised as giving rise to
questions about what was meant by 1441.

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

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

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

RT HON LORD GOLDSMITH QC: I wasn't expecting to discuss it
with Jonathan Powell. That wasn't the point. I did
want to discuss that with the Prime Minister, with the
Foreign Secretary, who had been very closely involved in
the negotiations, and this was a channel.

I suspect this arose because they asked for the meeting, "Where are you up to?" or something of that sort, and I told them in the course of it that this is what I wanted to do.

SIR RODERIC LYNE: So Number 10 asked you to come over, you had this meeting, you had this discussion, you asked for their help in organising things so that you could move forward with your advice, including a meeting with Jeremy Greenstock, ultimately with American counterparts.

RT HON LORD GOLDSMITH QC: Also, that I would want to have, as it were, from the client, you know, "What do you say in relation to certain of these arguments?"

SIR RODERIC LYNE: Yes.

RT HON LORD GOLDSMITH QC: Because often the client, who has been involved -- put it that way -- is in a position to say, "Ah, well, this is how we see that", and sometimes you say, "Well, it is very interesting but it doesn't change anything", and sometimes we say, "That actually helps me now see this in a clearer light".

SIR RODERIC LYNE: The client in this case was?

RT HON LORD GOLDSMITH QC: Ultimately, it was the Prime Minister.

SIR RODERIC LYNE: The Prime Minister, which is why you were
handling this with his Chief of Staff?

RT HON LORD GOLDSMITH QC: Yes.

SIR RODERIC LYNE: Was the client at this stage expressing a view on how soon your advice was required?

RT HON LORD GOLDSMITH QC: I don't recall. Certainly there wasn't, as I recall, any request at that stage for final advice, but given what I had said about needing to understand certain further matters before I did, it obviously wasn't going to be then and there.

SIR RODERIC LYNE: But you said earlier that the advice you volunteered at the end of July you felt hadn't been particularly welcome. I wondered if the client was concerned that you shouldn't come in too soon with your advice?

RT HON LORD GOLDSMITH QC: As I have said, I think you really have got to put that to Mr Blair.

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

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

SIR RODERIC LYNE: You would rather not answer that?

RT HON LORD GOLDSMITH QC: No, I'm perfectly happy to answer that. I think his staff, his Chief of Staff and his very close advisers know what his mind was. He may say, no, he didn't know about that at all.

SIR RODERIC LYNE: I'm not asking what his mind was, but
what was indicated to you at that meeting about the
timing of your replies.

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

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

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

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

That's why a number of us have been, as it were,
raising the question of the timing of when you were able
to give that advice. We will come back to that later
on.
When did you actually give the Prime Minister your first advice?

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

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

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

RT HON LORD GOLDSMITH QC: Yes.

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

RT HON LORD GOLDSMITH QC: Yes.

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

RT HON LORD GOLDSMITH QC: She wasn't involved.
Ms Wilmshurst wasn't --

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

I think she was speaking for the FCO legal advisers collectively then.

The question I wished to ask you is: what did you present to the Prime Minister, and how and when, in January?

RT HON LORD GOLDSMITH QC: As I said, I presented a sort of draft provisional advice as a basis for understanding what the response was to some of my concerns, particularly drawing attention to the need to understand what was meant by "for assessment" in operational paragraph 4.

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

RT HON LORD GOLDSMITH QC: Yes.

SIR RODERIC LYNE: Was it quite a lengthy document?

RT HON LORD GOLDSMITH QC: Because the whole point was there were a number of textual arguments that were being raised. You couldn't explain those in a ten-second conversation.

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

RT HON LORD GOLDSMITH QC: Yes, exactly so, and the reason for that was that, by setting them out, then it was possible for those who had been involved to be able to respond, as indeed -- and it was helpful in this
respect -- as indeed Sir Jeremy Greenstock did that month. He received it, he came and saw me. He went through this, challenging some of the arguments that I had raised, making some good points, some that I wasn't so persuaded by.

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

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

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

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

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

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

In other words, the Prime Minister made it clear -- the then Prime Minister made it clear he accepted that it was for me to reach a judgment and that he had to accept that.
SIR RODERIC LYNE: You were obviously at this stage offering him a preliminary draft of your advice.

RT HON LORD GOLDSMITH QC: Yes.

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

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

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

SIR RODERIC LYNE: Who else would have received the document at that stage, other than the Prime Minister and
Sir Jeremy Greenstock?

Sir Jeremy Greenstock. That was something that Number 10 did, I assume. The Foreign Secretary obviously saw it, because he wrote to me later with his comments on it. I don’t know where.

You didn’t send it to him, so he must have had it from Number 10 as well?

Yes, there were -- as you will appreciate, there were also very significant considerations about sensitivity and security and there had been things that had been appearing from time to time in the press --

I think the draft advice of the senior law officers for the government is always a very sensitive matter before it comes out. That’s, I think, perfectly understandable. If it reached the Foreign Secretary, I think that explains perfectly well how his own legal advisers were, not surprisingly, consulted on it by him or how it may have reached his own legal team.

I don’t know whether it came that way or whether it came from my officials.

I don’t wish to cast aspersions. I don’t think that’s a material point.

Forgive me, I’m not casting
aspersions.

SIR RODERIC LYNE: No, you're not, and I'm trying to make
clear that I'm not either.

RT HON LORD GOLDSMITH QC: They talked among themselves.

I understood that.

SIR RODERIC LYNE: Not only that, but we heard from
Sir Michael Wood yesterday that this close relationship
between your department and the Foreign Office legal
advisers was an extremely important one, and normally
there was very close agreement between them. So there
was nothing improper or wrong in that, it was completely
right.

So we have, I think, now moved to the point where
you actually meet Sir Jeremy Greenstock, which I think
you did on 23 January.

RT HON LORD GOLDSMITH QC: Yes.

SIR RODERIC LYNE: That was in London, presumably?

RT HON LORD GOLDSMITH QC: Yes.

SIR RODERIC LYNE: Can you describe the main purpose of your
conversation with Sir Jeremy? You have already told us
that he looked at and challenged some of the points in
your draft.

RT HON LORD GOLDSMITH QC: Yes, the purpose of the meeting
was to get first-hand from our principal negotiator at
the United Nations his observations on the negotiating
history and on the text which had been agreed and his understandings of what it meant, particularly to get his comments on the textual arguments we had raised.

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

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

RT HON LORD GOLDSMITH QC: Yes, I mean, he went further than just talking about a draft that was put forward. What
he was saying was that this was, if you will, the key argument, the key point between the United States and us, but particularly the United States, and the French, the Russians. Not so much the Chinese, but the French and -- sort of leading on that side, and that was, was there going to be a requirement for a decision or not? He was very clear in saying the French, Russians lost and they knew they had lost, and I think he repeats that in letters to me, that they knew that they had lost that critical argument, and his case was -- and his argument was -- that's why the resolution is worded the way that it is.

SIR RODERIC LYNE: It was a compromise?

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

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

RT HON LORD GOLDSMITH QC: Well, I'm just sort of pausing
over the word "implicitly", because, as I was saying before, the resolution meant one thing or the other.

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

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

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

They were obviously statements that were designed to present the position internationally and perhaps to a domestic audience as well as they could be. But they
were not saying -- this was -- I think the argument was
being put that they were not saying that they had agreed
that there would have to be a decision.
SIR RODERIC LYNE: No, there obviously had, indeed, been
some form of compromise and they were having to stay
within the parameters of it, but for their side, they,
the Russians and the Chinese, were saying the Council
would have to return to take a position.
As you say, they weren't able to use the word in
their statement "decision", but "take a position", and
I daresay that lawyers could probably have a very long
argument about what "take a position" means, but the
implication of the French statements and not only the
French statements at the time that the resolution was
adopted, didn't say in terms that the Council would have
to take another decision, because the resolution didn't
say that, but would it be fair to say that they were
trying to at least press in that direction in their
explanations of vote?
RT HON LORD GOLDSMITH QC: Well, I'm not the best person
obviously to say what was in their minds.
SIR RODERIC LYNE: No, no, I'm more interpreting their
words.
RT HON LORD GOLDSMITH QC: Yes, well, I think the point
first of all, is, if this were all crystal clear, we
wouldn't be in the position that we are today. I have made that point already and some may say -- and it may be a commentary on the United Nations institutions in a sense -- that we end up, on such an important issue, debating the meaning of two or three words, but that is the position.

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

SIR RODERIC LYNE: They did not in any sense in those public statements, did they, acknowledge that they had lost?

They did not acknowledge the American position that a second resolution wasn't needed?

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

SIR RODERIC LYNE: It is only in private that that interpretation was placed upon the French position?
RT HON LORD GOLDSMITH QC: Well, I'm not sure about the words "in private". As I have said, the relevant Ambassador after -- it is after the military intervention has taken place. He said on the record, but he said to the White House, "Don't ask for a second resolution because you don't need it. You can go without it".

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

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

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

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

It obviously doesn't help you at the time, but it
does seem to me that it is a point that is worth making, given what he has said about my process of analysis.

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

RT HON LORD GOLDSMITH QC: Yes.

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

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

Now, presumably, if we had succeeded in getting those words into the resolution, there would have been no need for a second decision at all?
RT HON LORD GOLDSMITH QC: Quite right.

SIR RODERIC LYNE: But we do not succeed in getting those words into the resolution. So in order to achieve a resolution, we had to give ground.

RT HON LORD GOLDSMITH QC: Well, the ground that was given particularly was to concede some second stage. The difficult question is whether the second stage was a Council discussion, where they would consider the discussion, or a Council discussion where they would decide what would happen next.

SIR RODERIC LYNE: We conceded that we had not been able to achieve a clear statement in this resolution that authorised member states to use all necessary means, ie to use force?

RT HON LORD GOLDSMITH QC: Well, I don't think -- I don't believe that is the view that our negotiators took, that they had failed to achieve a clear statement and I think it is -- if I may, it is very important to point to the architecture of 1441. This resolution was negotiated over a period of weeks. There are very important indicators of the use of force which are contained in 1441 and I just draw attention to preamble 4, preambular paragraph 4, which recalls that it is:

"Resolution 678 authorised member states to use all necessary means to uphold certain resolutions and to
restore international peace and security in the area."

Preambular paragraph 5 further recalling that it is:
"Resolution 687 1991 imposed obligations on Iraq as a necessary step for achievement of its stated objective of restoring international peace and security."

So necessary means in order to achieve this, and 687 had said:
"These are the things that are necessary in order to restore international peace and security."
The preambular paragraph 10 recalling that:
"In its Resolution 687 the Council declared that a ceasefire would be based on acceptance by Iraq of the provisions of that resolution including the obligations on Iraq contained therein."

So that is saying all necessary means have been suspended, but on the conditions of the ceasefire, and preambular paragraph 17:
"... determined to secure full compliance with its decisions."

Then you have this language which is used in operational paragraph 1 and operational paragraph 4 of material breach, which in the context, the members of the Security Council fully understood meant this is the revival argument. This could not be -- on this point, this could not be clearer, that the revival argument is
in play, and that is, of course, why member states were concerned about automaticity, because, without a firebreak, they understood from past practice, from what had happened in 1998, after Resolution 1205, that the United States and the United Kingdom, and perhaps other states, would have then taken that as saying, "We now have the authority of the United Nations to move today".

SIR RODERIC LYNE: So this is a brilliant diplomatic compromise in which both the revival argument and the argument that a specific Security Council authorisation needed are still in play. Both sides were able to emerge from this effectively restating their own positions, but, if I come back to what the -- the ground that was conceded, that -- what you have quoted was ground that was, if you like, gained by the United States in support of the revival argument, but what was conceded by the United States and Britain, what they were not able to achieve, was a clear decision to authorise all necessary means in this resolution. So from their starting position, they had had to concede: (a) that a further meeting to discuss and assess would have to be held. So in a sense, you could say that they had lost and knew that they had lost, just as -- on that point, on that point only. I don't want
to get into a long argument about this. Just as one could say that the French had lost and knew that they had lost.

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

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

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

SIR RODERIC LYNE: I think, with respect, that's a separate
point. We have gone past that point already.

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

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

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

SIR RODERIC LYNE: Yes.

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

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

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

RT HON LORD GOLDSMITH QC: Yes.

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

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

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

RT HON LORD GOLDSMITH QC: Yes.

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

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

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

RT HON LORD GOLDSMITH QC: Yes.

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

RT HON LORD GOLDSMITH QC: Yes.

SIR RODERIC LYNE: I think at this point -- I have just heard Big Ben striking 12 -- it would be sensible for us
to take another short break, if you like, and then we can come back.

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

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

(12.04 pm)

(Short break)

(12.15 pm)

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

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

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

RT HON LORD GOLDSMITH QC: I did. Sir Jeremy had made some good points and he had made some headway with me, but, frankly, there was still work for me to do and he hadn't got me there, if you like, yet.
I discovered that the Prime Minister was going to see President Bush again at the end of January and there was concern again about views being expressed that I had now been persuaded by Sir Jeremy, so I did send a short minute to the Prime Minister to make sure that he didn't think that was the case. I hadn't been asked for it, but I sent it.

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

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

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

RT HON LORD GOLDSMITH QC: Exactly.

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

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

SIR RODERIC LYNE: If you put it another way round, you
weren't at this stage telling the Prime Minister, just before he sees President Bush, who believes in that argument, that a reasonable case could be made for it?

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

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

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

RT HON LORD GOLDSMITH QC: Quite.

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

THE CHAIRMAN: Usha, over to you.

BARONESS USHA PRASHAR: Thank you very much indeed.

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

RT HON LORD GOLDSMITH QC: Yes.
BARONESS USHA PRASHAR: My understanding is that the FCO legal advisers consistently had held the view that a second resolution was necessary and that was your provisional view, as you said, until February. Would that be right?

RT HON LORD GOLDSMITH QC: The second part is right. As to the first part, perhaps I can just expand a little bit because you said the Foreign Office legal advisers. I knew that it was Sir Michael's view, because although he didn't say it in his note of December, his instructions of December, I saw that it was his view, I had been told it was his view, and I also saw it was his view when I saw a minute from him to the Foreign Secretary.

I believe I knew also that it was Ms Wilmshurst's views, because I think she was one of those associated with that particular minute. I didn't know what the view was of other members of the legal service, other than, of course, of the official who was in my office and I don't think that, after I had seen that minute -- I don't think I received anything further from Sir Michael. I didn't actually deal on this issue with Ms Wilmshurst at all. She dealt with the question of what the terms of the second resolution would be if they had one, by correspondence, but otherwise not. So I'm
not suggesting I knew that they had changed their view,
I didn't, but I just want to get the sort of flavour for
what I did know.

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

RT HON LORD GOLDSMITH QC: Yes.

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

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

RT HON LORD GOLDSMITH QC: Yes.

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

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

I think that the note is very clear.

I was unhappy when I saw that, not because I thought
it followed that Sir Michael was right and Jack Straw
was wrong about the legal issue. I think I made it
clear that I wasn't dealing with that, but I didn't
like, to be honest, the sort of tone of what has
appeared to be a rebuke to a legal -- a senior legal
adviser for expressing his or her view.

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

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

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

BARONESS USHA PRASHAR: In that note, the Foreign Secretary
asserted that international law is an uncertain field.

Do you consider it to be uncertain?

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

THE CHAIRMAN: It is an uncertainty of interpretation rather
than what the law might be?
RT HON LORD GOLDSMITH QC: Yes.

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

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

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

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

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

RT HON LORD GOLDSMITH QC: I don't know if it was the
underlying concern. I'm sure a lot of people will have
said that, or some people will have said that,
certainly. But I don't believe that was the issue.

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

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

BARONESS USHA PRASHAR: I presume you have seen
Sir Michael Wood's statement.
RT HON LORD GOLDSMITH QC: Yes.
BARONESS USHA PRASHAR: Can I just read a paragraph which
I think he said:

"Another issue is the strength of the legal case
that should be required before a 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?"

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

RT HON LORD GOLDSMITH QC: I do. First of all, it is very clear that the precedent in the United Kingdom was that a reasonable case was a sufficient lawful basis for taking military action. That was the basis, as I said -- say in my note of 7 March -- and I checked this at the time, because this is what I had been told by my officials -- it was the basis for the action in Kosovo, it was also the basis for the action in 1998.

Indeed, I think Sir Michael's words yesterday were that he approved of that and that -- I think he acknowledged that that was taken on the basis that there was a reasonable case for action.

BARONESS USHA PRASHAR: We said earlier, the Kosovo precedent was irrelevant.

RT HON LORD GOLDSMITH QC: I think -- forgive me, I'm saying on the basis of what is the right test to use, I'm saying that as a matter of precedent it was standard practice to use the reasonable case basis for deciding on the lawfulness of military action.

THE CHAIRMAN: Lord Goldsmith, could I ask to you unpack the word "reasonable"?

RT HON LORD GOLDSMITH QC: Yes. It means a case which not just has some reasoning behind it, put in practical terms, it is a case that you would be content to argue
in court, if it came to it, with a reasonable
prospect of success. It is not making the judgment
whether it is right or wrong, but it is -- I hope that
gives a flavour of it.

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

RT HON LORD GOLDSMITH QC: Yes.

BARONESS USHA PRASHAR: Do you accept that?
RT HON LORD GOLDSMITH QC: I agree with that, yes.

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

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

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

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

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

Sadly, at the end of the day, we disagreed about it.

Of course, I thought very hard about the fact that they
took that view, as indeed I thought hard about the fact
that others took a different view, and

Christopher Greenwood, now our judge in the
International Court, took a different view. It shows that there are two different points of view in relation to this.

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

RT HON LORD GOLDSMITH QC: Yes.

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

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

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

RT HON LORD GOLDSMITH QC: I don't think so. Because I had been at pains, as you have seen, to try to make sure that those who were moulding the policy didn't have a misunderstanding about, at least, what my view might be, and I had been involved. I think -- I'm not sure to what extent the Foreign Office legal advisers appreciated this. I had been involved in a number of discussions about -- with the run-up of 1441, some of which we have talked about, about what needed to be seen in the resolution. So the importance of having the statement about material breach, the unreasonable veto, wouldn't operate. So I think I had been involved.

BARONESS USHA PRASHAR: But was it timely? That's the question. You were involved, but was it timely?

RT HON LORD GOLDSMITH QC: I think that you have got two examples in this matter where I offered advice where it wasn't asked for; in July 2002, and again at the end of January 2003.

My view was, if I thought that it was necessary for a minister to know, I would tell them, whether they wanted to hear it or not.

BARONESS USHA PRASHAR: You were actually -- the sense I got earlier, in the first half you were surmising what was going on from the papers.
RT HON LORD GOLDSMITH QC: Yes.

BARONESS USHA PRASHAR: Then you, of course, asserted yourself and you gave advice when it was needed, but my question really is: would it have helped if you had been involved much earlier when there was discussion? Because one of the points made yesterday, by Sir Michael Wood was that they don't think the role of the Attorney General should be separate from being a political minister because you need to be involved in the policy development. Were you involved at the right time in terms of policy development?

RT HON LORD GOLDSMITH QC: I don't know. I don't know what difference, if any, it would have made. My own view is that it is right that the senior legal adviser, and all legal advisers, should be involved in the policy development, because that helps ministers, once you understand what their objectives are, to reach a way of achieving those which is lawful.

I personally believe that the Attorney General should attend Cabinet, not as a minister expressing views on all the policy issues, but rather -- but to be there, both so that you could understand the context in which important issues were being raised, and also help to keep ministers on the straight and narrow. You could pick up where they perhaps were going in the wrong
direction.

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

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

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

RT HON LORD GOLDSMITH QC: Well, I think it would have been -- I think it would have been better if legal advisers are involved as the policy is being formulated
rather than at the end, and I consistently said this to lawyers who were giving departmental advice. I said, "Don't wait until the end, if you can. You should be involved in policy". So I did insert myself into that policy consideration in this way.

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

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

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

My practice is -- I'm quite a hands-on lawyer, and if somebody had said, "Would you mind coming to New York for a week and talking this through and helping with the negotiations?" I would have been very happy to do it, but that's not the way it works and I don't imagine I would have had time to do it.
SIR MARTIN GILBERT: You didn't feel when you saw these notes that somehow this was something on which your judgment would be rather important?

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

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

RT HON LORD GOLDSMITH QC: That's true.

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

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

SIR MARTIN GILBERT: Or to give legal advice --

RT HON LORD GOLDSMITH QC: Yes, there were a lot of other demands on my time and I was no doubt thought -- but it has never been done that way before. In relation to some other areas of policy -- for example, I mentioned the EU policy -- I did get much more closely involved in the negotiation.
BARONESS USHA PRASHAR: I want to come back to a couple of other points that -- Jack Straw, when he wrote to you, he sort of said:

"In issues of international law, my experience is of advice which is more dogmatic, even though the range of reasonable interpretation is almost always greater than in respect of domestic law."

Did you consider this to be a fair and proper point to make?

THE CHAIRMAN: Do you need the reference?

RT HON LORD GOLDSMITH QC: No, I have got it, thank you very much indeed, Sir John.

I mean -- I did have a little bit of sympathy with that. I think there can be something of a tendency to be inflexible or dogmatic about a view, and I both understand why that position is taken sometimes, because it is necessary, because there isn't a court to determine it, then you stand by your point of view. But I did understand his frustration and I knew from his time in the Home Office that he had challenged legal advice he had received from time to time and he had turned out to be right.

So I had some sympathy with him, but what mattered to me wasn't that point. I mean, that didn't affect my view at all. My view remained to reach, after carefully
considering all the arguments, all the evidence, what I considered to be the correct legal position.

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

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

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

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

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

RT HON LORD GOLDSMITH QC: Some with more credibility to
state what they were saying than others.

BARONESS USHA PRASHAR: What about ministers? Did any ministers express different views to you, apart from Jack Straw, or were you aware of different views?

RT HON LORD GOLDSMITH QC: No.

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

THE CHAIRMAN: I think we have got one other topic we would like to pursue before the lunch break, and I will turn back to the tireless Sir Roderic.

SIR RODERIC LYNE: Yes, I will try to take you to Washington and back before lunch, which in 20 minutes is quite a feat, now that Concorde is no longer with us.

Just on that last point, before we get on to Washington, did you never at any stage have a conversation with the late Robin Cook or with Clare Short about their different views?

RT HON LORD GOLDSMITH QC: No.

SIR RODERIC LYNE: They never approached you?

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

SIR RODERIC LYNE: Thank you. You went to Washington in February, I think you were there on 10 February --

RT HON LORD GOLDSMITH QC: Yes.

SIR RODERIC LYNE: -- 2003.

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

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

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

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

RT HON LORD GOLDSMITH QC: I talked to a number of people. I suppose the most important was actually the legal adviser to the State Department, who was the man, as I said, who was regarded as my opposite number in relation to use of force -- the highly experienced Will Taft IV. I spoke to the legal adviser to the
national Security Council and, I think, Judge Gonzalez, who was the President's counsel at that stage, briefly to Condoleezza Rice, who came into the meeting, I spoke to senior officials in the State Department, Colin Powell's people. I think I spoke to the Department of Defense, although that was more to do with targeting issues, and I recall I had a meeting with the Attorney General later in the day, although he wasn't really very engaged -- that was John Ashcroft. He wasn't really very engaged on this particular issue.

SIR RODERIC LYNE: We have heard from previous witnesses how this administration, like other administrations, often speaks with many voices. In your conversations about this specific issue, did you find that they were speaking with one voice or more than one voice?

RT HON LORD GOLDSMITH QC: They were speaking with absolutely one voice on this issue. The discussion involved some detailed textual questions. I still had these sort of textual questions. Some of them really are quite detailed. You know, why is the word "and" used rather than "or", things of that sort. On one point, they were absolutely speaking with one voice, which is they were very clear that what mattered to them, what mattered to President Bush is whether they
would, as they put it, concede a veto -- I need to explain that -- and that the red line was that they shouldn't do that, and they were confident that they had not conceded a veto.

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

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

SIR RODERIC LYNE: So they were very clear that the French had acknowledged, presumably in private, that there wasn't any need for a second decision?
RT HON LORD GOLDSMITH QC: Yes, in the discussions that they had had. They were very clear -- they were very clear that they had been adamant that this was key to them and that they had stuck to their guns and they had therefore conceded the discussion, the French acknowledged that, a discussion and no more.

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

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

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

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

RT HON LORD GOLDSMITH QC: Yes, I did. But one thing did
seem to me absolutely clear: I had known -- indeed I had
known in October -- that the key issue had become the
issue between the United States and France, on one hand,
perhaps others behind France: was there going to be
a need for a second resolution or not? So this was, as
it were, the absolutely critical issue that was being
debated. Therefore, this wasn't a sort of peripheral
matter. This was the very, very heart of what the
resolution said, and, therefore, when you then look back
at the resolution, and you see the words that are used,
you look at it in that context. You can't interpret
legal documents in a vacuum.

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

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

RT HON LORD GOLDSMITH QC: With respect, I don't agree.
I simply don't agree. I think it is a different point.
I think the point that the US and the UK had had to give
ground on was that there would be a second discussion. What I was being told they didn't give ground on was that it would be a decision, and this is why this red line of President Bush was hugely important, because he could have had walked away from it. We couldn't walk away from the resolution. He could have done, on his view of the law.

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

THE CHAIRMAN: Did you want to?

RT HON LORD GOLDSMITH QC: If I may, because you are drawing attention, which I entirely understand, to a resolution, or a draft resolution, or words, as early as September. This is why I wanted to point to the fact that, by the time the resolution is concluded, there are a lot of very clear indicators of it of the use of force, the preambles we looked at before. There is the reference to serious consequences in operational paragraph 13. So I really don't think -- and actually, this was the Foreign Office view, I believe, as well, from what happened subsequently -- that there needed ever to be
a statement, "And you can use necessary means". So we weren't actually conceding the case at all by not insisting on those words going on.

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

RT HON LORD GOLDSMITH QC: Yes.

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

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

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

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

I couldn't -- you couldn't have had -- and you couldn't have had the British Attorney General being seen to go the French to ask them, "What do you think?"

The message that that would have given Saddam Hussein about the degree of our commitment would have been huge.

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

RT HON LORD GOLDSMITH QC: I'm not sure if that's possible.
THE CHAIRMAN: Or pursue the matter through diplomatic channels?

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

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

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

RT HON LORD GOLDSMITH QC: I think this was a hugely sensitive political area. The United States and the United Kingdom were acting very closely together. We were not acting very closely with France. They had, or they came to have, a clear view as to what they wanted to happen. I don't know whether they did throughout. They came to have a clear view in relation to it.

I don't think, if I had said to somebody, "Do you mind if I now go and talk to the French about this?" that anybody would have said that was acceptable.

SIR RODERIC LYNE: So we have a situation in which, as you are formulating your legal advice to the Prime Minister on this crucially important question -- you have got the accounts from Sir Jeremy Greenstock and from the Americans of exchanges held in private without written contemporaneous records with the French, and we also have on the public record what the French and other
governments have said about Resolution 1441, which does not point in exactly the same direction.

RT HON LORD GOLDSMITH QC: I have also had what Jack Straw has said. Jack Straw sent me a detailed letter. I think this may be one of the things which has not been declassified, but it is important that I mention that I had a detailed letter from him, which commented again on the textual arguments which I had raised and also provided a very clear view about what the negotiating issue had been and how it had been resolved. So there were those three things that I had had. You are absolutely right, Sir Roderic, that I did not have a signed statement and of course that's one of things which then gave rise to -- you know, to difficulties, and I made the point, I think on 7 March, we were dependent ultimately on their view. But that doesn't detract from the critical point that you have to interpret a resolution in the context and the context was -- and this I was persuaded on and I have seen enough to know that this was right -- was there going to be a second decision required or not?

Then, with that in mind, you then go back to the resolution and you look at the words that have been used, and, ultimately, the fact that a deliberate choice had been taken to use the words "considered the
situation" and not "decide", to me was the most powerful factor at the end of the day.

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

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

I would have had -- as I always do in cases, you have to then consider how you are going to present certain material, but I would have been able to present, I believe, the central issue. This is what this debate was about. There was enough in the newspapers about that. You could produce negotiating telegrams, perhaps,
and, therefore, said to any court, "Now come back to
what the words are, look at them, and can you really say
when they said 'consider the situation', they actually
meant 'decide'?"

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

His view was that:
"If this matter came before a court, a court would,
in my view, give very little weight to private
conversations which are recorded by one side."

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

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

RT HON LORD GOLDSMITH QC: First of all, I disagree with the
second part of that. I heard him say that yesterday.
I was actually rather surprised that he was saying that the weight was heavily in favour of that point of view. I certainly don't read it that way myself.

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

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

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

"The language of a resolution of the Security Council should be carefully analysed, having regard to the terms of the resolution to be interpreted --"
the terms of the resolution to be interpreted, the
discussions leading to it, the Charter provisions
invoked and, in general, all circumstances that might
assist in determining the legal consequences. ..."

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

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

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

Of course, there are other discussions that take
place in corridors and between individuals. What we are
talking about between the Americans and the French were
those sorts of informal, unrecorded, private
discussions. Not held in public, not held in front of
other people.

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

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

SIR RODERIC LYNE: If we can park that point, what I would
like to do, just before we take a break, is to fly you
back from Washington to London, if you are content.
Is there anything else you wish to say about the
discussions in Washington before we do that?

RT HON LORD GOLDSMITH QC: I would just like to make this
observation.
I do, of course, understand, Sir Roderic what you
are saying. I noted that Sir Michael, for example, said
that I was right. He used these words: I was right to try to discover as much as I could about the negotiating process. I did that. Others didn't. What weight you place on it is a matter of judgment, and when you can see that there is a critical issue which plainly was discussed -- and I'm not convinced that this was only discussed in what Sir Roderic would term private discussions as opposed to in the private but 15-member discussions.

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

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

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

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

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

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

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

RT HON LORD GOLDSMITH QC: Oh, no.

SIR RODERIC LYNE: If I can fly you back --
RT HON LORD GOLDSMITH QC: Please, fly me back!

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

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

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

RT HON LORD GOLDSMITH QC: Yes. I just -- may I just go back to this question of reasonable case? Because Baroness Prashar asked me the question.

When I first was asked to advise, it was suggested to me in my office that it would be sufficient for me just to say what a reasonable case was.

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

SIR RODERIC LYNE: Which is the better view?

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

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

RT HON LORD GOLDSMITH QC: No.

SIR RODERIC LYNE: That's not your position?

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

SIR RODERIC LYNE: Were you not recognising that there would
be stronger ground for us if there was a further
Security Council Resolution?

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

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

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

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

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

SIR RODERIC LYNE: Right.

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

SIR RODERIC LYNE: They might have stumbled into a situation
where, under very strong pressure from the British to have a Security Council Resolution, which, as you said they themselves did not think was necessary, they had made certain concessions, the concession of having a resolution, the concession that the Security Council should meet again, which at least complicated the situation.

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

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

SIR RODERIC LYNE: Now, I suspect that if President Chirac were sitting in your seat at this moment, he would say the French had a red line, which they had also preserved, which was that this should be a two-stage approach with a further decision -- at one point, I think he referred to this as seeking a lock on this -- and you would reach an argument to which there wasn't
a clear answer, because neither point was clear from the
resolution, as we have already made clear, that it was
unclear, to use a Rumsfeldism.

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

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

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

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

(1.05 pm)

(The short adjournment)

(2.00 pm)

THE CHAIRMAN: Welcome back everyone. We will resume this
session and the questioning will be led in a moment by

Sir Lawrence Freedman.

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

RT HON LORD GOLDSMITH QC: Yes.

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

RT HON LORD GOLDSMITH QC: Yes.

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

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

I'm sure I added that the safest course is still to
get a second resolution, you know, implicitly saying you
should still keep trying. So I had given that advice --

SIR LAWRENCE FREEDMAN: But that was verbal rather than
written?

RT HON LORD GOLDSMITH QC: Yes, it was verbal rather than
written. Obviously, I had prepared what I was going to
say. Then -- so I told them -- and I had given them,
therefore, as I saw it, and as I believe they saw it --
I had given them the green light, if you will, that it
was lawful to take military action, should there not be
a second resolution and should it be politically decided
that that was the right course to take.

I think then in the week in which the note of
7 March was given, I was then asked, "Would you now,
please, produce a written advice expressing your view?"
and I did, and although it contains more detail, it has
the same substance as the oral advice I had given
towards the end of February.

SIR LAWRENCE FREEDMAN: Thank you. Now, we have already
spent some time on the exegesis of 1441, but I think it
would be helpful, to start with, if we just went through
the resolution in order to make sure we understand what
it means.

One thing we have already mentioned, I think, in your answers to Sir Martin, was the nature of the revival argument and the fact that you were aware that this didn't seem to be controversial, but that you wanted to satisfy yourself that it is -- that it worked.

**RT HON LORD GOLDSMITH QC: Yes.**

**SIR LAWRENCE FREEDMAN: Now, this requires -- and I think this is why people may be interested in an explanation -- a link between a resolution passed in November 1990 with regard to Iraq's occupation of Kuwait --**

**RT HON LORD GOLDSMITH QC: Yes.**

**SIR LAWRENCE FREEDMAN: -- and how the members of the Security Council, acting with the Government of Kuwait, might use all necessary means to get its liberation, and the whole question of weapons of mass destruction, compliance with UN Resolutions 11 years or so later.**

Could you explain how that link can be made?

**RT HON LORD GOLDSMITH QC: Absolutely. First of all, it is very important to note that Resolution 678 was not limited to the liberation of Kuwait. Resolution 678 says in terms -- and I am reading from operative paragraph 2, that, it is to:**

"... authorise member states ... to use all
necessary means. To uphold and implement Resolution 660 and subsequent relevant resolutions ..."

That's really the removal from Kuwait:
"... and [importantly] to restore international peace and security in the area."

SIR LAWRENCE FREEDMAN: There has been a question raised about the word "restore", which suggests looking backwards rather than forwards.

RT HON LORD GOLDSMITH QC: I'm not sure I understand that point. Forgive me. The important point to me is that there was a dual purpose in the "all necessary means".

One was to cause Iraq to leave Kuwait, but also to have -- "restore", "met" whatever -- international peace and security in the area, which meant, therefore, dealing with those things which were a threat, and the issue to the Security Council -- this becomes clearer when one reads Resolution 687 -- that the Security Council were of the view that Iraq's conduct, not just by being in Kuwait, but more generally, was a threat to international peace and security. They had not just invaded Kuwait, they had intentions. There was concern about their ambitions in relation to weapons of mass destruction, which they had used, and if one looks at Resolution 687, for example, there is a -- preambular paragraph 8 talks about the Security Council being
conscious of the statement of Iraq threatening to use
weapons in violation of its obligations under the Geneva
protocol, its prior use of chemical weapons.

Preambular paragraph 14 refers to the Council being
aware of the use by Iraq of ballistic missiles for
unprovoked attack, and, therefore, of the need to take
specific measures in regard to such missiles located in
Iraq.

SIR LAWRENCE FREEDMAN: There are a lot of these.

RT HON LORD GOLDSMITH QC: There is a lot there.

SIR LAWRENCE FREEDMAN: But it has normally been its
assumption -- and this indeed was partly behind the
containment policy -- that the means by which Iraq was
controlled on 687 was through sanctions, rather than the
threat of military force.

RT HON LORD GOLDSMITH QC: Well, I think this was the
debate. 687, as indeed 1441 says, set out the
conditions for the ceasefire -- but it was a ceasefire,
not a termination of authority, and over the course of
the next few years, there were a number of incidents.
States had taken military action on two occasions
because Iraq had failed, on one occasion, to allow
UNSCOM inspectors in, on another occasion, I think, to
allow inspection of presidential palaces where it was
believed that perhaps things were. There was a long
process.

It was hoped, I have no doubt, that sanctions and, from time to time, targeted force and threat of force, would actually deal with these problems, but obviously the issue was, politically, that, by 2002, had that policy failed, was there any point doing any more sanctions or did it now have to go further?

SIR LAWRENCE FREEDMAN: Indeed. You mentioned the question of inspection of Saddam's palaces.

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: This was the December 1998 so-called Desert Fox.

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: Now, Sir Jeremy Greenstock told us that he had sought to replicate the position that had been taken in November/December 1998 in 1441.

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: Did you see these as being comparable? Did you think you'd succeeded?

RT HON LORD GOLDSMITH QC: In some respects 1441 was actually significantly stronger than 1205. 1205, which was a short resolution -- first of all, 1441 sets out in detail, in the preambles, the revival argument. That's essentially what it does and what I referred to this morning. 1205 did nothing of the sort.
Secondly, 1205 used this language of "flagrant violation" which, although it sounds very bad, doesn't have a legal meaning, whereas "material breach" was recognised as the thing which would then revive authorisation under 678.

1441 warns of serious consequences for non-compliance with this resolution, whereas 1205 sort of referred back to previous warnings. 1205 was also interesting because, 1205, there wasn't actually action taken immediately after the resolution was passed.

What happened, the resolution was passed, as I recall, Saddam Hussein then made a statement that he was going to comply. The United Kingdom, I think, Prime Minister Blair, then said, "As a result of that, we are holding back", and then UNSCOM said, I think, that, "This is not actually happening", and so then military action took place. But there was a gap between the resolution and military action. So those were the points.

SIR LAWRENCE FREEDMAN: The head of UNSCOM, in fact, declared the material breach, as it were, or the flagrant violation which then provided the basis for military action.

RT HON LORD GOLDSMITH QC: I think in 1205 -- at the time 1205, yes.
SIR LAWRENCE FREEDMAN: Now, Elizabeth Wilmshurst yesterday described the argument that had been used in late 1998 as a strained legal argument, and it was strongly criticised thereafter by Security Council members. Were you aware of that? Did you have a view on that?

RT HON LORD GOLDSMITH QC: I was aware that it had been criticised, although the criticism, at least in part, was because there had been resistance by some to the use of the term "material breach" in the resolution, as I understand it, precisely because that was known to be the thing that would allow the revival argument to operate.

Different language was used, but still the United States and the United Kingdom, thought there was enough there.

I was, if I may say so -- and I don't want to personalise this -- a little bit surprised to hear that, because 1205 and the operation in 1998 was supported by Foreign Office legal advisers. When I received my first briefing in relation to the revival argument, there was no hint from the Foreign Office legal advisers that they regarded the revival argument as not appropriate, and I never heard that said until the comment that was made yesterday -- from us; other countries disagree, that's perfectly true.
SIR LAWRENCE FREEDMAN: I think she acknowledged that she had gone along with it and worked with it at the time.

RT HON LORD GOLDSMITH QC: I'm saying nobody told me in the run-up to March 2003, "Actually, the Foreign Office has changed its mind", if, indeed, it had. I'm sure it hadn't.

SIR LAWRENCE FREEDMAN: Thank you. That leads us quite neatly on to the language of 1441, and the operative paragraphs start by explaining that Iraq is in material breach, and you have already given us an explanation of your understanding of "material breach".

It sounds a very either/or thing. Are there gradations of material breach? Can you have more severe material breach or is it just one basic category?

RT HON LORD GOLDSMITH QC: Of course you can have more severe material breach. The point is that the language is there to indicate a breach of such a character that, as I said in the language of the Vienna Convention on the Law of Treaties, means that the other party can treat that as a ground for terminating or suspending the obligation in question. So here terminating or suspending the ceasefire.

SIR LAWRENCE FREEDMAN: So that is what it allows you to do, but there can be variations in the nature of the breach and how serious it is?
RT HON LORD GOLDSMITH QC: Yes, the question is: does it pass that threshold to cause force to be -- the authority for force to be revived. If there had been an attack by Iraq on another country, that obviously would have been a most serious material breach, but there could be far less conduct than that and it would have been a material breach.

SIR LAWRENCE FREEDMAN: Then the next operational paragraph 2 gives Iraq a chance to comply with its disarmament obligations. Then it is required to issue a currently accurate, full and complete declaration to cover all aspects of its WMD programmes with which the Security Council has been concerned.

Then we come to this critical paragraph 4, and this defines the Iraqi behaviour that would constitute the sort of next and most potentially fundamental material breach.

Can I just check with you two aspects of this? First, while the discovery of actual weapons of mass destruction was being referred to as the smoking gun, presumably, you would have decided the issue once and for all. That's not actually the test. The test is an inaccurate and incomplete disclosure document and then inadequate cooperation with "the enhanced inspection".

RT HON LORD GOLDSMITH QC: A failure by Iraq at any time to
comply with and cooperate fully in the implementation of this resolution. I think that Mr Blix made it clear in his early reports that this was a resolution which called for positive action on the part of Iraq. It had to demonstrate its compliance. It wasn't a case for the inspectors to, as it were, catch as catch can.

SIR LAWRENCE FREEDMAN: It was both of these? An inaccurate disclosure document by itself wouldn't be sufficient? You would need -- that's the and/or argument?

RT HON LORD GOLDSMITH QC: As a matter of interpretation -- that's what was said. I actually am not sure, as a matter of interpretation, whether that's right. I actually read that as disjunctive, but it doesn't matter because, in fact, we have got into the second part of it.

SIR LAWRENCE FREEDMAN: So, okay. But what about means in terms of people's understanding of what a material breach might be? You are talking about this non-cooperation with the inspectors as a test, not necessarily a smoking gun, and I think Sir Jeremy Greenstock described to us the developing view within the Security Council that, without a smoking gun, it was going to be quite hard. Were you aware of this as an issue?

RT HON LORD GOLDSMITH QC: Of course, this was an issue in
the broader sense politically. What would be the right thing to do? Obviously, if there had been discovery of WMD, that might have made it different. The question is what the resolution required.

THE CHAIRMAN: You would say that that was a political judgment, not a matter of legal interpretation?

RT HON LORD GOLDSMITH QC: Exactly.

SIR LAWRENCE FREEDMAN: The resolution then describes the enhanced inspection regime in some detail. Then, in paragraph 11, it directs the Chairman of UNMOVIC and the Director General of the IAEA to report any interference or non-compliance.

Paragraph 12 explains how, on receipt of a report, the Security Council will convene to consider the situation, and then paragraph 13 recalls the repeated warnings to Iraq that it will face serious consequences.

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: Now, you drew attention before lunch, and you have just done it again, to the preambular paragraphs and the references to "all necessary means", but in this paragraph 13 it refers to "serious consequences".

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: Now, we know -- this has already been raised -- that the Americans would have preferred
the term "all necessary means" there, and that would --
that's the normal Security Council Resolution. That was
the language. That was the language of 678.

RT HON LORD GOLDSMITH QC: It was the language of 678.

SIR LAWRENCE FREEDMAN: It had been used in other Security
Council --

RT HON LORD GOLDSMITH QC: It had been used in other
Security Council Resolutions, yes.

SIR LAWRENCE FREEDMAN: So what was your understanding of
the phrase "serious consequences"?

RT HON LORD GOLDSMITH QC: My understanding of the phrase
"serious consequences" in the context was it was
actually saying the same thing, threatening that there
would be a use of force. I base that, I think, on two
things.

First of all, that was actually the advice
I received from Foreign Office legal advisers and it
came up, for example, particularly in the context of
what the terms of a second resolution would be, because,
after 1441, there was work being done on what a second
resolution would be, what did it need to say, and there
was very clear advice it didn't need to say then "use
all necessary means". I was also told that "serious
consequences" was regarded as coded language for "use of
force".
It is also, as a matter of common sense, not that obvious what else it could have meant. Iraq was already under a very stringent sanctions regime. There is all this talk about "use of force" earlier on in the resolution, I would have thought that it would have been pretty clear that this is what the Security Council were getting at.

SIR LAWRENCE FREEDMAN: But in 1998, the action that had been taken was military.

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: But far short of a full-scale invasion --

RT HON LORD GOLDSMITH QC: That is true.

SIR LAWRENCE FREEDMAN: -- of Iraq. So it might have implied, be understood, as threatening the use of force, but what sort of force does it imply?

RT HON LORD GOLDSMITH QC: The legal question -- and I think Sir Michael said this too. The legal question is precisely the same, whether it is a limited military intervention, or, as you say, a sort of wholesale military attack.

The question in either case is: is there a justification for force? Is there a legal basis for force? The next question you then have to consider, and I constantly made this point in my advice, is, even
though you have got authority to use force, that force
must be no more than is necessary and proportionate to
the objective you are trying to achieve.

If all you were trying to achieve was to open up
a particular place for inspection, you probably wouldn't
need to do more than a limited military intervention.
If you are trying to do more than that, because -- in
this case, because the regime had demonstrated that it
was not going to comply and the only way, therefore, to
have full compliance was to take much stronger action,
then that is what you would need to do, but that's
a separate question from whether there is a lawful basis
for your action.

SIR LAWRENCE FREEDMAN: Can I just check what authority this
notion that serious consequences is tantamount to
military force is based on?

RT HON LORD GOLDSMITH QC: I was so advised by
Foreign Office legal advisers based on past experience.

SIR LAWRENCE FREEDMAN: I may be wrong, but my understanding
is that in current UN Resolutions in relation to Iran,
the phrase "serious consequences" is used, and I am sure
in that case, I hope in that case, it doesn't
necessarily just mean full-scale military operations.

RT HON LORD GOLDSMITH QC: With respect, I agree with you.
I hope so too. The answer may well be, as I have sort
of been saying, you have got to look at the context, and
if the context is you talk a lot about use of force and
the context is one last chance, and the context is all
the sanctions regimes are in place at that stage.

SIR LAWRENCE FREEDMAN: The difficulty you can see
developing, and why members of the Security Council
might be concerned, would be that you can imagine
a situation where the material breach is
non-cooperation --

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: -- with the inspectors, and it is
well-known at the time that the view of the
United States, and, indeed, the United Kingdom, is that,
should it come to military action, this will not be an
air strike to open up the site, this will be the
invasion and occupation of another country.

So the issue of proportionality that you raise is to
the fore in this matter. It is an interesting
policy question, it is well understood what this must
mean.

RT HON LORD GOLDSMITH QC: I agree with you. Can I just
clarify one thing as well?

SIR LAWRENCE FREEDMAN: Please do.

RT HON LORD GOLDSMITH QC: I have told you what in the
context "serious consequences" I believe meant. Of
course, the basis for saying that there is authority for
the use of force is because of the revival back to the
"all necessary means" in 678, rather than just because
of operational paragraph 13, which provides some
additional context. That's what I'm saying.

But I do agree with you that the extent of what
takes place is an important question, which was why
I consistently advised it is not enough that there is
lawful authority, you must do -- use no more force than
is necessary and proportionate to the objective that you
are seeking to attain.

SIR LAWRENCE FREEDMAN: You would accept that the invasion
and occupation of Iraq could come into that category?

RT HON LORD GOLDSMITH QC: Yes, I think that's a military
and political judgment, but if the objective was -- and
it plainly was, so far as 1441 is concerned -- achieving
the complete verifiable disarmament of Iraq, the
stopping of all programmes, the reduction, the removal
of all threat that was coming from that, if the
political and military judgment was that the only way to
achieve that would be a full-scale invasion, then that
would be justified as a matter of law.

SIR LAWRENCE FREEDMAN: But you might understand why
a member of the Security Council, looking at this
situation, might be concerned that on a certain
interpretation of 1441, what it had done was to give the
United States the right -- and the United Kingdom -- to
take what might seem to be a minor or temporary act of
non-cooperation with the inspectors and turn that into
full-blown military action.

RT HON LORD GOLDSMITH QC: Well, as a lawyer, what I would
say is, "Well, you shouldn't have agreed to 1441. If
you wanted to reserve to yourself the right to stop that
happening, you shouldn't have agreed to 1441 in these
terms. You should have made it clear that there needed
to be a decision".

THE CHAIRMAN: At the back of it, there is still the
requirement for proportionality between the action taken
and the objectives sought.

RT HON LORD GOLDSMITH QC: Absolutely.

SIR LAWRENCE FREEDMAN: But they might also say that's
precisely why an assessment is needed, that that is why
there is a provision in the resolution for an
assessment.

RT HON LORD GOLDSMITH QC: Yes, they might indeed, but then
you come to the question, this either means you need
a decision or you don't, and that was the question that
was regrettably difficult, but, at the end of the day,
it required an answer.

SIR LAWRENCE FREEDMAN: So if we then are working out the
process by which military action might take place, you
referred earlier to the paragraph in 1441, where it
requires a report of a material breach by UNMOVIC or the
IAEA. Does it allow a member state also to report
a breach or does it have to come from them?
RT HON LORD GOLDSMITH QC: No, it allows a member state to
do so. I think that paragraph 4 allows for that to
happen.
SIR LAWRENCE FREEDMAN: Would you imagine it would be
difficult to do that without corroborative evidence from
the Director General of the IAEA or the head of UNMOVIC?
RT HON LORD GOLDSMITH QC: As a matter of practical
politics, of course the Security Council would want to
know what was being said by the inspectors, and, indeed,
they received that information.
SIR LAWRENCE FREEDMAN: So the process is that somebody,
a member state, one of the international organisations,
reports a material breach --
RT HON LORD GOLDSMITH QC: Yes.
SIR LAWRENCE FREEDMAN: -- and then there are two questions:
how it is assessed and what to do about it?
RT HON LORD GOLDSMITH QC: Well, this is the question
really, the difficult question, of what was meant about
"for assessment".
Certainly the Security Council was required, before
anything else happened, before military action took place -- this was definitely the second stage -- required to meet and to consider the situation.

Now, on the ultimate analysis, having considered the situation, they could have done a number of different things. They could have suggested more time, they could have decided to go -- have military action there and then, or they could have not decided.

The question then was: if they didn't decide, was there authority in the rest of the resolution?

SIR LAWRENCE FREEDMAN: So it is important that they have a serious discussion?

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: It did mean that there was something to discuss.

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: But if they didn't agree amongst themselves, then member states that took a particular view could then go off and do what they thought was necessary?

RT HON LORD GOLDSMITH QC: That's the architecture, in my view, of 1441, and that follows, you know, to some extent, if I may say so, from the fact -- and it is a very, very important point -- that operational paragraph 2 is saying: this is one last opportunity
after however many resolutions, the period of time for
inspections. This is the context in which it takes
place, repeated defiance, deception, all the things that
the Inquiry knows very well about the history leading up
to 2002.

SIR LAWRENCE FREEDMAN: So when the British and the
Americans said there was no automaticity here, they were
basically saying you would go through some sort of
process, but that process didn't have to conclude with
a particular decision?

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: I now want to look at your opinion,
but rather than go through it all in detail, because it
is quite long, I really want to focus on the summary,
where you are giving your advice to the Prime Minister.

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: Now, in paragraph 26, which is
going into your summary, you noted the unclear
language of 1441 and you give two views: either a need
for the Security Council to make an assessment on
whether Iraq is not taking its final opportunity; or
that's not needed because the Council has pre-determined
the issue.

Now -- you see, I don't quite understand. I can see
theological connotations in pre-determination, but I'm
not quite sure what it means in this case. Could you explain?

RT HON LORD GOLDSMITH QC: As I indicated this morning, the context of material breach really carries with it two elements.

One is the fact that there is a breach, which, in a sense, is a factual question; either there is or there isn't depending on what the obligation is.

The second is an assessment of its quality, and is it of the quality which enables you to say, "This is such a breach which entitles the other party to invoke it as a reason for terminating or suspending the relevant obligation".

Pre-determination meant that the Security Council, having said, "One last chance, if you like, but only one last chance", is saying, "Any further failure constitutes a material breach, which entitles member states to move for action".

So they have determined already the question of the quality of the act. Then what matters is whether, as a matter of fact, it occurs.

SIR LAWRENCE FREEDMAN: In your report earlier -- as I say, I'm not sure I fully understand that -- you said the American view is:

"Whether or not there has been a material breach is
an objective fact, and doesn't require any multilateral
assessment mechanisms."

You then say:

"I'm not aware of any other state which supports
this view."

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: So you are setting up here
a particularly American view --

RT HON LORD GOLDSMITH QC: No, absolutely not at all.

The point is that, because the Americans took the
view that they could decide material breach, therefore
they didn't need the Security Council Resolution at all.
We took the view that we did.

What the Security Council decided was: there is
a material breach as we stand at the moment, and, what's
more, if you don't take the final opportunity, you don't
comply in every respect, there will be a further
material breach.

So it is still the Security Council which is making
that determination. All that is left is the factual
question whether or not they have, in fact, failed, not
really an assessment of the --

SIR LAWRENCE FREEDMAN: You see this as a purely factual
question?

RT HON LORD GOLDSMITH QC: I think it is a factual question.
I would add -- and I have looked at this and others have
looked at it -- that in the Security Council meeting on
7 March, coincidentally the same day, no member state on
that occasion actually took the view, that I can see,
that Iraq had taken that final opportunity. Indeed,
quite a number of them were quite clear that it hadn't.
Indeed, I think one could say the majority hadn't.

So on that question of fact, had they taken that
final opportunity, it did seem that the Council had
considered it, and there was a very strong, if not quite
unanimous, view that they had not taken that final
opportunity. The question then was: what, politically,
is the best thing to do? Do we delay or do we go now?

SIR LAWRENCE FREEDMAN: This goes back again to the fact
that, if there were opportunities to get themselves out
of material breach, as it were, then there would be no
need for war. So it leads to the question: is material
breach something you can get out of, once you are in?

RT HON LORD GOLDSMITH QC: The whole point about 1441 was it
was enabling Saddam Hussein to do just that, provided
that he made this declaration and that he cooperated
fully in every respect that had been set out in the
resolution with what was required.

SIR LAWRENCE FREEDMAN: So the argument then would be -- and
this was clearly an argument that was running on the
Security Council -- that the issue about a second
resolution may not be, do we need one at all, but, do we
need one at this moment, because this story has got
a little bit further to go.

RT HON LORD GOLDSMITH QC: Yes, but I may, if I may, draw
a distinction: legality is a necessary condition for
military action. It is not a sufficient condition. Once
you have decided if it is lawful, then there is a very
important question, maybe a bigger question, as to
whether it is right to do it.

SIR LAWRENCE FREEDMAN: That's not a question on which you
were advising?

RT HON LORD GOLDSMITH QC: It is not a question of law, it
is a question for governments and so forth. Cabinet,
Houses of Parliament.

SIR LAWRENCE FREEDMAN: That's why you go on to say the
safest legal course would be to secure the adoption of
a further resolution, and then this question of the
negotiating history comes in --

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: -- in paragraph 28.

Now, you had a very long conversation with
Sir Roderic about this before lunch and you made your
view about its relevance very clear.

It is important to note, however, that you do say in
this advice that, "We had very little hard evidence".

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: So though you are putting quite
a bit of weight on it, the evidential basis is not that
strong.

RT HON LORD GOLDSMITH QC: Yes, but I think that -- I tried
to make this point this morning, which is actually, at
the end of the day, the key question still remains: what
do the words mean?

In circumstances where it is clear from the
negotiating history -- and on this it was clear that
that, at least, was the critical question, "Was there
going to be a need for a decision or not?" -- then the
fact that those words are not used -- the Security
Council members knew very well the difference between
"consider" and "decide", that that is a deliberate
choice, then you draw the conclusion that it was
intended that there should not be a decision.

SIR LAWRENCE FREEDMAN: Without going over all the ground
again, we had an interesting discussion about the
possibility of getting French views.

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: Now, on, I think, 4 February, the
Prime Minister actually met with President Chirac while
he was still in this process of getting your views.
Were you aware that that meeting was going to take place?

RT HON LORD GOLDSMITH QC: I cannot recall. I may have seen it in the press. I may have known. I wasn’t part of any briefing for the Prime Minister, or, as far as I can recall, saw any record of it afterwards.

SIR LAWRENCE FREEDMAN: It seems this might have been a rather good opportunity for the Prime Minister to ask President Chirac directly what he might have thought about the need for a further resolution.

RT HON LORD GOLDSMITH QC: Well, given where the two states were at that stage, I suspect -- but he can speak for himself -- that Mr Blair would say I couldn’t possibly go to the French and say, "Could you tell me what I'm entitled to do?"

SIR LAWRENCE FREEDMAN: I'm sure he couldn't, and this is a question obviously for the Prime Minister of the day, but there is an issue about having just come back, and you will have known, because you were advising before the meeting with President Bush, at this stage, that the balance of your view was against moving without a second resolution, that it wouldn't be surprising if the Prime Minister wished to speak to President Chirac about the possibility of working together on what that second resolution might be, in which case, views might have

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come out about them.

RT HON LORD GOLDSMITH QC: I very strongly suspect that he
did talk to him about -- I'm sure it was a very
important topic of discussion for them, what was going
to happen next, "Can we work together?" and this and
that.

SIR LAWRENCE FREEDMAN: You didn't get any intelligence
back?

RT HON LORD GOLDSMITH QC: No. I mean, it is interesting
because I had actually seen a telegram reporting what
French legal views were at an earlier stage as well,
before Resolution 1441, and they had said that they had
given President Chirac advice -- this was reported to
us -- that determination of material breach would revive
the authority under Resolution 1441.

SIR LAWRENCE FREEDMAN: Well, that's quite interesting
additional evidence you have given us.

RT HON LORD GOLDSMITH QC: It is in the files that my former
office I know has made available to the Inquiry. That
is not specific to 1441. That is before --

SIR LAWRENCE FREEDMAN: An indication of the advice that
they may have got. It doesn't alter the fact that they
may still have wished for something different in 1441
itself.

Can I then look at the consequences of no decision
by the Security Council?

In paragraph 24 of your advice you give three arguments that support the approach that a decision is necessary. The first of these is that when taken with the word "assessment", the language of paragraph 12 indicates that the Council would be assessing the seriousness of any Iraqi breach.

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: Which was the point I was making before. So that if some assessment is necessary --

RT HON LORD GOLDSMITH QC: I think I say, "if some assessment is necessary". That's the question.

SIR LAWRENCE FREEDMAN: So this is what we have been discussing. Okay.

Then you refer to the special significance of the words "in order to secure international peace and security".

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: Could you elaborate on why you thought that was important?

RT HON LORD GOLDSMITH QC: These are arguments. I set out the arguments both ways, of course.

SIR LAWRENCE FREEDMAN: I know. We are trying to understand the weight of these arguments.

RT HON LORD GOLDSMITH QC: You would say, "Because this
reflects the language as to what the Security Council's obligations are, does the fact that that is referred to, sort of point you in the direction that it is for the Security Council to decide? to which part of the answer is, "Well, they have decided". That's the point about pre-determination.

But that was the argument that I was -- I was setting out the arguments that could be put that way.

SIR LAWRENCE FREEDMAN: So despite the fact that, in a sense, they have delegated their authority in a way, that seems to be the implication?

RT HON LORD GOLDSMITH QC: That's what one is actually trying to discover by the process of interpretation, whether they have, by looking at all of the features, and that means looking at the language but also the arguments.

The whole point is, of course there were features which pointed the other way. That's why we were where we were and why I had taken provisionally the view that I did that then became clearer as to what I considered the true meaning of Resolution 1441 was.

SIR LAWRENCE FREEDMAN: Then, third:

"Any other construction reduces the role of the Council discussion under operation 12 to a procedural formality."
You seem to accept that this would be potentially of consequence.

RT HON LORD GOLDSMITH QC: I do say in legal terms -- and that's quite significant because what I'm really saying is -- people didn't like that expression "procedural formality", they said, "That simply isn't right".

What I'm saying is, as a matter of law, in a sense it amounts to that, because it would have been possible to have avoided even a discussion, as a matter of -- well, not to -- to avoid any engaged discussion, but as a matter of fact, of course, what it did provide -- and we saw this over the months between November and March -- was a series of discussions in which the extent of non-compliance was discussed, what the right thing to do at the end of it was, and it did provide for other member states the opportunity of expressing their view and whether they had a right to prevent it at least to seek to influence what was taking place.

So I said, in legal terms, in practical terms, I think that was perhaps quite a narrow thing to say. In practical terms, it did provide some real significance.

SIR LAWRENCE FREEDMAN: I mean, as you say, it means that members of the Security Council can come to the debate, engage in it in good faith, put forward compelling
arguments, but, in the end, military action could proceed regardless?

RT HON LORD GOLDSMITH QC: That's the legal consequence, yes.

SIR LAWRENCE FREEDMAN: You said before that, if member states didn't want that, then they shouldn't have voted for it.

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: But what you are also indicating is that these are questions of interpretation. So it is perfectly possible that they did think they were voting for something else.

RT HON LORD GOLDSMITH QC: Well, you know, it would have been, if I may say so -- if what really mattered, and it appears that it was what really mattered, that there should be either a decision or leave it for discussion and then the United States -- because I'm sure that's what people particularly had in mind -- would do what it believed it had to do, then it would have been easy for member states to have said, "We are not prepared to vote for this resolution unless it says 'decide' in operational paragraph 12".

Whether politically it is easy for them to do is another matter, but legally that could have been done.

SIR LAWRENCE FREEDMAN: But at least in the explanations of
voting a number seemed to indicate this is precisely what they did expect.

RT HON LORD GOLDSMITH QC: I don't share that view. Two member states, I think Mexico and Ireland, although Ireland in a slightly conditional way, seemed to be taking that view. Then there are some obscure, perhaps ambiguous phrases used by others, and, given the central position that France played, I think you can make the point that it is significant that they did not say in terms, which they could have done, "This means there has to be a decision".

SIR LAWRENCE FREEDMAN: So I see the consequences then of the Security Council not taking the decision -- and this is your paragraph 29. If 1441 alone had revived 678, that requires strong factual grounds for concluding that Iraq has failed to take the final opportunity.

Now, where was this strong factual basis to come from?

RT HON LORD GOLDSMITH QC: The strong factual basis was to come from the facts. That sounds obvious, but that is the point, and the point I was really making was, if this ever came to court, and we were saying -- we would have to persuade a court of our interpretation of 1441, but they would also say, "What's the evidence that they did actually fail?" and I was saying, at that stage,
there needs to be strong factual evidence of failure.

I wrote this before this discussion on 7 March in the Security Council that I have referred to, but it will be a question of fact whether that had happened or not.

SIR LAWRENCE FREEDMAN: Just before I move on, you mentioned, when we had a discussion about intelligence advice, that you had received a briefing in February.

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: Can you just explain the nature of that briefing and how relevant it was to this part of your advice?

RT HON LORD GOLDSMITH QC: Yes. I can't remember who asked for the briefing, but I do recall John Scarlett, probably with others, came, gave me a briefing. The briefing was focused on the question of compliance. The clear intelligence, the clear advice that I was being given by him was that Saddam Hussein in Iraq had not complied with the resolution, not just that there were specific elements of non-cooperation, serious non-cooperation, including, for example, intimidation of potential interviewees, this was an important part of the resolution that interviewees should be left to be interviewed by inspectors without intimidation. They could be flown abroad, if need be, and that there was
evidence, both Humint and Sigint, of deception and concealment and dispersal of relevant elements of WMD.

SIR LAWRENCE FREEDMAN: So how weighty was this intelligence in terms of your opinion --

RT HON LORD GOLDSMITH QC: Well, at the end of the day, I did not have the resources to be able to evaluate intelligence of that sort. My office didn't have a weapons specialist or something of that sort. At the end of the day -- and like any lawyer who is dependent upon the facts from his client -- I was dependent upon the assessment by the government which had all the resources it had, all the intelligence agencies. It had the military experts, people with great experience, who could judge that, and that was why I particularly wanted to be sure, come the week before the events, that the Prime Minister, who did have access to all that information, was of the view that there had been a failure.

SIR LAWRENCE FREEDMAN: So you couldn't really just say the facts spoke for themselves, somebody would have to collect the facts, present them and take a view about what they meant?

RT HON LORD GOLDSMITH QC: No, not really. The facts would speak for themselves. It was just, what were the facts at the time? Well, the facts were the facts. But it is
a commonplace for a lawyer to find somebody says, "These are the facts 1, 2, 3", and ultimately that may be established in court because they are the facts and they haven't changed, but you need to -- you don't know, you weren't there, and, therefore, you say to your client, "You must confirm that these are the facts".

SIR LAWRENCE FREEDMAN: So that leads you to say:

"We would need to be able to demonstrate hard evidence of non-compliance and non-cooperation."

The "we" is --

RT HON LORD GOLDSMITH QC: The United Kingdom.

SIR LAWRENCE FREEDMAN: The government?

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: Given the structure of the resolution, you go on to say that the views of UNMOVIC and the IAEA will be highly significant in this respect.

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: You note that in the light of the latest reporting by UNMOVIC, you will need to consider extremely carefully whether the evidence of non-cooperation and non-compliance by Iraq is sufficiently compelling.

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: Now, presumably, this was, from what you said, where you said you got the Clusters document
after this.

RT HON LORD GOLDSMITH QC: I think the Clusters document may have --

SIR LAWRENCE FREEDMAN: It came around almost exactly the same time.

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: But that could well have been a reference to the mid-February presentations by Dr Blix and El-Baradei, which had been interpreted as being somewhat more positive on Iraqi cooperation than the January 27th presentations had been.

RT HON LORD GOLDSMITH QC: I think I heard it said that that presentation sort of contained something for everybody. I don't know whether that was a fair statement, but I really wasn't -- it really wasn't for me to seek to assess that.

What I was saying in this paragraph -- and it was -- this is partly a sort of point about -- just based on litigation experience. You get to court, whatever the court may be, and you need to have -- you know, a strong case, as it were, on the facts that you are putting forward, and I think I was -- I really was saying, "I don't know. I see some of this stuff coming out of the inspectors, you need to assess very carefully whether the position actually is that Iraq is now
complying or whether it is not".

SIR LAWRENCE FREEDMAN: The consequence of this is that the
determination of material breach, however strong the
factual evidence, however much everybody else may be in
sympathy with this point, is actually going to be made
by the British Government.

RT HON LORD GOLDSMITH QC: Well, I think you know I don't
agree with that, because the determining of material
breach is actually being made by the --

SIR LAWRENCE FREEDMAN: There has been pre-determination, but
not the one that is necessarily now going to trigger
military action.

RT HON LORD GOLDSMITH QC: I hope I'm not quibbling, but it
is an important point, the pre-determination had been
made that, if there was a failure, it would be
a material breach.

Yes, we had to decide whether there was a failure,
but, if there was a failure, then the Security Council's
pre-determination would come in and clothe that with the
character of material breach.

SIR LAWRENCE FREEDMAN: So in paragraph 22 you had said the
UK view has always been that it is for the
Security Council to determine the existence of the
material breach of the ceasefire. You are now saying
that has already been done in 1441?
RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: So what is the need now for the Prime Minister to give a view? What is he giving a view on, if that determination has already been made?

RT HON LORD GOLDSMITH QC: I don't know really what the facts are. I had a view, of course, and you have identified some of the reasons why I had a view, but I thought, frankly, two things.

First of all, because it did depend upon the failure, it was important to point out you need to be satisfied about that and, secondly, I wanted the Prime Minister, consciousness and deliberately, to focus on that question. I wanted it to be a question that he would really apply his mind to.

Forgive me for even suggesting that he wouldn't have done. That wasn't the point. That he should have focused his mind on whether there was, in fact, a failure, and that was the purpose of saying, "I want this in writing", it was so there was a really conscious consideration of that.

SIR LAWRENCE FREEDMAN: In a sense, this is the client confirming his own views, though, his own facts?

RT HON LORD GOLDSMITH QC: Well --

SIR LAWRENCE FREEDMAN: The Prime Minister's views on Iraqi weapons of mass destruction were well-known. It would
have been very surprising if, at this stage, he had
suddenly said, "I'm not actually very sure".

RT HON LORD GOLDSMITH QC: I think subsequently, if it had
emerged that in these very few days there had suddenly
been a sea change in attitude and something important
had taken place so that there was now compliance, and
the Prime Minister had given to the Attorney General
a letter confirming his view; when, if one saw
subsequently, it was not the case, that would have been
a very serious matter.

SIR LAWRENCE FREEDMAN: So you are pushing the issue away
from the Security Council -- accepting the issue goes
away from the Security Council and back to the British
government on this crucial determination, and then, in
paragraph 30, you make a point that you have already
made to us, that:

"In Operation Desert Fox in 1998 and Kosovo in 1999,
British forces had participated in military action on
the basis of the advice from my predecessors that the
legality of the action under international law was no
more than reasonably arguable."

So you are accepting here that "reasonably arguable"
is a somewhat lesser standard than others that you might
like to present?

RT HON LORD GOLDSMITH QC: I think the key difference
here -- and it emerged subsequently, and I'm sure we
will come on to it shortly -- was between the authority
based on the assessment that there was a reasonable case
that it was lawful, to authority which is based upon
having balanced all the arguments and come down one side
or the other, is it, in fact, lawful?

That's the distinction I was drawing.

SIR LAWRENCE FREEDMAN: Were the precedents that helpful?
You have already indicated that Kosovo was a completely
different basis of law. Desert Fox is obviously
relevant, but, again, you have indicated a difference
there. How strong were these precedents, and isn't it
a bit unnerving at this sort of stage to say that we are
going into this with no more than a reasonable argument?

RT HON LORD GOLDSMITH QC: I don't think "reasonable case"
quite means that, but, of course, I see, Sir Lawrence,
the point that you are making.

That is why, when the armed forces and the
Civil Service said, "We need to know that you think it
is right to do it", I saw that point of view. I had
been doubtful originally. I had originally been not
that instinctively in favour of this "reasonable case" approach,
but these precedents were helpful, because, although
Kosovo was a different legal basis, the point was that
the British Government had committed itself to military
action on the basis of legal advice that there was
a reasonable case. That was the precedent. It had been
pressed upon me that that was the precedent in the past.
I can see, and in a sense this is right, that, with
hindsight, I was being overly cautious in expressing it
in this way, but that was the precedent that had been
used and I went along with it. Not, "I went along with
it", I followed the same practice.

SIR LAWRENCE FREEDMAN: So overly cautious in the sense that
you could have been stronger at this point?

RT HON LORD GOLDSMITH QC: Because subsequently, when I get
the request from the armed services and from the
Civil Service to say, "Please, will you say -- we want
the Attorney General to say is he of the opinion that it
is or isn't lawful", then I very quickly saw that
actually this wasn't satisfactory from their point of
view. They deserved more, our troops deserved more, our
civil servants who might be on the line deserved more,

So, therefore, it was important for me to come down
clearly on one side of the argument or the other, which
is what I proceeded to do.

SIR LAWRENCE FREEDMAN: One might think it is either
a reasonable case or it is not a reasonable case. How
does it suddenly become a stronger case?
RT HON LORD GOLDSMITH QC: It is the decision you make about it. It is the decision you make about it. You make a judgment. You say I'm asked to advise whether there is a reasonable case, and you examine all the evidence and you say, "Yes, there is a reasonable case". You don't need to go any further, and in that respect, I can see, with hindsight, that I was being overly cautious.

Then somebody says to you, "Actually, I don't want to know whether you say there is a reasonable case, I want to know whether or not you consider that it will be lawful".

Well, I regard that as a different question and you then have to -- you have to answer it.

SIR LAWRENCE FREEDMAN: Some might argue that justifiably you would be cautious in another direction, in that, if you are going to invade a sovereign state, you would want something more than a reasonable case.

RT HON LORD GOLDSMITH QC: Well, I think that's what the armed forces were saying in a sense. We don't want to go to war on the basis of -- I don't know if they were putting it quite this way, but they were saying, "We want an unequivocal yes or no. Please, what is the Attorney General's opinion?"

SIR LAWRENCE FREEDMAN: What I'm struggling with here is something which is cautious about the strength of the
arguments, because the arguments are difficult and the
resolution does have an ambiguity in it --

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: -- and then suddenly he is becoming
quite firm on that. You are giving the armed forces
more but not on the basis of any more legal arguments.

RT HON LORD GOLDSMITH QC: Well, not on the basis of more
legal argument, but on the basis of asking a different
question. This is, in a sense, why I'm saying "with
hindsight". I would have liked to have known before the
following week that what the armed services and the
Civil Service expect was not what had been by precedent
given in the past, that they wanted more, they wanted an
unequivocal answer.

Had I known that, then I would have approached the
question differently, and I'm simply saying I was
cautious in not going further than I needed to do on
7 March.

SIR LAWRENCE FREEDMAN: But there is another argument that
you make. You say:

"A reasonable case does not mean that if the matter
ever came before a court I would be confident that the
court would agree with this view."

I mean, just on that point first, if you make
a stronger argument, isn't there even a greater risk
that a court would not agree with this view?

RT HON LORD GOLDSMITH QC: I think what I'm saying here is I'm explaining what I mean by "reasonable case", and this is -- if you like, this is the "yes, but" point. I wanted to sort of underline to the Prime Minister that I was saying that reasonable case is enough. I'm saying it is a reasonable case. So that is the green light. Indeed, I had said that, as I told the Inquiry earlier in February, but I want to underline, "Please don't misunderstand, a reasonable case doesn't mean of itself that, if this matter were to go to court, you would necessarily win". I go on to say, "On the other hand, the counter view can reasonably be maintained". So you might, you might well.

SIR LAWRENCE FREEDMAN: Then you also warn about the unusually intensive degree of public and Parliamentary scrutiny.

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: Just to conclude, because I suspect we will need a break, what you are essentially saying to the Prime Minister at this point is, "There is an argument. I have considered it. This is what it is. But be aware that it needs from you a clear statement on material breach. You are not necessarily going to get it from anywhere else, and it needs -- you need to be
aware that the argument I have produced will be one that
will be subject to considerable scrutiny, even if not in
a court and has to be able to stand up there”.

So you are putting, in some sense, the risks of what
you are proposing back to the Prime Minister?

RT HON LORD GOLDSMITH QC: Well, you do that with clients
from time to time. I think I'm saying two things.

First of all, I wasn't actually saying there needed
to be a declaration by him. I was saying, "You need to
be satisfied. You need to judge that there really is
a failure to take the final opportunity. You need to
judge that on the basis of the resources, the
intelligence and the information that you have got", and
I also wanted to express this "but".

It is a pretty obvious point, actually. Probably
not thanked for making it. This was going to be a very
controversial decision, whichever way it went. There
would be a lot of scrutiny. We had had sort of legal
actions bubbling up already. So, "Whereas in the past
reasonable case was sufficient, you can expect a degree
of scrutiny on this occasion".

SIR LAWRENCE FREEDMAN: So the issue was not necessarily
going to be closed by this advice?

RT HON LORD GOLDSMITH QC: Well, at the time, I thought it
was, because I thought I had given the green light
in February, I was following precedent in giving the
green light again, and I thought, therefore, the issue
was closed, and, therefore, if, politically, the
decision was taken wherever it needed to be taken in the
United Kingdom, and no doubt the United States, about
military action, then that would be it.

I did say in the advice, on the other hand,
recognising that things could change, I said at the end
of paragraph 31 that we would need to assess it in the
light of -- assess the strength of the legal case in the
light of circumstances at the time if there were
a failure to obtain the second resolution. I think at
that stage it was beginning to look doubtful, but it
wasn't yet clear that there wouldn't be a second
resolution and there could have been events which could
have affected the legal analysis taking place between
then and --

SIR LAWRENCE FREEDMAN: This was still not definite.

I think we have a precedent: at the chimes of
Big Ben, we break. So I think it would be best to stop
there.

THE CHAIRMAN: Good. Thank you very much. Let's stop for
ten minutes and come back at quarter past.

(3.02 pm)

(Short break)
THE CHAIRMAN: Well, let's resume and I'll ask Sir Martin Gilbert to open the questioning.

SIR MARTIN GILBERT: Lord Goldsmith, I would like to talk briefly about the risks and consequences.

In the aftermath of Resolution 1441 what was your view of the potential negative consequences to the UK civil servants here, to military personnel, if we acted without specific authorisation?

RT HON LORD GOLDSMITH QC: Well, if we acted without specific authorisation -- well, first of all, if the question is getting at what was my view of the consequences if we acted unlawfully and knew we were acting unlawfully, that would have been a very wrong thing to do.

What would be the risk if we believed we were acting lawfully and what happened afterwards? Well, a number of things: there was a potential for court action in different ways -- I set some of this out in my advice -- and there was a concern about the position of servicemen and women and about civil servants. There was actually a difference of view between the Ministry of Defence and the Foreign Office about how real that risk was, but the Ministry of Defence taking the view that, if soldiers operated under orders in these circumstances, they had
nothing to fear.

But I know that subsequently -- I have learned subsequently there were concerns from senior military commanders about their personal position. I was told subsequently -- I think I said this publicly -- that the First Sea Lord actually took his own legal advice as to whether the invasion would be lawful, and he tells me that the advice that he received was that it was lawful.

SIR MARTIN GILBERT: At that time, were you aware of Sir Michael Wood's advice to the Foreign Secretary in October 2002 that to advocate the use of force without, as he put it, a credible legal base, would be to advocate the commission of a crime of aggression and would expose members of the armed forces to charges of murder?

RT HON LORD GOLDSMITH QC: I think, so far as the first point is concerned, I don't know whether I was aware of his view particularly. I'm not sure if that's the minute that I saw, but I wouldn't have disagreed that for us to take action without what we believed to be a proper basis for lawful action would have been a very wrong thing for us to have done.

Whether it would have exposed servicemen and women to the possible prosecution for murder is precisely the point I have just raised, as to whether it does do that
in relation to individual servicemen and women, but, undoubtedly, there was an issue, so far as commanders were concerned. They are in a different position.

SIR MARTIN GILBERT: Did you discuss this with the Foreign Secretary and the Secretary of State for Defence?

RT HON LORD GOLDSMITH QC: No, I didn't, although it is dealt with in my minute of 7 March.

SIR MARTIN GILBERT: They didn't take it up with you following your minute?

RT HON LORD GOLDSMITH QC: No.

SIR MARTIN GILBERT: In your minute of 7 March, in paragraph 32 you list some of the potential legal areas of activity, the legal case you say internationally or domestically against the members of the government, UK military personnel, and that it would not be surprising, despite what you call the fairly remote possibilities of this happening, that it might not be surprising if some attempts were made to get a case of some sort off the ground.

With regard to getting a case of some sort off the ground, at what point might that take place and what particular court or courts would this potentially involve?

RT HON LORD GOLDSMITH QC: Well, it could have taken place, as it were, immediately that we had announced we were
going to take military action, or it could have taken place after it had started.

As I recall in relation to Kosovo, there was an attempt to get some sort of injunction from the International Court of Justice and I can't recall whether the bombing had started or was about to start at that stage, and there had already been some attempts to get an injunction even before we got to this point, but they had not been accepted by the courts.

SIR MARTIN GILBERT: The adoption of the statute of the International Criminal Court which I believe had just taken place in July 2002, was that an added factor with regard to potential legal action?

RT HON LORD GOLDSMITH QC: I think it was a little bit earlier than that, actually, because my recollection was we passed the International Criminal Court Act before I was in government. So perhaps it is 2000 or just before, but in any event, it was an important issue.

The legal position was that it would not have been possible for the International Criminal Court to have taken proceedings in relation to the crime of aggression, because, although that was, as it were, within the envelope of possible authority of the International Criminal Court, it required there being agreement on what the definition was and that had not
taken place.

THE CHAIRMAN: When it does, we heard in evidence yesterday, it would not have retrospective effect.

RT HON LORD GOLDSMITH QC: Exactly. What could have happened -- and I made this point -- was that the United Kingdom was a party to the Rome statute, in my view very rightly, and it could mean that it would therefore be subject to possible proceedings based on the conduct of any military action, the international breach of international humanitarian law, and I think there had been a threat that there would be an attempt to do that.

I suppose in the world of practical politics, although the legality of the original act in a sense doesn't come into it, then it may add a certain context to any accusation that there had been indiscriminate military action or military action which had imperilled civilians more than it should properly have done.

SIR MARTIN GILBERT: You lay out the basis of this in your March 7 advice. Did you also discuss this aspect with the Prime Minister personally?

RT HON LORD GOLDSMITH QC: I actually think I did. I think I spoke to him about these consequences.

SIR MARTIN GILBERT: Can you recall his response?

RT HON LORD GOLDSMITH QC: I think he noted what I had said.
I can't recall anything more than that.

SIR MARTIN GILBERT: You did do it verbally, as well as --

RT HON LORD GOLDSMITH QC: I believe I did, yes.

THE CHAIRMAN: Thank you. Sir Roderic?

SIR RODERIC LYNE: There are a number of points, I think,
arising from your conversation with Sir Lawrence, that
we will want to pursue with other witnesses. In
particular, the question of why the UK continued
pressing for a second Security Council Resolution and
whether or not the final opportunity, which you
mentioned, had indeed been taken and the diplomatic
route exhausted, but I think to a large extent these are
political issues and time is pressing on us, so I will
register those for the record.

We will come back to them, but what I would like now
in the time available to us to focus on, as quickly as
I can, is the way that your position developed between
7 March, when you submitted your formal advice to the
Prime Minister, and 17 March, when you gave
a Parliamentary answer to Baroness Ramsay.

A key document here obviously is the note of your
discussion, which, happily for both of us, has been
declassified by our ever bountiful government, with
David Brummell on 13 March. We understand from David
that that discussion took place early on 13 March and
this bit of paper says that his record of the discussion was actually approved by you. So it is presumably a very accurate record.

It says here that, after further reflection, you told David Brummell that you had come:

"... to the clear view that, on balance, the better view was that the conditions for the operation of the revival argument were met in this case; ie there was a lawful basis for the use of force without further resolution beyond Resolution 1441."

RT HON LORD GOLDSMITH QC: Yes.

SIR RODERIC LYNE: Now, what this note doesn't tell us is precisely why you had come to that clear view. You referred earlier to your conversation with the CDS but that isn't mentioned in this note.

Can you tell us what led you, on 13 March, to this clear view?

RT HON LORD GOLDSMITH QC: Absolutely. I mean, there were a number of things which happened after 7 March. It was becoming clear, thought it hadn't yet become definitive, that the second resolution was going to be very difficult to obtain.

There had been the debate on 7 March at the Security Council, which actually is mentioned in this note at the end of paragraph 4. But, most importantly, I had had
sort of two conversations.

First of all, I had been presented with a letter which had come from the Ministry of Defence, which reflected the view of CDS, and which was, as in the sense you have heard from him and as I understood in discussions about that letter, calling for this clear view, a yes or no answer, as I think he has put it.

At about the same time, I also received a visit from Juliet Wheldon. Juliet Wheldon was the Treasury Solicitor. I understood her to be speaking on behalf of the Civil Service, and, indeed, from what I have -- I can't remember whether she said this, but from what I now know, I suspect, believe, she would at least have been encouraged to do that by the Cabinet Secretary, as it were, on behalf of the Civil Service.

Both of them in a sense were saying the same thing. They were saying, "We are potentially at risk personally if we participate", or, in the case of the Civil Service, "assist in war, if it turns out to be unlawful, and, therefore, we want to know whether the Attorney's view is yes or no, lawful".

That seemed to me to be actually a very reasonable approach for them to take. They were the people we would be asking, if it was then decided to take action, possibly to take personal risk and they were entitled to
have a clear view. They weren't to be put in the
position of being sent off, "Maybe it is and maybe it
isn't lawful". I thought it was a reasonable request.

There was no other way of anybody answering that
question but me. The courts couldn't deal with it, and
so I had to, as I have described it, clear the decision,
yes or no. It was my responsibility. I therefore now
recognise, as I actually suspected at the outset,
that -- I now recognise that it wasn't good enough to
say, "There is a reasonable case" and I must now consider
whether or not on balance my view was that it was right
or wrong, and so it was a question then of taking that
step, of considering those issues, and I reached the
view -- I'm happy to explain why -- I reached the view
that, on balance, the better view was that it was lawful
and that's why I came out with that view.

THE CHAIRMAN: Could I just ask: was the fact of the
existence of the International Criminal Court part of
the background and was there a line of precedent
stretching back on previous comparable occasions of such
requests from the Chief of Defence Staff or the head of
the Civil Service?

RT HON LORD GOLDSMITH QC: I don't think there was any
precedent for this, because I think that if there had
been, I think it would have been drawn to my attention
before, when people were saying, "You can say there is
a reasonable case".

I think there are sort of two elements. I think
first of all, the International Criminal Court certainly
focused the attention of the armed services on their
personal responsibility. I think there is also another
feature, which is a sort of growing interest, belief, in
legality, and the individual responsibilities of people
who are involved in actions.

I'm happy to welcome that, but it did result in this
request or these requests.

THE CHAIRMAN: Just to be clear I have understood what you
have just said, Lord Goldsmith: this has nothing much or
has it to do with the offence of corporate manslaughter,
which was very much under consideration?

RT HON LORD GOLDSMITH QC: No, not at all.

THE CHAIRMAN: Right.

SIR RODERIC LYNE: If I just take the two points made
there, the difficulties we were running into in the
Security Council made it much more likely now that we
wouldn't have a further determination, a determination
of further breach from the Security Council, and,
therefore, all the more important to know, in those
circumstances, without that determination, whether we
would have sufficient legal basis for military action.
RT HON LORD GOLDSMITH QC: Yes.

SIR RODERIC LYNE: So that's why you had to focus on that channel and see -- then to advance to your second point -- whether you could give a yes or no answer to that because your advice of 7 March had looked at a wider range of options?

RT HON LORD GOLDSMITH QC: Well, I think I would put it, if I may, this way: that, until the Civil Service and the armed services said they wanted this clear view, I was working on the basis with -- I take full responsibility for this, but it was with the approval of my office on the basis that saying there was a reasonable case was a green light. It was sufficient for the government, and if the Cabinet and, as it turns out, the House of Commons, took the view that it was the right thing to do, then we had done enough to explain what the legal basis was and to justify it.

But when they came with their request, I then saw that actually that wasn't fair on them.

SIR RODERIC LYNE: Yes, and as I think you have explained earlier, the reasonable case doesn't have to be the safest case.

RT HON LORD GOLDSMITH QC: Well, the safest case remained getting -- but that's legally safe. Of course, we would rather --
SIR RODERIC LYNE: We are talking very much about the legal position.

Now, how important in this reflection had been the actual meeting in Downing Street on 11 March?

RT HON LORD GOLDSMITH QC: Actually not at all. 11 March I met -- and CDS was there and the Cabinet Secretary was there and the Prime Minister, I think the Deputy Prime Minister was there. I recall that.

I know there was some reference to CDS saying, "I will have to put in my operational orders", something about the basis of law.

Subsequently, I saw the minute -- I don't know whether it was the following day -- and the minute says something about "which the Attorney General will clear". I didn't actually terribly remember that being said at the time, but actually it was wasn't that meeting, although I can now see that the communications that I received led back to that meeting, it was the specific request that was coming from the legal adviser at the Ministry of Defence -- I don't know whether that is one of the documents that is declassified or not, but I know you have seen it -- and then the visit from the Treasury Solicitor, Dame Juliet Wheldon.

SIR RODERIC LYNE: Yes. At that meeting, chaired presumably by the Prime Minister, did the Prime Minister express
a view, for example, in support of the request of the
CDS for a clear yes or no position?

RT HON LORD GOLDSMITH QC: I don't actually recall CDS
making the request at that meeting. I can understand --

SIR RODERIC LYNE: All right, did the Prime Minister express
a view of any kind on this?

RT HON LORD GOLDSMITH QC: No.

SIR RODERIC LYNE: He didn't?

RT HON LORD GOLDSMITH QC: No.

SIR RODERIC LYNE: He didn't ask you now to come up with
some definitive position?

RT HON LORD GOLDSMITH QC: I don't recall it that way. The
way it may have been seen by others or interpreted by
others, or recollected by others, I don't know, but
I don't recall the Prime Minister asking for that, no,
definitely not.

SIR RODERIC LYNE: If we look at the context, we are by then
in a very serious situation, in which, if we did not
have a legal basis for going to action, the government
would have been in an extraordinarily difficult position
with troops deployed. If it had had to, as it were,
return from the theatre, that would have been treated as
a huge triumph for Saddam Hussein.

Perhaps you would like to say what the political
consequences, as well as the international consequences,
would have been if we had said, "No, we can't participate without a second decision from the Security Council"?

RT HON LORD GOLDSMITH QC: I really don't think I'm the right person to say what the political consequences would have been.

SIR RODERIC LYNE: You were a minister in the government.

RT HON LORD GOLDSMITH QC: Well, I was, with a specific responsibility, but I think -- and there were obviously two points of view in relation to this.

There was a point of view that proceeding would be a mistake, and there was a point of view that not proceeding would be a mistake, because of what it would have done, as I recall it, particularly to the principles of upholding the United Nations and enforcing the resolutions which had been defied for a significant period of time.

SIR RODERIC LYNE: Other witnesses have suggested that the Prime Minister's personal future was at stake, the government's future perhaps was at stake. There was huge pressure on the government at this point and you must have been conscious of that. Did it weigh on you?

RT HON LORD GOLDSMITH QC: No.

SIR RODERIC LYNE: Not at all?

RT HON LORD GOLDSMITH QC: The consequences for the
government did not. Sorry to say that to my colleagues in government, but it didn't. What did matter to me, of course, was the United Kingdom as a country, in terms, and the people that we were -- would have been asking to take part in this with a potential personal responsibility, and I did believe it was right to respond to the request from the head of the armed services, "We want you to tell us, we want your backing, because otherwise -- because that will give us legitimate cover for what we are doing, and we genuinely want to know what your view is, of course, and for the Civil Service". That weighed with me.

SIR RODERIC LYNE: Did the international consequences, particularly vis a vis Saddam Hussein and disarming him of his WMD presumed at the time of telling the Grand Old Duke of York, the CDS in this case, that he had to take his troops down from the top of the hill, not also weigh upon you?

RT HON LORD GOLDSMITH QC: That wasn't --

SIR RODERIC LYNE: If you had had to say that to him?

RT HON LORD GOLDSMITH QC: No. Those sort of consequences are not what the lawyer has to take into account. What the lawyer has to do is to weigh up the arguments and evidence carefully and reach what he believes is the correct legal view, whatever the consequences may be,
and it is a commonplace, and has been, in my practice, that you had to make decisions and sometimes people would say, "This will be terrible if you make this decision", and you would say, "I'm very sorry. I will do what I can to mitigate those perhaps, but that is the consequence".

SIR RODERIC LYNE: So you separated that very clearly, as you have just said very emphatically, from the legal decision. That was the decision you made. Can I just quickly look through your diary on 13 March --

RT HON LORD GOLDSMITH QC: Yes, of course.

SIR RODERIC LYNE: -- of which I think you and I have a copy in front of us, just to be clear about this, and, as you know, we have also discussed this with David Brummell yesterday.

RT HON LORD GOLDSMITH QC: Yes.

SIR RODERIC LYNE: So I hope we can do this quite briefly. I think you met with him before the first appointment written down in the diary to give your legal advice.

RT HON LORD GOLDSMITH QC: Yes.

SIR RODERIC LYNE: I do not think we need deal with your meeting with Jonathan Crow which I understand was on a completely separate issue not relevant to the Inquiry.

RT HON LORD GOLDSMITH QC: That's right.

SIR RODERIC LYNE: At lunchtime, you met David Brummell
again, with Cathy Adams, to discuss where you go from here having now made the decision that you have made.

RT HON LORD GOLDSMITH QC: Yes.

SIR RODERIC LYNE: Then you met Christopher Greenwood who has been mentioned earlier.

RT HON LORD GOLDSMITH QC: Yes.

SIR RODERIC LYNE: Was he effectively the only well-known specialist in international law outside the government who was arguing in favour in the UK of the revival argument?

RT HON LORD GOLDSMITH QC: I certainly didn't know that to be the case and that had nothing to do with why he was there.

SIR RODERIC LYNE: Are you aware that there were others taking the same line as Christopher Greenwood?

RT HON LORD GOLDSMITH QC: As it happens, I am, but that wasn't the point. As David Brummell's note makes clear, what I wanted to do at that stage was prepare for possible legal action. That was my primary concern. As I have said, it had happened in Kosovo, I'm the sort of lawyer who says, "Okay. I can see this on the horizon. Let's get on with it", and therefore I wanted to instruct counsel who would be able to argue the case for us. Christopher Greenwood was the obvious choice, a hugely distinguished international lawyer, regularly
appeared, as it happened, for the government, and
exactly the sort of person who would be a very strong
and able advocate to present our case, if need be.

As it happens, before I instructed him -- and
I believe this was in the morning and David Brummell
refers to this. I spoke to him on the phone and I did
ask him then, told him my view and asked him what his
view was -- or at least I asked him what his view was,
I may not even have told him what my view was, and asked
him what his view was, and he told me then that it was
his view that it was lawful to proceed without a second
resolution.

So that gave me some comfort, but I had reached my
decision. What I then wanted to do was make sure we
were well prepared for any legal action. That was one
of my jobs as Attorney General, to deal with litigation
against the government, and, therefore, you get
prepared.

SIR RODERIC LYNE: Did you reach outside the government at
this point, because you were not fully confident that
you were going to get the right kind of advocacy advice
from international lawyers inside the government who,
like Sir Michael Wood, didn't 100 per cent agree with
the view that you had taken?

RT HON LORD GOLDSMITH QC: No, this is not advocacy advice,
SIR RODERIC LYNE: Advice preparing for a possible challenge to your decision?

RT HON LORD GOLDSMITH QC: This was, in sort of classic terms, to instruct counsel to be ready to turn up with wig and gown at the relevant court the following day.

SIR RODERIC LYNE: So he wasn't going to be involved also in presenting the decision in advocacy terms.

RT HON LORD GOLDSMITH QC: I think the way it developed was that was the reason that I was interested in instructing him, and, indeed, two other names are mentioned as to people who would be instructed with him.

As it happened, the idea then emerged, not from me, but I think from others, that it would be a good idea to use him, with his great experience, to help produce the arguments, as it were, not just for court but for other purposes as well.

SIR RODERIC LYNE: Why didn't you use Sir Michael Wood who was also hugely experienced?

RT HON LORD GOLDSMITH QC: In the end, I did.

SIR RODERIC LYNE: But you also felt the need --

RT HON LORD GOLDSMITH QC: Michael Wood would not have argued the case in court. Sir Michael would not have been the advocate in court. I'm sure if we had been taken to court, he would have been an important part of
SIR RODERIC LYNE: You wouldn't have argued the case yourself in court --

RT HON LORD GOLDSMITH QC: I might have done --

SIR RODERIC LYNE: -- advised by somebody like Sir Michael Wood?

RT HON LORD GOLDSMITH QC: -- but I would have wanted somebody hugely experienced in the International Court of Justice, like Professor Greenwood and the other names mentioned. There is a lot of work to do in these circumstances, presenting the evidence and the arguments and the detailed points. So I would have done. I hadn't made a decision as to whether -- I'm sure I would have turned up. Whether I would have borne the brunt of the argument -- well, we never came to it, so I don't know.

SIR RODERIC LYNE: Thank you. Let's move on to your next engagement, which was with Lord Mayhew, one of your predecessors. Is that relevant or not?

RT HON LORD GOLDSMITH QC: It is relevant. He had asked to see me. He is a former distinguished Attorney General, he had some knowledge of these things. He had asked to come and see me and he wanted to know what my view was, and I told him.

SIR RODERIC LYNE: Was he supportive?
RT HON LORD GOLDSMITH QC: Well --

THE CHAIRMAN: Was this professional confidence at work?

RT HON LORD GOLDSMITH QC: Can I put it this way? You can read what he said in the debate the following Monday when he professed himself in agreement with the course that had been taken.

SIR RODERIC LYNE: So that was a useful conversation?

RT HON LORD GOLDSMITH QC: Yes, it was a useful conversation. It was one, as I say, that he had asked for. These matters are actually apolitical. People may be surprised that I spoke to a member of the Conservative Party about this, but Law Officers, we talked often about difficult issues.

I think I was the one minister who is allowed to see the advice of former ministers in other administrations. So I knew what he had said before on various matters, and it was a useful conversation, but it was really there to tell him what my view was, and I did.

SIR RODERIC LYNE: Then you saw the Foreign Secretary. What was the main thrust of your discussion with him?

RT HON LORD GOLDSMITH QC: Planning, particularly for what was going to happen. I can't recall whether he had already got to know of my view I had reached or not, but in any event, there was some discussion about that, but the rest was planning for what was going to happen next.
SIR RODERIC LYNE: Did that include planning for how you were going to present your decision to the Cabinet and then to Parliament?

RT HON LORD GOLDSMITH QC: No, not really. The planning I had in mind was telling him, "Look, there is a risk that we will be taken to court if the decision is taken to go. I have instructed Professor Greenwood". "Very good", he said, "That's a good decision". I think he said maybe there was somebody -- other people that he would suggest should be part of that team, and I think we may well have discussed -- I'm not sure -- developing the arguments.

SIR RODERIC LYNE: So at what point, did you initiate the process of working out what you were going to tell the Cabinet and how much?

RT HON LORD GOLDSMITH QC: Well, there are two things were happening. First of all, there was this sort of -- there was a huge interest in what my view was in relation to the legality of war, and I had had, for example, I think, almost weekly calls from the Shadow Attorney General, who had both been telling me what his view was, which was that it was lawful, and saying, "You will have to tell Parliament what your view is in relation to this".

Normally, a Law Officer's opinion is not disclosed.
It was, in fact, impossible in these circumstances not
to disclose what my conclusion was, because the clamour
to know, "Well, Prime Minister, does the
Attorney General agree with you or not?" would have
been, frankly, impossible to avoid. So I knew that
I would have to make some sort of statement as to what
my position was. So that is -- that's the point about
the Parliamentary answer.

So far as Cabinet is concerned, I can't remember at
what stage I was told the Cabinet was going to meet and
I was going to be asked to come to Cabinet on that
occasion. I think it would have been the second
occasion ever that I had attended Cabinet.

SIR RODERIC LYNE: Only the second occasion?

RT HON LORD GOLDSMITH QC: Only the second occasion.

I don't think my predecessors -- I'm not sure, my
immediate predecessors, whether they had attended
Cabinet at all. I didn't attend Cabinet, for
example, when I advised that the Afghanistan conflict
was lawful.

SIR RODERIC LYNE: Before you went to Cabinet -- I know I'm
going ahead a bit here -- how was it decided that you
would present the advice to Cabinet in the way that you
presented it to Cabinet? Was it solely by you or was it
by you in discussion with the Prime Minister or the
Foreign Secretary or others?

RT HON LORD GOLDSMITH QC: No, this was really my decision, and the point for me was to decide what the -- determine how to express my view to Parliament, and the Parliamentary answer then seemed to be a convenient way, as a framework really, for what I would then say to Cabinet about my view on legality.

SIR RODERIC LYNE: So no one at any stage asked you to restrict what you said to Cabinet to the fairly limited terms in which you presented this to Cabinet?

RT HON LORD GOLDSMITH QC: No.

SIR RODERIC LYNE: Nobody else, no outside party. Can I just finally, because I think this helps to dispose of something that has attracted attention in the newspapers, raise the question of your last appointment that day --

RT HON LORD GOLDSMITH QC: Yes.

SIR RODERIC LYNE: -- which was a meeting with Lord Falconer and Baroness Morgan, which was the subject of an article in a tabloid newspaper in November of last year, in which it was alleged that you had been more or less pinned to the wall at a Downing Street showdown with Lord Falconer and Baroness Morgan, who allegedly had performed a pincer movement on you and told you what Blair wanted. Would you like to comment on that?
RT HON LORD GOLDSMITH QC: Thank you.

Absolute complete and utter nonsense. I had not
spoken to Lord Falconer about this issue before. When
I saw them, I, of course, had reached my opinion.
I communicated it to my officials, to the Foreign
Secretary, as it happens to Lord Mayhew as well. There
was no question of them performing a pincer movement.

Baroness Morgan, I don't believe -- she doesn't --
I have never seen her do anything of the sort in any
event. Lord Falconer, it is perfectly true, is a more
forceful character but he was junior to me in chambers
and he wasn't the person -- and he would have known
that -- who would persuade me to a different point of
view.

SIR RODERIC LYNE: So the allegation in the paper that
sources close to you had briefed that newspaper is
untrue?

RT HON LORD GOLDSMITH QC: Absolutely, and it is very odd,
because "sources close to" is often thought to be the
person himself. It is a sort of code. This certainly
didn't come from me. Nobody has acknowledged to me that
it came from them. I didn't ask anybody to speak to
this newspaper. So I simply don't understand this.

SIR RODERIC LYNE: So that we can just close off that
discussion, can you tell us what you did discuss with
Lord Falconer and Sally Morgan?

RT HON LORD GOLDSMITH QC: I told them the conclusion that I reached and I think briefly why, and I think we then went on to discuss -- I think by that stage it was known that there was going to be a debate the following Monday in the House of Lords and I think we discussed something about how that debate would be dealt with, the debate on the legality issue, I think a Liberal Democrat peer put down a motion. That's what I recall of that meeting. But I started by telling them what conclusion I had reached.

THE CHAIRMAN: Thank you. I think back to you, Lawrence.

SIR LAWRENCE FREEDMAN: Thank you. In our previous discussion you explained why you thought it was necessary for the Prime Minister -- why you thought it was necessary for the Prime Minister to decide whether Iraq had failed to take its final opportunity.

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: I just want to check with you -- clarify why you told the Prime Minister this. Was it as a political precaution, because trouble was to be expected and he should be very sure of his ground? Was it a sort of double-check on the position being reached by UNMOVIC, or was it because in the end he was the one who had to make the determination?
RT HON LORD GOLDSMITH QC: I think certainly the first and third. I’m not sure about double-check on UNMOVIC. But certainly he had to make -- well, not make the determination in a legal sense. He had to make the political judgment, ultimately, whether to ask for authority to take military action, and, therefore, I thought it right that he should understand that he had to be very clear of his ground on this and conscious of the considerable significance of that particular statement.

SIR LAWRENCE FREEDMAN: So it was basically: make sure of your case?

RT HON LORD GOLDSMITH QC: Make sure of your case and make sure -- sorry to say this: make sure that the Prime Minister understood that this was an important issue and he had focused his mind on it.

SIR LAWRENCE FREEDMAN: I suspect he had probably realised by then. I just want to therefore just check on the evidence you used for -- to say that there was, as you said in your final submission -- your final opinion that there was a material breach.

You have mentioned that you had seen the Clusters document.
RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: Now, Jack Straw made particular mention of this when he saw us. Did you see that as a particularly important document in this process?

RT HON LORD GOLDSMITH QC: It was a document which set out a statement of the falsities, the deceptions, and lack of cooperation and unanswered questions and I think -- was it 29 or 39, I can't recall, separate areas of the inspectors' activities.

SIR LAWRENCE FREEDMAN: Had you -- you had also by this time presumably been able to see the reports that had been made by the inspectors to the Security Council?

RT HON LORD GOLDSMITH QC: Yes, whether I read the detail of them or I relied upon reports, and -- of course, they were all over the television. I'm not sure.

SIR LAWRENCE FREEDMAN: Presumably you were aware that Dr El-Baradei had more or less given Iraq a clean bill of health on the nuclear issue.

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: So that issue was, in that sense, no longer a material breach?

RT HON LORD GOLDSMITH QC: I think that's right, yes, it was really the other side, the chemical and biological weapons obviously.
SIR LAWRENCE FREEDMAN: With UNMOVIC, the issue is that, though Dr Blix was reporting difficulties, he hadn't said that he had given up. Indeed, he was seen to be setting out a timetable for further work that stretched some way ahead.

RT HON LORD GOLDSMITH QC: There was the political judgment, the political will, with perhaps a small "p", about whether Iraq had frankly been given enough time to meet the final opportunity they had been given or not.

SIR LAWRENCE FREEDMAN: So do you consider timing to be a matter for a lawyer? This is, as we have discussed, a situation that is moving a lot. You continually refer to the need to take account of the circumstances of the time. So why stop now? Why take the decision at this moment? Why not say that, "Of course, in two weeks' time, or three weeks time, or four weeks' time, if UNMOVIC is able to carry on, they may reach a much more positive conclusion"?

RT HON LORD GOLDSMITH QC: Sir Lawrence, you are absolutely right, that is not a question for a lawyer. The question for the lawyer is saying "Politically, this may be the moment when we know we are not going to get a second resolution and when we believe politically it is right to take military action. Lawyer, you must advise us whether or not, if we do this now, it will be
SIR LAWRENCE FREEDMAN: So the timing of your advice at this stage is obviously determined by the questions of diplomacy and the questions of readiness of the armed forces, but that your own advice might well have been different if you had been asked for it two or three weeks later?

RT HON LORD GOLDSMITH QC: That depends what would have happened.

SIR LAWRENCE FREEDMAN: Of course.

RT HON LORD GOLDSMITH QC: One of the things we had in mind particularly, and I think it is referred to in at least one of these documents, is that, if there were things said at the time of a further Security Council Resolution being put, and, for example, not accepted, then that might be relevant to the interpretation of 1441. So things could have changed and there may have been more material that came to light in relation to that.

SIR LAWRENCE FREEDMAN: But this question of material breach is potentially a moving target, that -- we have seen with the nuclear side that it started off with Iraq being believed to be in material breach and now it is no longer the case.

RT HON LORD GOLDSMITH QC: I think that, putting a sort of
another possibility, if, for example, what had happened
had been -- there had been a sea change in the Iraqi
regime, if Saddam Hussein, for example, had gone into
exile at that moment, that would of course have put
a very different complexion on it, because then one
would at least have said, "Why do you now need" --
because you need to have a reason for the force, "Why do
you now need to use force in order to get disarmament?
You need now to see whether this new regime is actually
going to give the cooperation which the United Nations
has been asking for for ten years".

SIR LAWRENCE FREEDMAN: So the political circumstances could
have led you in a sense to go to the Prime Minister
rather urgently and say, "In the light of what has
happened, just hold on a moment"?

RT HON LORD GOLDSMITH QC: Yes, that could have happened.

SIR LAWRENCE FREEDMAN: Can I just quote to you from the
Foreign and Commonwealth Office document which is
essentially the legal basis for the use of force on
17 March?

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: It states obviously largely the line
of analysis that you have been giving us today.

In the final paragraph, 12, you, after saying that
what is needed is consideration, said:
"That consideration has taken place regularly since the adoption of Security Council Resolution 1441. It is plain, including from UNMOVIC statements to the Security Council, its 12th quarterly report and the so-called Clusters document that Iraq has not complied as required with its disarmament obligations."

Was that statement checked with UNMOVIC before it was made?

RT HON LORD GOLDSMITH QC: This is not my document. This is a Foreign Office document. It is perfectly true that it was largely drafted in my office. I think the first draft of it was actually -- from what I have seen in the files -- was actually produced by Sir Michael Wood, and it was a document which Jack Straw wanted to put to the Foreign Affairs Committee.

I didn't disagree with the legal points that were made, and in that sense one can say that I approved it, but the factual issues which were there were really a matter for the Foreign Secretary, and I don't want to, you know, dodge this in any way, but I would think that the Foreign Secretary was in an extraordinarily good position, having been in the Security Council and having had all the discussions that he had, to know whether or not that statement was true.

SIR LAWRENCE FREEDMAN: But we know from Dr Blix that he was
not in favour of calling a halt to inspections at this
time. I mean, this is a very definite statement about
the implication of everything that UNMOVIC had said.
Would you be concerned, as the Attorney General, that
a document as important as this was relying on a claim
that had not been checked?

RT HON LORD GOLDSMITH QC: I understand the statement that
is made to be accurate. The statement that is being
made is that Iraq has not complied as required, with its
disarmament obligations. I don't believe that Dr Blix
was saying that it had. At the meeting on 7 March, no
other states said that it had.

There is a separate question as to whether or not,
even though it hasn't, they should be given more time.
But that they had not complied I think is a factual
statement, but further than that, I think it is a matter
for Mr Straw.

SIR LAWRENCE FREEDMAN: It then goes on to say:

"It therefore follows that Iraq has not taken the
final opportunity and remains in material breach."

But it could also be reworked to say that Iraq may be in the
process of taking the final opportunity, which I think
might be what Dr Blix might have said.

RT HON LORD GOLDSMITH QC: Well, I think you would still
say, if one is being accurate about this, that they had
not taken the final opportunity. The question then becomes, do you wish politically to give them more time?

SIR LAWRENCE FREEDMAN: It doesn't say in this, and I'm not sure if it says in any other document at this time, that the Prime Minister has confirmed that Iraq is in material breach?

RT HON LORD GOLDSMITH QC: No. As I have explained, that is not a sort of legal requirement for the revival authority. The legal requirement is the interpretation of 1441 and the fact of failure. I was pushing for the reasons, Sir Lawrence, you put to me, this point specifically to the Prime Minister for his confirmation. But it is not a legal requirement in any way and therefore I am not surprised that it doesn't appear here. This was a statement by the Foreign Secretary of what the factual position was.

SIR LAWRENCE FREEDMAN: But you did seek on 14 March confirmation that it was unequivocally the Prime Minister's view that Iraq had committed further material breaches of 1441?

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: When did you get that confirmation?

RT HON LORD GOLDSMITH QC: I had had it orally already, as I think David Brummell said yesterday. But I thought it was important to have it in writing, and so I asked for
it, or he asked for it on my behalf -- I'm not sure
whether we have got the document -- and it was -- it has
been referred to in the Butler Report. We got the
confirmation -- the written confirmation on the 15th --

SIR LAWRENCE FREEDMAN: This came, I think, in an email from
Baroness Morgan.

RT HON LORD GOLDSMITH QC: No, the confirmation came in
a letter from the private secretary to the
Prime Minister to my Legal Secretary.

SIR LAWRENCE FREEDMAN: When was that?

RT HON LORD GOLDSMITH QC: 15 March. May I mention the
name? Matthew Rycroft.

SIR LAWRENCE FREEDMAN: Yes, his name has been mentioned.

Just finally, this question of the Prime Minister's view
was not, therefore, particularly relevant in terms of
the advice you were giving to CDS, or was it important
in terms of the advice you were giving to CDS?

RT HON LORD GOLDSMITH QC: It was part of the issue that
I had had the oral confirmation already.

SIR LAWRENCE FREEDMAN: Because you gave the advice the day
before.

RT HON LORD GOLDSMITH QC: I understand that, but I had had
the oral confirmation that that was the Prime Minister's
view.

SIR LAWRENCE FREEDMAN: So you were confident?
RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: Thank you very much.

THE CHAIRMAN: I think it is time for our last break now.

If we could come back for quarter past four?

RT HON LORD GOLDSMITH QC: Yes.

THE CHAIRMAN: Thank you.

(4.04 pm)

(Short break)

(4.12 pm)

THE CHAIRMAN: Thank you. We are a bit ahead of time, which is good news. Let's resume and Baroness Prashar will take up the questioning.

BARONESS USHA PRASHAR: Thank you, Chairman.

Lord Goldsmith, we have been talking about the development of your legal advice.

Now, I want to turn to the question of discussion or otherwise of your advice in Cabinet and the presentation of it.

RT HON LORD GOLDSMITH QC: Yes.

BARONESS USHA PRASHAR: Now, yesterday, a document was declassified, which is a record of your discussion with the Foreign Secretary --

RT HON LORD GOLDSMITH QC: Right.

BARONESS USHA PRASHAR: -- which took place on 13 March and it says -- and I'll read it out to you:
"The Attorney General said to the Foreign Secretary that he thought he might need to tell the Cabinet when it met on 17 March, that the legal issues are finely balanced. The Foreign Secretary said that he needed to be aware of the problems of leaks from the Cabinet. It would be better surely if the Attorney General distributed the draft letter from the Foreign Secretary to the Foreign Affairs Committee as the basic standard text of his position and then made a few comments. The Attorney General agreed."

Is that your recollection?

RT HON LORD GOLDSMITH QC: It isn't actually. There wasn't any question of distributing the longer FAC document as my opinion. That wasn't at all what I was going to do.

BARONESS USHA PRASHAR: But the significant point is that you wanted to tell the Cabinet how finely balanced the arguments were, but you were persuaded by the Foreign Secretary that it would be better to present to the Cabinet the text of your Parliamentary question and answer.

RT HON LORD GOLDSMITH QC: No, I mean, I don't think the conclusion you were drawing from that really is right.

I came to. (Handed). Thank you very much indeed.

THE CHAIRMAN: Do you want a moment just to skim through it?

RT HON LORD GOLDSMITH QC: May I just look at it? (Pause).

Right. I think I saw this yesterday, but I hadn't
seen this before. It is not a record that came to me at any stage.

I came to Cabinet ready to answer any questions which were put to me and to explain my advice. Certainly the view I took was that producing my answer to Parliament would be a good framework for explaining to them what the legal advice was, and I would have been happy to answer the questions which were put to me. I was ready, fully briefed, ready to debate all these issues.

What actually happened was that I started to go through the PQ, which had been handed out as this framework. Somebody, I can't remember who it was, said, "You don't need to do that. We can read it". I was actually trying to use it as a sort of framework for explaining the position, and there was a question that was then put.

I do recall telling Cabinet, "Well, there is another point of view, but this is the conclusion that I have reached", and then the discussion on the legality simply stopped, and Cabinet then went on to discuss all the other issues, the effect on international relations, domestic policy and all the rest of it.

So the way that it took place was that I was ready to answer questions and to deal with them and in the
event that debate did not take place.

BARONESS USHA PRASHAR: Okay. So you were ready to answer
the questions, but that debate didn't take place?

RT HON LORD GOLDSMITH QC: That's right.

BARONESS USHA PRASHAR: Earlier, you were saying that you
firmed up your advice because there was a request from
the armed forces and the civil forces --

RT HON LORD GOLDSMITH QC: I answered a slightly different
question.

BARONESS USHA PRASHAR: That's one point, but the point I'm
driving at for me is the missing piece of the jigsaw:
why did the Cabinet not take the opportunity to discuss
the finely based arguments that you had been looking at?
Because you were at the Cabinet meeting twice, once
in January and it didn't get discussed.

RT HON LORD GOLDSMITH QC: No.

BARONESS USHA PRASHAR: But this time, what was presented
was the document being developed over the weekend and
you were there to discuss, but no discussion took place?

RT HON LORD GOLDSMITH QC: Yes.

BARONESS USHA PRASHAR: As far as you can tell, was the
weight of the risk, the political responsibilities of
ministers discussed at this Cabinet meeting?

RT HON LORD GOLDSMITH QC: I don't quite understand the last
point, but you are asking me why wasn't there more of
a debate?

BARONESS USHA PRASHAR: Yes.

RT HON LORD GOLDSMITH QC: Obviously, there were a number of Cabinet ministers there who had actually seen -- I knew had seen the whole of the minute, for example, of 7 March, although things, as you rightly say, had moved on.

Obviously this was a matter that was of particular concern. There had been different opinions circulating. As I said, I think, earlier, to my recollection, all Labour members of Parliament, perhaps all members of Parliament, had received a rather long opinion arguing that it would be unlawful without a second resolution. So these issues were very well-known, but they didn't want to debate it.

Now, thinking about it afterwards, I mean, I could sort of understand that. I could understand that for this reason: that actually debating the legal question with the Attorney General was a slightly sterile exercise. It may be thought to be a slightly sterile exercise because they could have put to me, "What about this and what about that?" and I would have answered them, but what mattered, I thought, was that they needed to know whether or not this had the certificate, if you like, of the Attorney General. Was it lawful? That was
a necessary condition. Then they would need to consider
whether it was the right thing to do.

That's what they then went on to debate, and I sat
and listened as they went through the issues of the
effect on the domestic community, the effect on
international policy, how would this -- what would this
do in terms of the United Nations and so forth.

So they were looking at the much bigger question of
"Is it right?" not just, "Is it lawful?"

BARONESS USHA PRASHAR: But I think in her book Clare Short
talks about a letter that she wrote to you.

RT HON LORD GOLDSMITH QC: After the event?

BARONESS USHA PRASHAR: After the event.

RT HON LORD GOLDSMITH QC: Yes.

BARONESS USHA PRASHAR: I think you sort of dismissed what
she was suggesting about the breach of the
Ministerial Code.

Do you want to give any observations on that?

RT HON LORD GOLDSMITH QC: Yes, I think the
Ministerial Code, which talks about providing the full
text of the Attorney General's opinion is actually
dealing with a quite different circumstance. That's
dealing with the circumstance where a minister comes to
Cabinet and says, "I have got clearance from the
Attorney General. He says this is all right, or she
1 says this is all right". In those circumstances, the
2 Ministerial Code requires that the full text should be
3 there rather than just the summary. You can summarise
4 it, but you need to produce the full text as well.

5 I was there. I was therefore in a position to
6 answer all questions. I was in a position to say that
7 my opinion was that this was lawful. I did manage to
8 say -- I did say that there was another point of view,
9 but they knew that very well in any event, and I know
10 that subsequently the complaint of breach of the
11 Ministerial Code was dismissed by those who have
12 responsibility for the Code.

13 BARONESS USHA PRASHAR: But you would say there was never
14 a full discussion in Cabinet about your opinion which
15 was caveated and was finely balanced?
16 RT HON LORD GOLDSMITH QC: I think -- you say "caveated".

17 I think it is -- it is caveated in one respect and there
18 is another important point. It takes the central issue
19 of the interpretation of 1441 and identifies that there
20 are two points of view, and then I have come down in
21 favour of one of them.

22 The Cabinet, I'm sure, knew that there were two
23 points of view because that had been well-travelled in
24 the press. The caveat was you need to be satisfied that
25 there really has been a failure to take the final
opportunity. That, of course, was something which was	right in the forefront of Cabinet's mind, I have no
doubt, and I'm sure was mentioned by the Prime Minister
and the Foreign Secretary and others in the course of
the debate. I would expect so.

So I think that issue was well understood.

BARONESS USHA PRASHAR: Thank you. Can I move on to the
arrangements for the presentation to Parliament?

RT HON LORD GOLDSMITH QC: Yes.

BARONESS USHA PRASHAR: There has been much discussion of
the relationship between the advice you gave on 7 March
and the Parliamentary answer on 17 March.

RT HON LORD GOLDSMITH QC: Yes.

BARONESS USHA PRASHAR: That you presented. I think you
said in an answer, a written answer to Lord Lester on
6 November 2003:

"The 17 March statement was a summary of my view of
the legal position rather than a detailed consideration
of the legal issues. The statement was consistent with
my detailed legal advice."

Can you sort of explain what the relationship
between the two documents is, and is it consistent with
what you were saying on the 7th and the summary that you
presented on the 17th?

RT HON LORD GOLDSMITH QC: I believe it is, because, on
the 7th, I was saying there is a green light for
military action because there is a reasonable case for
saying that the revival argument operates in these
circumstances on the interpretation of Resolution 1441.

By 17 March, I was saying, "Actually, and what's
more, that's the better view, that it does in fact give
rise to a revival of authority".

So I think they were consistent in that sense,
definitely.

BARONESS USHA PRASHAR: But in one you were saying there was
a reasonable case and on the 17th you were saying that
it was fine.

RT HON LORD GOLDSMITH QC: I was saying that was --
absolutely, that was my view, having reached the
conclusion, having to come down one side or another
and -- I know I have made this point before, but I do
want to underline it. The question, "Is it lawful or
not?" only admits ultimately of the answer "Yes" or "No".
It could not be a little bit lawful, and having reached
the conclusion that the better view was that it was
lawful, that was my view.

BARONESS USHA PRASHAR: Thank you.

THE CHAIRMAN: Martin?

SIR MARTIN GILBERT: Yes, my first question this morning was
about the No Fly Zones --
RT HON LORD GOLDSMITH QC: Yes.

SIR MARTIN GILBERT: -- including the targeting issue.

In February 2003, you were given a briefing on military objectives --

RT HON LORD GOLDSMITH QC: Yes.

SIR MARTIN GILBERT: -- with regard to the potential campaign in Iraq.

RT HON LORD GOLDSMITH QC: Yes.

SIR MARTIN GILBERT: Can you tell us in broad terms what were the issues and concerns you raised at that briefing, particularly with regard to targeting, proportionality and also possible allegations that might be made in the International Criminal Court?

RT HON LORD GOLDSMITH QC: Yes, I haven't been able to see in the files I was able to go back to precisely what the detailed briefing was, but I do recall that I did receive a briefing -- I can't remember the precise date -- as to what the proposed targeting was.

Two particular points are striking to me. One was I was shown what some of the early targets were. Now, these were legally important to look at, because there was a decision that what are known as the command and control centres should be targeted at an early stage, and the difficulty about that was that some of the command and control centres I think were in places like
presidential palaces. So there was an issue about
whether these were legitimate targets, and I wanted to
understand from the targeters and the military people
that they genuinely were right that this is where the
opposition to a military invasion would be run from. If
they were, these were legitimate targets.

There were questions -- I can't recall at this
stage, but certainly there were questions at some stage
about whether or not -- if I may say this, I'm afraid
that Saddam Hussein and his sons were legitimate targets
as well, which depended really upon whether or not they
were part of the military command or simply part of the
political apparatus. So that I recall.

The second thing I recall very specifically was
I was told about the precautions that were going to be
taken to protect armed forces against possible attack by
chemical and biological warfare and what precautions
were going to be taken in the event that the targeting
actually hit a stockpile of weapons of mass destruction
and what was going to be done in those circumstances.

SIR MARTIN GILBERT: Were you satisfied with the assurances
you got with regard to these rather complicated and
difficult targeting issues?

RT HON LORD GOLDSMITH QC: I was satisfied. I went at it,
as I always did, with great care. I asked questions.
I wanted to be satisfied about the basis of the decisions that had been made, but I was satisfied.

SIR MARTIN GILBERT: I believe that in April, after the military action had begun, that you were again -- you again examined this question, particularly of targeting. What conclusion did you come to then? I believe you presented your conclusions in some form to the Cabinet?

RT HON LORD GOLDSMITH QC: I don't recall that. I became, at that stage, after the military intervention had started -- I became a member of what was colloquially called the War Cabinet. It wasn't strictly that. We met for a period of time every morning, and I'm sure there was discussion on occasions of particular targeting.

The one incident I remember particularly well was in relation to a possible assault on a particular city, when I was unhappy from what I had heard about the proposal, and I actually blocked it and said it could not take place with British participation. That was a matter that I had to discuss with the Prime Minister but I stood my ground and it didn't happen.

SIR MARTIN GILBERT: You were unhappy because there might be significant Iraqi civilian casualties?

RT HON LORD GOLDSMITH QC: Yes, I was not happy with the legal basis for it, in the sense of: did it actually
involve a legitimate military objective and were the
risks to civilian casualties so great that it was not
a justified attack?

SIR MARTIN GILBERT: Your legal advice prevailed --
RT HON LORD GOLDSMITH QC: I stood my ground and said this
could not happen. It didn't happen. That particular
place, things happened in relation to it at a later
date, but at that particular point I blocked it.

SIR MARTIN GILBERT: Thank you very much.

THE CHAIRMAN: Usha, back to you?

BARONESS USHA PRASHAR: Thank you. I want to talk about the
duties and responsibilities of occupying powers.

RT HON LORD GOLDSMITH QC: Yes.

BARONESS USHA PRASHAR: When were you first asked for advice
on military action and duties and responsibilities of an
occupying power. At what stage was that advice sought?

RT HON LORD GOLDSMITH QC: It was after the military
intervention had started and I recall that it arose as
a result --

BARONESS USHA PRASHAR: It was rather late in the day?

RT HON LORD GOLDSMITH QC: It was rather late in the day
and --

BARONESS USHA PRASHAR: You made that clear to them?

RT HON LORD GOLDSMITH QC: I'm not sure I did make it clear.

I mean, I dealt with the request at that stage. I was,
frankly, somewhat surprised. I didn't know if there was
any difficulty about what the rights of occupying powers
would be. After all, we had been in that position in
relation to Afghanistan, in relation to Kosovo. I would
have thought it was well-travelled ground, but it became
apparent that there was an issue in relation to it.

I was asked to advise. I did.

BARONESS USHA PRASHAR: What were the main issues in play?

RT HON LORD GOLDSMITH QC: I think the main legal issue that
I was asked about was the extent to which --
fundamentally, to what extent was it necessary for there
to be a further United Nations Resolution.

This is quite a complicated area, but the basic
point is that an occupying power has certain
responsibilities and certain powers in relation to the
occupied territory, but it does not become, because it
is occupying, the government of the country. So there
are things that it can't do.

Certainly it can do humanitarian aid. It can do
things, it can change things, which are necessary, but
unless absolutely prevented, it should obey the laws
and, as it were, the structures in place. So there was
an issue about the extent to which reform and
restructuring in Iraq could take place without
a United Nations Resolution.

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2 The witness subsequently added that he meant that, in the sense that UK forces had been engaged in post-conflict activities in another country where there had been issues about UN cover, he assumed the issue would have been considered before now. He said that strictly UK forces were not occupying powers in fact in either of them and to that extent the comment is too broadly expressed.
BARONESS USHA PRASHAR: What was their response to the advice and issues that you raised before them?

RT HON LORD GOLDSMITH QC: The response was to accept the advice. I know that the government worked to get the United Nations Resolution, which subsequently it obtained. It became apparent to me that there was something happening on the political level as well, because the Development Secretary plainly took the view that in some way more should be done -- I'm not quite sure what -- or she had been promised more and subsequently relied upon the advice I had given as a reason for her resignation.

BARONESS USHA PRASHAR: But did you actually have concerns in relation to -- I think with the Organisation for Reconstruction and Humanitarian Assistance --

RT HON LORD GOLDSMITH QC: Yes.

BARONESS USHA PRASHAR: -- that we would be jointly responsible for that, and did the US plans cause any particular concerns for you in terms of deployment of our own staff?

RT HON LORD GOLDSMITH QC: Well, it was quite difficult. There were a number of areas, and I was concerned that some of the things that it became apparent that the United States administration wanted to do probably did go beyond the powers of an occupying force. Therefore,
what was necessary was United Nations Security Council
cover for that.
That's really then what Resolution 1483 and then
subsequent resolutions were designed to attain.
BARONESS USHA PRASHAR: Did you actually look at concerns of
DFID in terms of how they could get involved in
reconstruction and maybe some of the MoD staff in
relation to human rights issues, and were there specific
issues to do with different departments?
RT HON LORD GOLDSMITH QC: There were specific issues.
I remember there was a specific issue that was raised by
the Treasury about what could be done about the Iraqi
currency. There was a problem about that because of
a lack of supply, and there was a concern that this
might look like economic restructuring and would that go
beyond the powers that an occupying force has.
The Development Secretary certainly raised issues
about what DFID can do. I don't believe I was ever
asked to advise on whether the concerns that were being
expressed could, in fact, have been overcome without
a United Nations Resolution.
BARONESS USHA PRASHAR: What about the MoD and anything to
do with human rights issues?
RT HON LORD GOLDSMITH QC: I don't recall specifically.
There were other issues in relation to our
responsibilities, which really meant soldiers' responsibilities towards Iraqi detainees or members -- civilian members; for example, did the European Convention of Human Rights apply to activity or at least some activity in relation to Iraq? It is not a part of Europe, but that was a question which I did have to advise, and then we got on to the question of treatment of detainees.

Fundamentally, my advice was that the obligations about the proper treatment of people, which are contained in the European Convention, did apply in relation to detainees, and, subsequently, I became involved in issues where there were allegations that detainees had not been treated properly, and, indeed, I authorised certain prosecutions as a result and was concerned --

BARONESS USHA PRASHAR: But initially, you had given advice on these issues before the specific cases arose?

RT HON LORD GOLDSMITH QC: I'm not sure that's right.

I gave advice on -- I have to recollect this: I gave advice on the application of the European Convention to certain aspects of the conduct, advising those standards did need to be complied with. Subsequently, a specific issue arose, when it came apparent -- this is quite a long time later -- that methods of treatment had been
used in relation to certain detainees which actually
were methods which had been outlawed by -- I think by
the Heath government in 1972, arising from Northern
Ireland. I was surprised that those methods were being
used. The prosecution was authorised. We still have
not got to the bottom of who it was that apparently said
such methods were legitimate. I most certainly did not.

BARONESS USHA PRASHAR: The other area is the basis on which
we invaded was to actually disarm.

RT HON LORD GOLDSMITH QC: Yes.

BARONESS USHA PRASHAR: Obviously, that restricted what we
could or couldn't do, because the idea was to disarm,
and eventually no weapons of mass destruction were
found. What were the implications of that as an
occupying power?

RT HON LORD GOLDSMITH QC: Well, the Iraq Survey Group got
on with its job, which was to find the evidence that was
there, large country, as I was being told, and a lot of
searches to be done. What I can't recall is the precise
chronology of when the search, as it were, seemed to
have been given up.

I think it must have been the case that by that
stage the United Nations had passed a series of
resolutions which then provided a quite different basis
for the presence of coalition forces in Iraq, including
eventually being there at the request of what had become a legitimate, if perhaps interim, Iraqi authority.

BARONESS USHA PRASHAR: I mean we got Resolution 1483. Did other issues arise after that? You were there for some time.

RT HON LORD GOLDSMITH QC: Yes, I can't remember precisely what the issues were, but certainly one of the things about Resolution 1483 was that it was a sort of amalgam of confirmation of the authority that the coalition forces had as occupying powers and, as I recall, part of the framework of that was that there was a letter that was produced explaining what the coalition forces believed they were entitled to do, which effectively got the approval of the Security Council by the way it was referred to in the resolution.

Then the process of assisting the Iraqis to produce their own government came about. I know there was an issue, for example -- I had a concern that the Iraqi people were entitled to free self-determination, and, therefore, it wasn't really for anybody to tell them how to do that, and that created something of an issue about how to get to the point that they had their own government.

BARONESS USHA PRASHAR: I mean my final question really is that you did say earlier that they left it a bit late.
Do you think that if they had thought this through and the planning was done earlier in terms of getting legal advice on being an occupying power, it would have ironed out some of these difficulties earlier?

RT HON LORD GOLDSMITH QC: My experience of the government and military people and Civil Service is that they get to the point, even if they start late, and that they achieve through the hard work that they do and the skills that they have got, to which I pay a huge tribute there, even if it started late. I was surprised.

I think it would have been better to have appreciated in advance that there was going to be an issue in relation to what could be done. I think it would have been better, therefore, to have focused on those issues at that stage, so that the plan would have been clear what needs to be done, if it could be, or at least what the options were, rather than it happening after the event.

BARONESS USHA PRASAR: Thank you.

THE CHAIRMAN: Lord Goldsmith, I think we are coming to the final part of this hearing today. I have a small number of questions myself and then one or two of my colleagues might want to finally wrap up before you may want to say what you would like to finish on.

I suppose the first one -- and some of these are
just nailing down what we have heard in the course of
today's hearing -- my first question related to
timeliness, how in a fast-moving, fast-developing,
political, diplomatic, military situation, as the Iraq
venture was, how you fold in, in a timely way, the legal
advice, both at the level of the law officers but also
in departmental terms.

Looking back on it, I think you weren't content that
it was perfect. With hindsight, nothing is. But in
general, what's your judgment about how the legal issues
were folded into the developing policy questions?

RT HON LORD GOLDSMITH QC: I think in the event that did
happen. As you have heard, on two occasions I insisted
on offering a view, even though it wasn't being asked
for, to make sure the policy, as it were, took account
of that. The one area that perhaps wasn't was one we
discussed earlier, which was the detailed consideration
of the resolution as it was going through. That may be
frankly impossible to achieve a greater involvement of
the law officers in that.

THE CHAIRMAN: Yes. You have drawn our attention to the
fact that on more than one occasion, when your advice
had not been sought you nonetheless felt bound to give
it.

RT HON LORD GOLDSMITH QC: Yes.
THE CHAIRMAN: But there was, to a degree, a discouragement from ministers, the Prime Minister's office, wanting to receive formal legal advice until really it became absolutely essential because of a stage reached.

Is that a fair description? Because it carries the implications that there may not be a full understanding that legal advice will change, even as a legal diplomatic military process changes. So what may be formal advice at one point early or middle on may have to change itself. So people shouldn't be frightened of taking that advice.

RT HON LORD GOLDSMITH QC: You are absolutely right that this is what may happen. I mean, I have some sympathy with the view -- and it would arise in other contexts as well -- that you don't ask for the Attorney General's formal opinion until it is necessary to have it.

That did give rise to a question of what needed to be known during the policy process and that's why -- I mean, I was kept informed. There were discussions that took place and I did offer advice, or give advice on -- even when I wasn't being asked for it.

THE CHAIRMAN: Associated with this, you have just told us a little in answer to Baroness Prashar, at the final Cabinet meeting which you were present at and explained your legal advice, does a procedure like that -- and
again, looking ahead to lessons learned as well as
backwards to what happened -- does it enable Cabinet
ministers, by no means all of them with legal
qualifications, perhaps none of them have been exposed
to this kind of issue before, does that process enable
them sufficiently to understand, as a Cabinet, with
collective responsibility for whatever is decided, to
understand the inwardness, the significance of the legal
advice that the government -- you said your client was
essentially in this case the Prime Minister -- is
receiving?

RT HON LORD GOLDSMITH QC: Yes. I have seen in the context
of this Inquiry one suggestion that it would have been
helpful, indeed the request was made, to form, as it
were, a subcommittee as a War Cabinet even before that.

I have to say I can see huge merit in that, because
it would have provided a forum for formal
discussion, or at least structured discussion, with
a small group of people and that's something in which legal
advice could have been involved and discussed.

THE CHAIRMAN: I'm grateful for that because machinery and
process is clearly something we have to look at, so
thank you.

It may or may not be a very small point, and it may
be a layman's mistake but you have used it at different
times, the expression "the better view" as between the
two explanations, and yet, the better view does not
correspond with what you also describe as the safest
course or the safer course. Could you just unpack for
me how that distinction can be forced?

RT HON LORD GOLDSMITH QC: By saying the safest course, that
is, as it were, advice as to what it would be better to
do, in that sense better, and that was to say, "Don't
give up on trying to get a second resolution. Indeed,
really work very, very hard to get a second resolution,
because that would put the position beyond doubt".

Now, in the absence of a second resolution -- and
you have to interpret Resolution 1441 -- the question
then is balancing all the arguments, it is a common
process for lawyers, there will be arguments both ways,
which is the better view, and that means which is,
therefore, the more correct legal view, and given that
it can't be a little bit lawful, the better view is then
either it is lawful or it is not lawful.

THE CHAIRMAN: Thank you. I have only got two more, but one
of which I hope you will allow. Yesterday, we took
evidence from Elizabeth Wilmshurst.

RT HON LORD GOLDSMITH QC: Yes.

THE CHAIRMAN: She found herself in a position where, for
professional reasons, she felt bound to resign. You
have spoken to us today both about the heavy burden that
is borne by the Attorney General in a situation like
this, but also that you did not feel part of that burden
was, as it were, a wider duty to the policy, the
political side. It was a burden that rested on the
legal advice that you needed to give.

Did you at any point find in your own mind that it
might get too difficult to give advice that would be
acceptable, in which case you might have had to say,
"I'm sorry, I can't go on"?

RT HON LORD GOLDSMITH QC: You phrase that in terms of too
difficult to give advice which might be acceptable.

THE CHAIRMAN: Yes.

RT HON LORD GOLDSMITH QC: It cannot be the job of a lawyer
to decide that you can't decide to give advice, and it
was not a question, as far as I was concerned, of giving
advice that was acceptable. It was a question of giving
advice which was correct, and if the question is: did
I ever think this is all -- the pressure -- that
I should resign? No, I didn't.

THE CHAIRMAN: It wasn't that, actually. I am afraid it was
probably too speculative. It was: had your client, had
the government, decided not to follow your advice in any
significant sense, where does that place the
Attorney General?
RT HON LORD GOLDSMITH QC: Ah, that is a different point.

THE CHAIRMAN: Yes.

RT HON LORD GOLDSMITH QC: If the government -- if I had given advice -- for example, if I had given advice that a course of action was not lawful and notwithstanding that, the government goes against it, then that creates a very important moment of constitutional crisis and the Attorney General, at least if it is an important matter, would, in those circumstances, resign, and that would then force, I would think, a constitutional crisis on the government, and that is ultimately where the authority of the Attorney General comes from.

THE CHAIRMAN: And it is right to remember that, when taking evidence from Jack Straw as Foreign Secretary, he said that if he had found himself, in policy terms, in a position of not being able to go along, that would have forced the crisis as well. But in the legal sense, if the Attorney General is in that position, it does similarly force the crisis.

RT HON LORD GOLDSMITH QC: Yes.

THE CHAIRMAN: Thank you. Only two lesser questions in a way, not lesser perhaps to those closely involved, but a few days ago we received the report of the Dutch Iraq Inquiry, an independent Parliamentary inquiry there. Just to be read out for the record -- you will be
familiar with it, I think -- at number 18 of its
conclusions they said:

"The Security Council Resolutions on Iraq during the
1990s did not constitute a mandate for the US/British
military intervention in 2003. Despite the existence of
certain ambiguities, the wording of Resolution 1441
cannot reasonably be interpreted as authorising
individual member states to use military force to compel
Iraq to comply with the Security Council's resolutions
without authorisation from the Security Council."

Looking at that with all the benefit of hindsight,
does that change your judgment at all?

RT HON LORD GOLDSMITH QC: No, it does not. This is -- and
I strongly suspect will continue to be -- an issue of
intense debate, politically and academically. I did
look at what is an unofficial translation of those
parts. I was not persuaded. If I may very respectfully
say so, they appeared to doubt the revival argument as
a matter of principle, which, of course -- whereas the
United Kingdom has taken a firm view on that, and
I don't think they paid enough attention to the context
in which the resolution was passed, and I -- again, with
respect, I thought that what was said about the
explanations of vote was not accurate and they didn't
see that there could at least be a difference between
automaticity in the sense of second decision and
automaticity in the sense in which I believe it was
being used of simply a second stage.

THE CHAIRMAN: Right. Thank you. I'm going to invite you,
if I may, in a moment, given that we are a lessons
learned inquiry, to offer us your reflections,
particularly with the lessons that are to be learned.

Just before I do, can I ask my colleagues if they
have any final questions. Lawrence?

SIR LAWRENCE FREEDMAN: Well, actually, it just follows on
from that. You explained to me earlier how, if members
of the Security Council were unhappy that they had
a view that they should be in a position to decide and
they weren't given that opportunity, that they shouldn't
have voted for 1441?

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: Now, you have also told us today how
you reached your conclusions at the end of a very
intensive process of deliberation.

RT HON LORD GOLDSMITH QC: Yes.

SIR LAWRENCE FREEDMAN: And for the first months after the
passage of 1441 your view also inclined to the position
that a second resolution was needed, and that
consideration meant a decision, and you only changed
this view after intensive discussions with key players.
Now, those sort of discussions are not available to most people, whether they are academics, jurists or indeed other governments, and it was these discussions that you have explained changed their view. So is it unreasonable, therefore, for those who didn’t have access to those discussions to stick with the view that you held at the start of your deliberations?

RT HON LORD GOLDSMITH QC: If you are asking me about the other Security Council members, of course they were involved in the discussions and they were in a position to do something I wasn’t. I had to take the resolution as they had passed it. They were in a position to say, particularly knowing the US view -- which we know very clearly what it was -- to say, "That's not what I'm prepared to accept and in those circumstances I will not vote for that." That wasn’t open to me.

The second point that I would make about that is that the principal point that I have been seeking to make today is what the negotiations demonstrate is really two things, first of all that a central issue was was there going to be a decision or not, and ultimately you then look back to the wording of the resolution, which everyone can do, and see -- and some people would see it as simply as this -- it does not say that. It does not say that there should be a decision and that is
something that they can see and that other people could see.

SIR LAWRENCE FREEDMAN: But it is fair to note that from November to early February you saw it in a different way to how you later saw it.

RT HON LORD GOLDSMITH QC: You are absolutely right. On the provisional basis -- I'm sorry, I said there were two things. One is that that was the central issue and that was something that hadn't really perhaps come home as much to me as it should have done. The second was the red lines which the United States administration had, which made it, frankly, extremely unlikely that all these experienced negotiators in Washington and New York could actually have allowed themselves to concede something which was beyond the red line, the one red line that President Bush had.

SIR LAWRENCE FREEDMAN: We have heard in these hearings before about laws of unintended consequences, and it is not inconceivable that in a negotiation that could happen.

RT HON LORD GOLDSMITH QC: It is very, very unlikely. So far as we were concerned, the United Kingdom, that is one thing. We -- in a sense, because we needed a resolution if we were going to act at all, we might have found ourselves having to accept language which we
didn't really want. If the United States view was, as it was, that they could take action then and there --
they had been persuaded to ask the United Nations for its view but it the United Nations hadn't been prepared to give it in the terms that the United States wanted -- the United States could have said, "Well, we have tried and we have failed and we are just going to do what we think is right."

SIR RODERIC LYNE: But would you concede that other people also had red lines, including the French, which they subsequently were able to argue that they too had not --

RT HON LORD GOLDSMITH QC: We have had this debate,

Sir Roderic.

SIR RODERIC LYNE: I know we have but you have just restated one side of it.

RT HON LORD GOLDSMITH QC: And I really don't agree -- I don't agree with that because, as -- I'm sorry to keep repeating it, but as we know, I believe, from what happened subsequently and what was told and what I have subsequently seen on the record, if the French red line was that there should be a decision, they did not obtain that. They certainly obtained a second stage. They were able to say that the United Nations Security Council would still be involved. They were able to say that the United States cannot send its forces in the day
after Resolution 1441 has passed. To that extent, they
succeeded, but I don't accept they had a red line.

SIR RODERIC LYNE: I refer back to our earlier discussion
and I won't pursue it further now.

RT HON LORD GOLDSMITH QC: Yes, of course.

SIR LAWRENCE FREEDMAN: Just finally, the Foreign Office
lawyers also were not persuaded along the lines that you
chose. The point is that it remained, even within the
British Government and therefore, not surprisingly,
within the Security Council, a controversial view.

RT HON LORD GOLDSMITH QC: Forgive me. I mean, I make
one observation. I know what the view of Sir Michael
and Elizabeth Wilmshurst was, although I did not have
any discussions with Elizabeth Wilmshurst, even at the
time of her resignation, though I offered some. I don't
criticise her at all for not giving me that opportunity
to speak to her. I don't know really what the position
was of others and perhaps it doesn't really matter.

If, Sir Lawrence, the question is, was this
a difficult issue, on which there were different views,
of course, and we wouldn't have spent today debating it
if that were not the case.

The point I was making was really responding,
I think, to the question, well, other members wanted
something else, and I'm simply say saying, well, they
were involved in the negotiations and the discussion and
they should have -- sorry, it sounds a hard way of
putting it. They were in the position to insist on
something different or not to sign up.
SIR LAWRENCE FREEDMAN: I will leave it there.
THE CHAIRMAN: Thank you.

Lord Goldsmith, it has been a long day and we have
been asking a lot of questions. You will have things
perhaps that you would like to say that we either
haven't covered, or observations you would like to offer
us, recalling that we are a lessons learned inquiry
looking ahead from the experience of the past.

RT HON LORD GOLDSMITH QC: Yes.

On the lessons learned, I think I have touched on
three things which may be worthy of your consideration.
One is whether the -- this is a big topic, which is
whether or not the United Nations structure,
international procedures and law really is as effective
as it should be to deal with these critical questions of
international peace and security, and indeed one could
extend it to and human rights as well, and therefore
what can one do about that. To end up having a debate
about language in the way that we have done doesn't
ultimately show the institution to the greatest credit.

Secondly, a degree of formality and discipline in
the way one gets to a conclusion. Perhaps a War Cabinet
subcommittee, that might have been a helpful process.

And, thirdly, were some elements of planning from
the legal side -- I say nothing about other elements of
planning, which I know the Inquiry is considering --
where I think it would have been at least better
practice to have looked at those at an earlier stage.
I hope my colleagues will not think I'm criticising any
of them in saying this but I'm simply responding to your
request.

THE CHAIRMAN: Thank you very much, Lord Goldsmith, and
thanks to everybody who has sat here through --

RT HON LORD GOLDSMITH QC: Forgive me, Sir John, may I just
add a further word if I may?

THE CHAIRMAN: Yes, of course.

RT HON LORD GOLDSMITH QC: Because I just really wanted to
say this, if I may.

To date, I have kept my own counsel on most of these
matters, despite the criticisms of my integrity and
professional judgment. But today, with a tribunal which
has had access to all the documents, I have had the
opportunity to deal with those questions, to explain the
events and my part in them.

Whether or not the military intervention was, as
a matter of policy, right or wrong, I don't think is for
me to judge, but so far as the legality is concerned,
I did reach the view then, and still am of the opinion,
that it was lawful.

I stand by that advice, and I have tried to explain
today that it was an opinion which I reached
independently, having considered all the arguments and
the evidence and that it was my genuine view. That
is the basis upon which I have given legal advice as
a professional lawyer for over 35 years. And it was the
basis on which I reached this conclusion in March 2003.

THE CHAIRMAN: Thank you very much.

Thanks again to our witness and to all those who
have been here through a long day, and with that I will
close today's session.

We have no sessions tomorrow but on Friday at 9.30,
not 10 o'clock, we take evidence from the former
Prime Minister, Tony Blair.

Thank you all.

(5.00 pm)

(The Inquiry adjourned until 9.30 am on Friday,
29 January 2010)