THE CHAIRMAN: Good afternoon.

MS ELIZABETH WILMSHURST: Good afternoon.

THE CHAIRMAN: Welcome to everyone, including those who were here this morning, and to our witness, Elizabeth Wilmshurst.

Elizabeth, you were a Deputy Legal Adviser in the Foreign Office up until 2003, I understand.

MS ELIZABETH WILMSHURST: Yes.

THE CHAIRMAN: Our concern this afternoon is to hear from you your account of your recollection of events at that critical time.

Now, we recognise, though it hardly needs saying in this case, that witnesses give evidence based on their recollection of events, at least in part, and we can check what we hear against them.

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

Can I start simply by asking what your role within the Foreign Office and its legal advisers department was as a Deputy Legal Adviser?

MS ELIZABETH WILMSHURST: Yes, as a Deputy Legal Adviser I had primary responsibility for some issues and shared
responsibility for others. So from about September 2001
I was working with Sir Michael Wood and the legal
counsellor who had day-to-day responsibility for Iraq.
I was supporting them, I was deputising for Michael Wood
when that was necessary.

THE CHAIRMAN: Did the legal counsellor report up to you?

MS ELIZABETH WILMSHURST: Theoretically, but, as Sir Michael
was explaining this morning, we very much worked as
a team.

THE CHAIRMAN: Thank you.

Just turning to Iraq and the legal issues therein,
how much of your time was taken up by that particular
topic in the period up to 2003?

MS ELIZABETH WILMSHURST: It very much depended on whether
someone else was away, on what else I was dealing with.
I can't give you a sensible average.

THE CHAIRMAN: But it was a topic, a theme, a set of issues,
that you were following quite closely?

MS ELIZABETH WILMSHURST: It certainly was, and in the
run-up to the conflict in March 2003, I think it is true
to say that every major issue was discussed between
myself and Michael Wood and the legal counsellor
concerned.

THE CHAIRMAN: Thank you. One thing which, from time to
time, both this Committee, and, indeed, some of our
witnesses, remind us of is that there is always a lot
else going on at the same time. I just wondered if, in
the period, say 2001 to 2003, were there other
preoccupations, both for you and your colleagues, which
were quite dominant, if not wholly dominant?

MS ELIZABETH WILMSHURST: Of course, after September 2001,
we had Afghanistan and there were a large number of
legal issues with which I was concerned as well, and we
were also engaged, so far as I was concerned, in
negotiations in the International Criminal Court on the
crime of aggression and on other such matters.

THE CHAIRMAN: Thank you. Well, I think, with that, by way
of preliminaries, can I turn to Baroness Prashar? Usha?

BARONESS USHA PRASHAR: Thank you very much indeed, and
thank you for your very clear statement.

What I want to focus on is on the process of
providing legal advice and working with ministers,
Number 10, and so on.

How was legal advice actually provided to ministers
within the FCO?

MS ELIZABETH WILMSHURST: I think you have heard this
morning from Sir Michael Wood about that, and I don't
think I have anything to add.

BARONESS USHA PRASHAR: Okay. I mean, again, would you say,
like he said, that you were able to volunteer advice, if
you felt it necessary --

MS ELIZABETH WILMSHURST: Certainly, absolutely.

BARONESS USHA PRASHAR: So that was the case there too.

Were you involved in actually giving advice or liaising closely with the Attorney General's office?

MS ELIZABETH WILMSHURST: Yes, and, as Sir Michael was saying this morning, that did go on all the time.

BARONESS USHA PRASHAR: So what you wrote or said, was that automatically copied to the Attorney General's office or was some discretion exercised?

MS ELIZABETH WILMSHURST: Yes -- of course, I can't remember whether every single piece of paper was copied over, but on this issue, on the issue of Resolution 1441, we really did try to keep them informed of everything that was being said, everything significant that was being said.

BARONESS USHA PRASHAR: Did you ever provide advice directly to Number 10?

MS ELIZABETH WILMSHURST: On this matter, no.

BARONESS USHA PRASHAR: No. Were you involved in any advice given in the negotiations for the two Security Council Resolutions going on? Were you involved in giving advice?

MS ELIZABETH WILMSHURST: Well, as I said, in relation to the issues on Iraq, we were discussing these matters as
a team. But the person who was involved in giving
advice to the department within the Foreign Office and
then to be sent to our mission in New York was the legal
counsellor, but in terms of the substance of his advice,
I was --

BARONESS USHA PRASHAR: But --

MS ELIZABETH WILMSHURST: -- entirely in agreement.

On the question of the second resolution, I recall
that I did write myself to the law officers' department.
It must have been a time when I was acting directly in
relation to that.

BARONESS USHA PRASHAR: The law officers' department where?

MS ELIZABETH WILMSHURST: The legal secretariat to the law
officers in relation to the drafting of the second
resolution which never got adopted.

BARONESS USHA PRASHAR: Was your advice on that one
different to what was being submitted when you said you
wrote personally?

MS ELIZABETH WILMSHURST: No, it wasn't different, no. Who
signed off particular letters or particular pieces of
advice was actually not important, because all of the
lawyers dealing with the matter in the Foreign Office
were entirely of one view.

BARONESS USHA PRASHAR: Okay. Can I just then confirm, what
were your views of the legal position on the use of
force against Iraq before the Security Council Resolution 1441?

MS ELIZABETH WILMSHURST: They were the same as described by Sir Michael Wood this morning, that it would be necessary to have a resolution of the Security Council, if force against Iraq were to be lawful, that the other lawful reasons for the use of force were not present at that time.

BARONESS USHA PRASHAR: But there was a consistent view of all the law officers within the FCO?

MS ELIZABETH WILMSHURST: Of all of the legal advisers within the FCO, yes.¹

BARONESS USHA PRASHAR: Was the Foreign Secretary aware of your advice?

MS ELIZABETH WILMSHURST: I certainly believe -- yes, certainly, because some of the documents that we have had disclosed confirm that.

BARONESS USHA PRASHAR: Did he ever discuss it with you or did he respond to what you had to say to him? Were you personally involved in discussions with him about your views?

MS ELIZABETH WILMSHURST: No, I wasn't.

BARONESS USHA PRASHAR: So that is something you never actually had, a bilateral with him?

MS ELIZABETH WILMSHURST: Not personally, no, I saw the

¹ The witness subsequently wrote to the Inquiry to clarify that she meant that all the legal advisers in the FCO who were dealing with the matter had a consistent view.
documents, the papers that Sir Michael would put up.

BARONESS USHA PRASHAR: Thank you very much.

THE CHAIRMAN: Lawrence?

SIR LAWRENCE FREEDMAN: Can I just follow on from that? One of the papers that was declassified this morning is this note from the Foreign Secretary to Michael Wood, where he notes the advice but doesn't accept it.

Did you see this?

MS ELIZABETH WILMSHURST: Yes, I did.

SIR LAWRENCE FREEDMAN: It raises two questions. One which the Attorney General responded to on the role of legal advisers, and, secondly, on the status of international law.

Can I ask you about the first of these? Did you see this as a challenge to your role as a legal adviser?

MS ELIZABETH WILMSHURST: Well, it is rather uncomfortable when the Secretary of State of the department doesn't agree with the legal advice given to him or her. So in that sense, it was a challenge.

SIR LAWRENCE FREEDMAN: Was this unusual, in your experience?

MS ELIZABETH WILMSHURST: Yes.

SIR LAWRENCE FREEDMAN: So you hadn't been in a position before where the Foreign Secretary was receiving what you have described as unanimous advice from --
MS ELIZABETH WILMSHURST: Not when it was minuted out in this formal way. I have had an experience where, in fact, Mr Straw disagreed with advice on something else and I went to the private office and we had a good discussion, and I'm happy to say I prevailed. That was not in relation to Iraq, but I haven't seen it done in quite this way, no.

THE CHAIRMAN: Did it make a difference that Jack Straw himself is a qualified lawyer?

MS ELIZABETH WILMSHURST: He is not an international lawyer.

SIR LAWRENCE FREEDMAN: Which brings me to the second of the issues, which he describes -- I'll quote directly:

"I'm as committed as anyone to international law and its obligations, but it is an uncertain field."

As I understand, the basis of his critique is that he can't be certain in an uncertain field that the advice he was getting was too dogmatic. Is that a fair assessment of what he was saying?

MS ELIZABETH WILMSHURST: That seems to be what he was saying.

SIR LAWRENCE FREEDMAN: Did you respond or was there a way of responding to this sort of challenge, not only to the role of advisers, but to the whole question of the nature of international law?

MS ELIZABETH WILMSHURST: I am in the comfortable position
of having heard Sir Michael Wood's evidence this morning
and I don't know that there is anything else I want to
add to that on this matter.

Of course, international law is defective in not
having a system of courts which can try the legality of
certain issues, or at least not always available. So it
is uncertain in that respect. But I think that, simply
because there aren't courts, it ought to make one more
cautious about trying to keep within the law, not less.

SIR LAWRENCE FREEDMAN: In terms of British foreign policy,
    Michael Wood talked about this again this morning,
    but -- you are now an academic commentator on these
    things as well as reminiscing.

    In terms of British foreign policy, how would you
    see international law as being represented?

MS ELIZABETH WILMSHURST: Certainly reminiscing in my career
    in the Foreign Office, it was the policy of successive
governments to comply with international law, the rule
of law in international affairs, and they put the
United Nations really in the heart of foreign policy as
    well, and, of course, it is the United Nations' charter
    which has these rules against the use of unilateral
    force.

    So that has always seemed to me an important part of
foreign policy and necessarily in UK interests to keep
to international law. Certainly that was the lesson I draw from Suez: that is in the UK's interests to keep within international law and within the UN charter.

SIR LAWRENCE FREEDMAN: Is that because we wish to promote international rules as a general approach, rather than it is of particular benefit to us in particular cases.

MS ELIZABETH WILMSHURST: Both. That we want to get the world to comply with international law in particular instances, but, also, that it is in our interests that we should go about international peace and security in a collective way.

SIR LAWRENCE FREEDMAN: Because one of the criticisms, not, I think, the one that the Foreign Secretary is making here, is that we may do this, but there are people out there who don't, and that we disadvantage ourselves, as a result of being too strict, whilst the people we are trying to deal with aren't strict at all.

MS ELIZABETH WILMSHURST: As you know, one could have an argument about that, but, as an international lawyer, I would be in favour of keeping within it and that it is in our interests to do so.

SIR LAWRENCE FREEDMAN: So in terms of the role of international law in British foreign policy, you are obviously saying that it is very important, but, because there aren't courts, then you are saying there is
a special responsibility on the government to be sure it stays as true as possible to the dictates of international law?

MS ELIZABETH WILMSHURST: There is a special responsibility on government legal advisers to advise the government that, yes.

SIR LAWRENCE FREEDMAN: How difficult is it, as a legal adviser, when there is a divergence between the demands of policy and expediencies of the moment and what you think is the straight and narrow, how do you draw your lines in this?

MS ELIZABETH WILMSHURST: I think that's a terribly important question, if I may say so, and one that deserves more than a brief answer, but I think that you call upon criteria such as what Jeremy Greenstock in front of you called "legitimacy". I think some of what he called "legitimacy", I would take into the legality box, but you are looking at the view of the international community as seen in the Security Council. I have to say that sometimes, being a legal adviser in the Foreign Office, you cannot be naive or unaware of the policy and I was certainly not unaware of the view and the advice given by the Iraq experts within the Foreign Office that going to war without a second resolution would be what they called a nightmare
scenario. So I think it would be difficult to keep to
what you called the straight and narrow international
law, if it went against all of the criteria of the rest
of the world and of policy generally.

SIR LAWRENCE FREEDMAN: This is an important issue, because
what Sir Jeremy said to us is that he thought the war
was legal but lacked legitimacy, and I took that to mean
that he believed there was a case, and he did support
the view that 1441 did not require a second resolution
but it was the lack of support, both domestically and
internationally, that drained it of legitimacy.

MS ELIZABETH WILMSHURST: And internationally.

SIR LAWRENCE FREEDMAN: Yes.

MS ELIZABETH WILMSHURST: Yes.

SIR LAWRENCE FREEDMAN: You are saying that that's actually
part and parcel of the legal problem as well? That you
don't necessarily see this distinction between legality
and legitimacy?

MS ELIZABETH WILMSHURST: In the case of Resolution 1441, he
seemed to be saying that it was all right if we trod
a very narrow line of textual interpretation, with which
I didn't agree, of course, but he had a narrow textual
argument, but which didn't have regard to what he said
the majority of the Security Council believed.

I was saying that, in this particular case, actually
the whole question is: whose is the decision, the
Security Council's or individual member states'? So
that what in this case he was calling "legitimacy",
I would call "legality". I would treat it as part of
the legality argument. I do not know that I would make
a wider proposition of it.

SIR LAWRENCE FREEDMAN: Presumably, if there was what
broader legitimacy, that is, if there was more support
in the international community, then the legality
question wouldn't have been so much of an issue because
you would have had less trouble getting a second
resolution?

MS ELIZABETH WILMSHURST: Exactly.

SIR LAWRENCE FREEDMAN: Can I just ask one more question
which relates to some other evidence that you presumably
heard this morning, that Sir Roderic Lyne was asking
about this particular question of asking the
Prime Minister to judge on a material breach, and sort
of the answer appeared to be that this was in the
absence of anybody else who could do so and the
Prime Minister was speaking for the government.

Can you think of any other circumstances where that
sort of request would be made to the Prime Minister?

What do you think of it as a procedure?

MS ELIZABETH WILMSHURST: It was a procedure that came from
the interpretation of the Attorney General on the resolution, so I didn't -- I didn't pay much attention to it because it was part of his argument.

SIR LAWRENCE FREEDMAN: So it followed logically from where the Attorney General was, and, as you came from different places --

MS ELIZABETH WILMSHURST: Yes, he could have asked for that view elsewhere in the government, but he was writing to the Prime Minister as the top -- the Prime Minister could have got that sufficient factual basis for that view elsewhere within the government, I suppose, but it was part of the logic of the Attorney General's case.

SIR LAWRENCE FREEDMAN: Just to conclude on that, it seems to me, on reading of 1441 and the Attorney General's view of that, that he is very careful to say that nations by themselves can't determine material breach. Yet, at the end, we seem to be saying that that's what has to happen, that a government has to determine the material breach. Do you think that that is part of the difficulty that the government had got itself in?

MS ELIZABETH WILMSHURST: I really find it difficult to answer questions about the Attorney General's view, because it wasn't mine and my view was that it should be the Security Council who made this determination rather than asking the Prime Minister or anyone else within the
government.

SIR LAWRENCE FREEDMAN: That's really the question.

MS ELIZABETH WILMSHURST: Then I entirely agree that it is strange to ask the Prime Minister the question.

The whole issue, as you know, with regard to the interpretation of Resolution 1441 was: was it the Council or was it individual member states to determine whether there was a material breach sufficient to justify the use of force?

The position that I took, that the legal advisers took, was that it was a Security Council to make this...

SIR LAWRENCE FREEDMAN: Were you looking at any of the evidence on material breach over this period?

MS ELIZABETH WILMSHURST: No, we were leaving that to others. It wasn't a legal question.

SIR LAWRENCE FREEDMAN: Thank you very much.

THE CHAIRMAN: You mentioned earlier that there is no comprehensive system of courts to determine issues of legality in international law terms, and we heard just a bit this morning regarding the crime of aggression, not, we were told, I think by Michael Wood, deemed to be part of English law following a House of Lords', as it then was, judgment but there are courts with some jurisdiction, clearly the ICC.

Can you say how far the ICC may come into relevance
in the context of a crime of aggression?

MS ELIZABETH WILMSHURST: Yes. The ICC does have jurisdiction over the crime of aggression, but it can't exercise that jurisdiction until the states' parties to the ICC statute have agreed on a definition of the crime and the conditions for its exercise. They have been negotiating for years and they are going to have a review conference in May and June at which they will either decide on this or not.

THE CHAIRMAN: If they were to decide, is it possible to speculate whether it would have retrospective application?

MS ELIZABETH WILMSHURST: It wouldn't have retrospective application.

THE CHAIRMAN: It would not?

MS ELIZABETH WILMSHURST: No.

THE CHAIRMAN: Thank you.

SIR RODERIC LYNE: As you have heard the earlier evidence, I'll try to compress the points.

Firstly, the difference between the Attorney General and the Foreign Office legal advisers. Would it be right to say that, throughout 2002, before and after the adoption of Resolution 1441, and up until the point of the Attorney General's advice of 7 March 2003, that there was no substantive difference of view between the
FCO legal advisers and the Attorney General?

MS ELIZABETH WILMSHURST: That was my understanding. We hadn't seen any formal, final -- obviously, no final written view from the Attorney, but it was our understanding that we were together in our views.

SIR RODERIC LYNE: But then, on 7 March, he came out with a different view, in which he stated that -- he accepted that there was a reasonable case that could be made in favour of the revival argument. How did you see that position that he had adopted?

MS ELIZABETH WILMSHURST: Well, of course, I was sorry because I then had to consider my own position. But there were -- there were two things that struck me about it.

First, that he had relied, and he said he had relied, on the views of the negotiators of the resolution to change the provisional view that he had previously had, and the issue really is: how do you interpret a resolution or a treaty in international law and is it sufficient to go to individual negotiators, but not all negotiators, and ask them for their perceptions of private conversations, or does an international resolution or treaty have to be accessible to everyone so that you can take an objective view from the wording itself and from published records of the
preparatory work? I mean, it must be the second. The
means of interpretation has to be accessible to all.

But the Attorney had relied on private conversations
of what the UK negotiators or the US had said that the
French had said. Of course, he hadn't asked the French
of their perception of those conversations.

That was one point that I thought actually was
unfortunate in the way that he had reached his decision,
and the other point that struck me was that he did say
that the safest route was to ask for a second
resolution. We were talking about the massive invasion
of another country, changing the government and the
occupation of that country, and, in those circumstances,
it did seem to me that we ought to follow the safest
route.

But it was clear that the Attorney General was not
going to stand in the way of the government going into
conflict.

SIR RODERIC LYNE: There was a fourth evolution of his
position between 7 and 13 March, which you probably
heard me discussing with David Brummell this morning --

MS ELIZABETH WILMSHURST: Yes.

SIR RODERIC LYNE: -- although David said it wasn't a change
of position. Did you at the time -- because it is not
clear from the document that has been declassified
today -- see David Brummell's note of his conversation with the Attorney on 13 March --

MS ELIZABETH WILMSHURST: No.

SIR RODERIC LYNE: -- which recorded this evolution?

MS ELIZABETH WILMSHURST: No.

SIR RODERIC LYNE: When did you first become aware of that?

Had you seen the document before today?

MS ELIZABETH WILMSHURST: No. I had, however, seen a disclosure notice under the Freedom of Information Act which used that term "the better view", and that was out, I think, last year.

SIR RODERIC LYNE: So between the 7th and 13th, the Attorney had evolved from saying that the stronger case was to have the resolution, to saying that the better view was the revival argument, which he had previously described as a reasonable case that could be made.

Is a reasonable case adopted as his better view, in your opinion, a firm enough basis for going to war?

MS ELIZABETH WILMSHURST: I didn't think so, no.

SIR RODERIC LYNE: No.

THE CHAIRMAN: I'm sorry to interrupt, should we understand the word "reasonable" in that formulation as having an almost technical meaning being supported by reasoned argument or being just generally reasonable?

MS ELIZABETH WILMSHURST: I didn't see it as being supported
by technical argument. I think I recall that in that minute of 7 March he referred to the fact that previous law officers had advised that there was a reasonable argument about various aspects and the government had considered that that was sufficient. A reasonable case. So I think it was only a technical form in that sense, that other people had used it as well.

THE CHAIRMAN: Yes, something that could be argued for with a reasoning process?

MS ELIZABETH WILMSHURST: Yes.

THE CHAIRMAN: Thank you.

BARONESS USHA PRASHAR: Could I just ask, because in his statement Sir Michael Wood in paragraph 36 says:

"Another issue is the strength of legal case that should be required before the government goes to war. Is a reasonable legal case sufficient, a respectable case, an arguable case, or should there be a higher degree of legal certainty? This is ultimately a policy question and one that perhaps cannot be answered in the abstract."

Do you have a view on that?

MS ELIZABETH WILMSHURST: I do in this sense, in that our troops are entitled to be able to operate without controversy as to the legality of conflicts in which they are engaged, and so, therefore, certainly in an
ideal world, one would want to have a strong case, if
one is undertaking an operation so major as invading
another country.

BARONESS USHA PRASHAR: So you are suggesting that the legal
advice of the Attorney General did not have that
certainty?

MS ELIZABETH WILMSHURST: He said himself it didn't.

BARONESS USHA PRASHAR: Thank you.

THE CHAIRMAN: Sir Martin?

SIR MARTIN GILBERT: Can you tell us your view of the
potential consequences of the United Kingdom using force
in Iraq without obtaining legal authority? What did you
see the potential consequences as being?

MS ELIZABETH WILMSHURST: Well, of course, the legal aspect
of the story is only a small part. It was the part in
which I was engaged, but I couldn't -- I couldn't give
advice on all of the consequences.

So far as I was concerned, I mean, I could see that
the UK reputation as an upholder of the rule of law and
as an upholder of the United Nations would be seriously
damaged, at least that's what I foresaw.

SIR MARTIN GILBERT: With regard to the position that the UK
servicemen would be put in, where do you see that?

MS ELIZABETH WILMSHURST: Well, you have seen the advice
that we gave to the Foreign Secretary on that and --
well, I contributed to that advice.

SIR MARTIN GILBERT: Can you just summarise it --

MS ELIZABETH WILMSHURST: Well, it does not seem likely that
there would be any criminal liability for a UK
serviceman participating in a conflict on that basis.

SIR MARTIN GILBERT: That wasn't a concern of yours, the
situation --

MS ELIZABETH WILMSHURST: No, I think it just made legal
proceedings more likely and, of course, that came about,
but, no, for individual servicemen, I didn't think there
would be criminal responsibility.

SIR MARTIN GILBERT: On the wider issue of whether the
United Kingdom might be considered to have committed the
crime of aggression, what institution or institutions
would have responsibility for determining that? Was
that a concern of yours?

MS ELIZABETH WILMSHURST: It wasn't so much that we would
fear that the United Kingdom would be taken to a court,
because, as we have said, there are very few courts
available to try international law issues in the
circumstances of this case.

SIR MARTIN GILBERT: So it was a question of reputation in
its widest --

MS ELIZABETH WILMSHURST: Indeed.

SIR MARTIN GILBERT: Thank you.
THE CHAIRMAN: Usha?

BARONESS USHA PRASHAR: On the question of the circumstances and the consideration which led to your decision to seek early retirement, when did you first consider your position?

MS ELIZABETH WILMSHURST: When I saw the Attorney General's minute of 7 March.

BARONESS USHA PRASHAR: So at that time, you decided that you wanted to reconsider your position?

MS ELIZABETH WILMSHURST: Yes.

BARONESS USHA PRASHAR: So you requested an early retirement, which was granted, or you indicated in your letter of 18 March that that would constitute a notice of resignation, if that was not possible?

MS ELIZABETH WILMSHURST: Yes, I decided --

BARONESS USHA PRASHAR: What were the reasons for that?

MS ELIZABETH WILMSHURST: Well, deciding to leave a job is an enormously personal matter, isn't it? I didn't agree with the law on a matter which was central to my job, which was international law on the use of force and the upholding of the United Nations in its function for international peace and security, and I thought that I would not feel comfortable supporting the government's position that the war was lawful in various international fora where I had to work.
BARONESS USHA PRASHAR: I mean, there are some deeper questions here because Sir Michael Wood, I think, was saying that, having given advice, and it is the Attorney General's role to come to a decision, and once that decision has been taken, then it is the job of a civil servant to actually implement that. You obviously took a different view.

MS ELIZABETH WILMSHURST: Not at all. It is the job of a civil servant to implement that, but it is also the right of a civil servant to leave if they don't want to do that.

BARONESS USHA PRASHAR: That's what I wanted to get at. Does that, in your view, raise some questions about the role of the legal officers, the relationship with the ministers and the government of the day?

Because what we heard this morning, that the legal advice is incorporated with the policy advice and it should be sought in a timely manner. I mean, on reflection, are there any issues that you want to draw attention to which are of constitutional importance?

MS ELIZABETH WILMSHURST: Thank you. I think most of the issues have been brought up before you this morning. One of them on the process of obtaining the law officer's advice, it was clearly far from satisfactory, and it seemed to have been left right until the end, the
request to him for his formal opinion, as if it was
simply an impediment that had to be got over before the
policy could be implemented, and perhaps a lesson to be
learned is that, if the law officer's advice needs to be
obtained, as it always does for the use of force issues,
then it should be obtained before the deployment of
substantial forces.

For the Attorney to have advised that the conflict
would have been unlawful without a second resolution
would have been very difficult at that stage without
handing Saddam Hussein a massive public relations
advantage. It was extraordinary, frankly, to leave the
request to him so late in the day.

BARONESS USHA PRASHAR: So from your point of view, how
should the process have operated? Do you think the
Attorney General's advice should have been written at
each stage, or should he have been involved in the
discussions?

MS ELIZABETH WILMSHURST: Very often the Attorney's advice
is obtained informally, whether at meetings or on the
phone. It could have been more formally recorded. But
he was being told, as you heard, that he should not give
his formal legal advice until asked.

BARONESS USHA PRASHAR: Does that, in your view, raise an
issue, which again was -- has been touched on in
Sir Michael Wood's paper, on combining the functions of
the Attorney General as being a law officer and being
a minister of the government?

MS ELIZABETH WILMSHURST: This has been extensively
discussed, hasn't it, in relation to the constitutional
renewal legislation? I think it is actually useful if
the Attorney General is a politician, in the sense that
he is able to argue with his colleagues. Over the
years, it has been a very useful function.

I was in the Attorney General's office when
Lord Mayhew was there in the run-up to the first
Gulf War and he used to have many a happy argument with
Mrs Thatcher.

BARONESS USHA PRASHAR: So what you are really suggesting
from that answer is that there wasn't a kind of an open
discussion and discussion of different points of view
which were challenged and different options which were
actually considered?

MS ELIZABETH WILMSHURST: I think all of the options were
there in the correspondence in the various minuting --
I think all of the options were there.

BARONESS USHA PRASHAR: So what did go wrong if the options
were there? You compared -- was it Patrick Mayhew with
Mrs Thatcher? What was different?

MS ELIZABETH WILMSHURST: The Attorney -- as I have said,
the formal advice was not asked until the very last
moment, when really it would have been very, very
difficult for him to give a different view without
giving a major public relations advantage to Iraq.

BARONESS USHA PRASHAR: Thank you.

MS ELIZABETH WILMSHURST: Sorry, I may not have understood
your question.

BARONESS USHA PRASHAR: No, no, that's fine, thank you.

THE CHAIRMAN: These are broad questions, I think two of my
colleagues would like to ask one or two more questions
and I have got one of my own. First, Lawrence.

SIR LAWRENCE FREEDMAN: One of the arguments that I know is
put by those arguing in favour of the military action at
that time was that the -- otherwise, there was a risk of
the UN Security Council sort of letting itself down,
that there had been a succession of resolutions,
a series of demands, yet Saddam Hussein had continued to
violate these, ignore them, challenge them, obstruct
them, and that -- I think President Bush put this almost
in his mid-September speech to the General Assembly --
it was up to the Security Council to decide whether it
was capable of upholding its own resolutions.

Did you see the force of that argument?

MS ELIZABETH WILMSHURST: I saw the force of it. Of course
one would also wish that argument to be applied across
the board for all of the other resolutions that the
Security Council adopts and that are not implemented or
enforced.

But it is up to the Security Council to decide how
to enforce its resolutions, and it was, as I think
Hans Blix has pointed out -- it was a slightly ironical
situation, where the plea was to the Security Council to
enforce its resolutions by going against the Security
Council's views about whether use of force was needed.

SIR LAWRENCE FREEDMAN: You could argue that the Security
Council was going to be the loser either way; that
either two of its members ignored the apparent view of
the others or that a succession of resolutions were
still without compliance.

MS ELIZABETH WILMSHURST: Yes, except, as you know, a lot of
Security Council members wanted to wait to see if the
inspections would reveal anything. So that was almost
a view in itself.

SIR LAWRENCE FREEDMAN: Indeed, which is obviously something
that we will have to talk about.

Can I just ask you one other question, which is
slightly unrelated to this, but goes back again to
arguments that have been put to us, which is the view of
Sir Jeremy Greenstock, that his aim was to get to
a position with 1441 which replicated the position
of December 1998 with regard to Desert Fox. What did you think of that view? Do you think he would have succeeded?

MS ELIZABETH WILMSHURST: Two points on the distinction between this and Desert Fox. I mean, the first is that Resolution 1441, as Sir Michael was saying this morning, clearly set up a new procedure, an enhanced inspection regime, which Iraq had to comply with, and thereby set a sort of fire-break from the decisions of the Security Council on material breach. This was a new regime which Iraq had to comply with, and then there was a procedure of the Security Council to follow next, and that was different from 1205.

The other point on 1205 was that we recognised that it was rather a strained legal argument and it was sharply criticised thereafter by Security Council members. I think it was at a meeting while the bombing was going on, on 16 December. So that was a lesson we should have learned, but -- sorry, your question about whether we reached the same position --

SIR LAWRENCE FREEDMAN: You have answered it partly, which is a question of the differences between the two, but clearly one of them is that the British and the Americans took military action without a further determination by the Security Council.
The other is this question of material breach, that in the case of December 1998 the head of UNSCOM, Sir Richard Butler, had said that we are being obstructed in what we are trying to do.

Would you say that made a difference in that case as against the position in 2002/2003?

MS ELIZABETH WILMSHURST: No, I really do think the difference was whether -- was that, in 2002, the Council had said any decision on material breach will be for the Council to consider and assess, and that was the major difference.

SIR LAWRENCE FREEDMAN: The final question: Sir Michael Wood pointed out that he had not been in place at the time of December 1998 and continually aware of the controversy surrounding the view then.

What was your personal view about the action taken in December 1998? Were you uncomfortable with that?

MS ELIZABETH WILMSHURST: I gave legal advice at that time. I was personally involved, but, looking back, I can see that the argument was strained. The revival argument was getting more and more controversial in itself, although, again, we used it in 2003, and the use of 1205 and 1154 is a little bit difficult, but it was -- as I say, it was anyway different from the 2002 resolution.

SIR LAWRENCE FREEDMAN: But you thought that was a stretch?
MS ELIZABETH WILMSHURST: It was a stretch.

SIR LAWRENCE FREEDMAN: Even then.

MS ELIZABETH WILMSHURST: Well, then particularly.

SIR LAWRENCE FREEDMAN: So it is really just a question of the nature of the incidents. From what you have said, you took the situation in 2003 more seriously because what was involved was full-scale invasion rather than the air attacks of December 1998? Is that fair?

MS ELIZABETH WILMSHURST: No, I think the two legal situations were different, for the reasons I have given: that 1441 set up a new inspection regime and made it clear, in my view, that the Council had to assess whether there was a breach sufficient to justify the use of force. But it was for the Council to do. But even with that, 1205 was a bit of a stretch.

SIR LAWRENCE FREEDMAN: So you would disagree then with Sir Jeremy's view that he had got into a similar position?

MS ELIZABETH WILMSHURST: Yes, I would, and I did read his evidence very carefully. He did say that the wording of 1441 was equivocal, as to whether the Council had to take the decision or whether it was left to member states. Again, we come back to: should we go to war on what even he accepted was simply equivocal?

SIR LAWRENCE FREEDMAN: Thank you.
THE CHAIRMAN: Roderic?

SIR RODERIC LYNE: If I can take you back one more time to the Attorney General’s advice, on 14 January 2002 the Attorney gave the Prime Minister a draft of what eventually became his advice and we heard from David Brummell that then subsequently he engaged in a long process, an extensive process, of analysis, consideration, enquiry and discussion with a large number of people before he formed his final view, and those people, I think if I remember rightly, included the Prime Minister, the Foreign Secretary, the Foreign Office legal advisers, academic commentators and so on.

Do you think it was appropriate and in line with established practice for the Attorney to give what was intended to be formal law officer’s advice in draft to its ultimate recipient, conceivably thereby opening up a process of negotiation about it?

MS ELIZABETH WILMSHURST: I think that draft advice, as you say, it became his ultimate advice, except it came with a different result. I mean, his draft advice, his provisional view, was that a second resolution was needed, as I recall.

SIR RODERIC LYNE: That was -- you were informed of that draft advice?
MS ELIZABETH WILMSHURST: I was shown it unofficially.

SIR RODERIC LYNE: Yes. It was handled fairly restrictively, I think.

MS ELIZABETH WILMSHURST: It was, it was. But -- well, certainly it is in accordance with practice for law officers to receive political comments from their colleagues on the consequences of, for example, mounting a prosecution and they can take those considerations into account. That's the closest -- that's the only analogy I can think of. I'm not myself aware of a previous precedent for this. I have to say that I was surprised when I --

SIR RODERIC LYNE: Surprised that he --

MS ELIZABETH WILMSHURST: The process.

SIR RODERIC LYNE: -- handed it over in draft and with a very restricted circulation?

MS ELIZABETH WILMSHURST: Yes.

SIR RODERIC LYNE: Okay, thank you very much.

THE CHAIRMAN: Thank you. I think that brings us almost to the end. I have got one very general question, which you may perfectly reasonably decline to respond to. It follows from a question that Baroness Prashar was asking, and I don't want to press further on your personal decision to resign or retire, but it is rather the more general thing.
In a Parliamentary democracy ministers decide and must carry, if they can, the House of Commons. Should they, in informing their decisions, pay special regard, and, if so, how much, to professional opinion as opposed to policy advice by professional, including legal, medical, statistical, perhaps military, or should they accord it absolute respect and deference?

I'm not trying to lay a trap, but -- and I'll expose the final point, which is: is there a difference between their professional advisers and the weight that ministers should attach to that advice and, in this special case, the formal opinion of the Attorney General?

MS ELIZABETH WILMSHURST: I don't want to answer your question right across the board because I can't have anything to say about economists or statisticians or other professional advice. On the law you are, of course, up against various constraints like what used to be in the Ministerial Code, what is in the rules of engagement of our forces, what is in the -- no doubt the financial requirements of the Civil Service, which all require in some sense legality to be there?

So in that sense, at least, it would be advisable for ministers to attach particular importance to legal advice. That's the bottom line. I would like to say
that, for the reasons we were saying, that it is in the
interests of the United Kingdom to comply with
international law, that one ought to make particular
effort to keep within that.

THE CHAIRMAN: One last attempt, if I may: should,
therefore, a government contemplating this very serious
course of action continue to rely, as historically
governments have, on the convention that the Attorney
General's opinion in the matter is final and beyond
argument? It is conventional.

MS ELIZABETH WILMSHURST: I think that the process that was
followed in this case was lamentable and there should
have been a greater transparency within government about
the evolving legal advice. So that it wasn't left
to the Attorney General, and then, right at the
end, to have to say ...

THE CHAIRMAN: Thank you. Is there any final or other
comment you would like to offer before we close this
session?

MS ELIZABETH WILMSHURST: I think we have covered all the
points I wanted to make.

THE CHAIRMAN: We have? Thank you. Can I thank you, the
witness, very much, both for your statement and for your
evidence this afternoon and thank those who have been in
the room to hear it.
We are resuming after a longer break than usual at half past three when Mrs Margaret Beckett will be here to give evidence about her time as Foreign Secretary.

With that, I'll close this part of the session, thank you.

(2.50 pm)

(Short break)