

1 (2.00 pm)

2 MS ELIZABETH WILMSHURST

3 THE CHAIRMAN: Good afternoon.

4 MS ELIZABETH WILMSHURST: Good afternoon.

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

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

10 MS ELIZABETH WILMSHURST: Yes.

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

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

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

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

24 MS ELIZABETH WILMSHURST: Yes, as a Deputy Legal Adviser

25 I had primary responsibility for some issues and shared

1 responsibility for others. So from about September 2001
2 I was working with Sir Michael Wood and the legal
3 counsellor who had day-to-day responsibility for Iraq.
4 I was supporting them, I was deputising for Michael Wood
5 when that was necessary.

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

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

10 THE CHAIRMAN: Thank you.

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

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

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

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

24 THE CHAIRMAN: Thank you. One thing which, from time to
25 time, both this Committee, and, indeed, some of our

1 witnesses, remind us of is that there is always a lot
2 else going on at the same time. I just wondered if, in
3 the period, say 2001 to 2003, were there other
4 preoccupations, both for you and your colleagues, which
5 were quite dominant, if not wholly dominant?

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

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

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

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

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

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

24 BARONESS USHA PRASHAR: Okay. I mean, again, would you say,
25 like he said, that you were able to volunteer advice, if

1 you felt it necessary --

2 MS ELIZABETH WILMSHURST: Certainly, absolutely.

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

4 Were you involved in actually giving advice or

5 liaising closely with the Attorney General's office?

6 MS ELIZABETH WILMSHURST: Yes, and, as Sir Michael was

7 saying this morning, that did go on all the time.

8 BARONESS USHA PRASHAR: So what you wrote or said, was that

9 automatically copied to the Attorney General's office or

10 was some discretion exercised?

11 MS ELIZABETH WILMSHURST: Yes -- of course, I can't remember

12 whether every single piece of paper was copied over, but

13 on this issue, on the issue of Resolution 1441, we

14 really did try to keep them informed of everything that

15 was being said, everything significant that was being

16 said.

17 BARONESS USHA PRASHAR: Did you ever provide advice directly

18 to Number 10?

19 MS ELIZABETH WILMSHURST: On this matter, no.

20 BARONESS USHA PRASHAR: No. Were you involved in any advice

21 given in the negotiations for the two Security Council

22 Resolutions going on? Were you involved in giving

23 advice?

24 MS ELIZABETH WILMSHURST: Well, as I said, in relation to

25 the issues on Iraq, we were discussing these matters as

1 a team. But the person who was involved in giving
2 advice to the department within the Foreign Office and
3 then to be sent to our mission in New York was the legal
4 counsellor, but in terms of the substance of his advice,
5 I was --

6 BARONESS USHA PRASHAR: But --

7 MS ELIZABETH WILMSHURST: -- entirely in agreement.

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

12 BARONESS USHA PRASHAR: The law officers' department where?

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

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

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

24 BARONESS USHA PRASHAR: Okay. Can I just then confirm, what
25 were your views of the legal position on the use of

1 force against Iraq before the Security Council
2 Resolution 1441?

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

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

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

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

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

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

22 MS ELIZABETH WILMSHURST: No, I wasn't.

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

25 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.

1 documents, the papers that Sir Michael would put up.

2 BARONESS USHA PRASHAR: Thank you very much.

3 THE CHAIRMAN: Lawrence?

4 SIR LAWRENCE FREEDMAN: Can I just follow on from that? One

5 of the papers that was declassified this morning is this

6 note from the Foreign Secretary to Michael Wood, where

7 he notes the advice but doesn't accept it.

8 Did you see this?

9 MS ELIZABETH WILMSHURST: Yes, I did.

10 SIR LAWRENCE FREEDMAN: It raises two questions. One which

11 the Attorney General responded to on the role of legal

12 advisers, and, secondly, on the status of international

13 law.

14 Can I ask you about the first of these? Did you see

15 this as a challenge to your role as a legal adviser?

16 MS ELIZABETH WILMSHURST: Well, it is rather uncomfortable

17 when the Secretary of State of the department doesn't

18 agree with the legal advice given to him or her. So in

19 that sense, it was a challenge.

20 SIR LAWRENCE FREEDMAN: Was this unusual, in your

21 experience?

22 MS ELIZABETH WILMSHURST: Yes.

23 SIR LAWRENCE FREEDMAN: So you hadn't been in a position

24 before where the Foreign Secretary was receiving what

25 you have described as unanimous advice from --

1 MS ELIZABETH WILMSHURST: Not when it was minuted out in
2 this formal way. I have had an experience where, in
3 fact, Mr Straw disagreed with advice on something else
4 and I went to the private office and we had a good
5 discussion, and I'm happy to say I prevailed.
6 That was not in relation to Iraq, but I haven't seen
7 it done in quite this way, no.
8 THE CHAIRMAN: Did it make a difference that Jack Straw
9 himself is a qualified lawyer?
10 MS ELIZABETH WILMSHURST: He is not an international lawyer.
11 SIR LAWRENCE FREEDMAN: Which brings me to the second of the
12 issues, which he describes -- I'll quote directly:
13 "I'm as committed as anyone to international law and
14 its obligations, but it is an uncertain field."
15 As I understand, the basis of his critique is that
16 he can't be certain in an uncertain field that the
17 advice he was getting was too dogmatic. Is that a fair
18 assessment of what he was saying?
19 MS ELIZABETH WILMSHURST: That seems to be what he was
20 saying.
21 SIR LAWRENCE FREEDMAN: Did you respond or was there a way
22 of responding to this sort of challenge, not only to the
23 role of advisers, but to the whole question of the
24 nature of international law?
25 MS ELIZABETH WILMSHURST: I am in the comfortable position

1 of having heard Sir Michael Wood's evidence this morning
2 and I don't know that there is anything else I want to
3 add to that on this matter.

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

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

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

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

24 So that has always seemed to me an important part of
25 foreign policy and necessarily in UK interests to keep

1 to international law. Certainly that was the lesson
2 I draw from Suez: that is in the UK's interests to keep
3 within international law and within the UN charter.

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

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

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

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

22 SIR LAWRENCE FREEDMAN: So in terms of the role of
23 international law in British foreign policy, you are
24 obviously saying that it is very important, but, because
25 there aren't courts, then you are saying there is

1 a special responsibility on the government to be sure it
2 stays as true as possible to the dictates of
3 international law?

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

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

12 MS ELIZABETH WILMSHURST: I think that's a terribly
13 important question, if I may say so, and one that
14 deserves more than a brief answer, but I think that you
15 call upon criteria such as what Jeremy Greenstock in
16 front of you called "legitimacy". I think some of what
17 he called "legitimacy", I would take into the legality
18 box, but you are looking at the view of the
19 international community as seen in the Security Council.

20 I have to say that sometimes, being a legal adviser
21 in the Foreign Office, you cannot be naive or unaware of
22 the policy and I was certainly not unaware of the view
23 and the advice given by the Iraq experts within the
24 Foreign Office that going to war without a second
25 resolution would be what they called a nightmare

1 scenario. So I think it would be difficult to keep to
2 what you called the straight and narrow international
3 law, if it went against all of the criteria of the rest
4 of the world and of policy generally.

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

12 MS ELIZABETH WILMSHURST: And internationally.

13 SIR LAWRENCE FREEDMAN: Yes.

14 MS ELIZABETH WILMSHURST: Yes.

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

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

25 I was saying that, in this particular case, actually

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

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

13 MS ELIZABETH WILMSHURST: Exactly.

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

22 Can you think of any other circumstances where that
23 sort of request would be made to the Prime Minister?
24 What do you think of it as a procedure?

25 MS ELIZABETH WILMSHURST: It was a procedure that came from

1 the interpretation of the Attorney General on the
2 resolution, so I didn't -- I didn't pay much attention
3 to it because it was part of his argument.

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

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

13 SIR LAWRENCE FREEDMAN: Just to conclude on that, it seems
14 to me, on reading of 1441 and the Attorney General's
15 view of that, that he is very careful to say that
16 nations by themselves can't determine material breach.

17 Yet, at the end, we seem to be saying that that's
18 what has to happen, that a government has to determine
19 the material breach. Do you think that that is part of
20 the difficulty that the government had got itself in?

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

1 government.

2 SIR LAWRENCE FREEDMAN: That's really the question.

3 MS ELIZABETH WILMSHURST: Then I entirely agree that it is

4 strange to ask the Prime Minister the question.

5 The whole issue, as you know, with regard to the

6 interpretation of Resolution 1441 was: was it the

7 Council or was it individual member states to determine

8 whether there was a material breach sufficient to

9 justify the use of force?

10 The position that I took, that the legal advisers

11 took, was that it was a Security Council to make this...

12 SIR LAWRENCE FREEDMAN: Were you looking at any of the

13 evidence on material breach over this period?

14 MS ELIZABETH WILMSHURST: No, we were leaving that to

15 others. It wasn't a legal question.

16 SIR LAWRENCE FREEDMAN: Thank you very much.

17 THE CHAIRMAN: You mentioned earlier that there is no

18 comprehensive system of courts to determine issues of

19 legality in international law terms, and we heard just

20 a bit this morning regarding the crime of aggression,

21 not, we were told, I think by Michael Wood, deemed to be

22 part of English law following a House of Lords', as it

23 then was, judgment but there are courts with some

24 jurisdiction, clearly the ICC.

25 Can you say how far the ICC may come into relevance

1 in the context of a crime of aggression?

2 MS ELIZABETH WILMSHURST: Yes. The ICC does have

3 jurisdiction over the crime of aggression, but it can't

4 exercise that jurisdiction until the states' parties to

5 the ICC statute have agreed on a definition of the crime

6 and the conditions for its exercise. They have been

7 negotiating for years and they are going to have

8 a review conference in May and June at which they will

9 either decide on this or not.

10 THE CHAIRMAN: If they were to decide, is it possible to

11 speculate whether it would have retrospective

12 application?

13 MS ELIZABETH WILMSHURST: It wouldn't have retrospective

14 application.

15 THE CHAIRMAN: It would not?

16 MS ELIZABETH WILMSHURST: No.

17 THE CHAIRMAN: Thank you.

18 SIR RODERIC LYNE: As you have heard the earlier evidence,

19 I'll try to compress the points.

20 Firstly, the difference between the Attorney General

21 and the Foreign Office legal advisers. Would it be

22 right to say that, throughout 2002, before and after the

23 adoption of Resolution 1441, and up until the point of

24 the Attorney General's advice of 7 March 2003, that

25 there was no substantive difference of view between the

1 FCO legal advisers and the Attorney General?

2 MS ELIZABETH WILMSHURST: That was my understanding. We

3 hadn't seen any formal, final -- obviously, no final

4 written view from the Attorney, but it was our

5 understanding that we were together in our views.

6 SIR RODERIC LYNE: But then, on 7 March, he came out with

7 a different view, in which he stated that -- he accepted

8 that there was a reasonable case that could be made in

9 favour of the revival argument. How did you see that

10 position that he had adopted?

11 MS ELIZABETH WILMSHURST: Well, of course, I was sorry

12 because I then had to consider my own position. But

13 there were -- there were two things that struck me about

14 it.

15 First, that he had relied, and he said he had

16 relied, on the views of the negotiators of the

17 resolution to change the provisional view that he had

18 previously had, and the issue really is: how do you

19 interpret a resolution or a treaty in international law

20 and is it sufficient to go to individual negotiators,

21 but not all negotiators, and ask them for their

22 perceptions of private conversations, or does an

23 international resolution or treaty have to be accessible

24 to everyone so that you can take an objective view from

25 the wording itself and from published records of the

1 preparatory work? I mean, it must be the second. The
2 means of interpretation has to be accessible to all.

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

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

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

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

22 MS ELIZABETH WILMSHURST: Yes.

23 SIR RODERIC LYNE: -- although David said it wasn't a change
24 of position. Did you at the time -- because it is not
25 clear from the document that has been declassified

1 today -- see David Brummell's note of his conversation
2 with the Attorney on 13 March --

3 MS ELIZABETH WILMSHURST: No.

4 SIR RODERIC LYNE: -- which recorded this evolution?

5 MS ELIZABETH WILMSHURST: No.

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

7 Had you seen the document before today?

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

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

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

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

20 SIR RODERIC LYNE: No.

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

25 MS ELIZABETH WILMSHURST: I didn't see it as being supported

1 by technical argument. I think I recall that in that
2 minute of 7 March he referred to the fact that previous
3 law officers had advised that there was a reasonable
4 argument about various aspects and the government had
5 considered that that was sufficient. A reasonable case.

6 So I think it was only a technical form in that
7 sense, that other people had used it as well.

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

10 MS ELIZABETH WILMSHURST: Yes.

11 THE CHAIRMAN: Thank you.

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

14 "Another issue is the strength of legal case that
15 should be required before the government goes to war.

16 "Is a reasonable legal case sufficient,
17 a respectable case, an arguable case, or should there be
18 a higher degree of legal certainty? This is ultimately
19 a policy question and one that perhaps cannot be
20 answered in the abstract."

21 Do you have a view on that?

22 MS ELIZABETH WILMSHURST: I do in this sense, in that our
23 troops are entitled to be able to operate without
24 controversy as to the legality of conflicts in which
25 they are engaged, and so, therefore, certainly in an

1 ideal world, one would want to have a strong case, if
2 one is undertaking an operation so major as invading
3 another country.

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

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

8 BARONESS USHA PRASHAR: Thank you.

9 THE CHAIRMAN: Sir Martin?

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

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

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

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

24 MS ELIZABETH WILMSHURST: Well, you have seen the advice
25 that we gave to the Foreign Secretary on that and --

1 well, I contributed to that advice.

2 SIR MARTIN GILBERT: Can you just summarise it --

3 MS ELIZABETH WILMSHURST: Well, it does not seem likely that

4 there would be any criminal liability for a UK

5 serviceman participating in a conflict on that basis.

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

7 situation --

8 MS ELIZABETH WILMSHURST: No, I think it just made legal

9 proceedings more likely and, of course, that came about,

10 but, no, for individual servicemen, I didn't think there

11 would be criminal responsibility.

12 SIR MARTIN GILBERT: On the wider issue of whether the

13 United Kingdom might be considered to have committed the

14 crime of aggression, what institution or institutions

15 would have responsibility for determining that? Was

16 that a concern of yours?

17 MS ELIZABETH WILMSHURST: It wasn't so much that we would

18 fear that the United Kingdom would be taken to a court,

19 because, as we have said, there are very few courts

20 available to try international law issues in the

21 circumstances of this case.

22 SIR MARTIN GILBERT: So it was a question of reputation in

23 its widest --

24 MS ELIZABETH WILMSHURST: Indeed.

25 SIR MARTIN GILBERT: Thank you.

1 THE CHAIRMAN: Usha?

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

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

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

10 MS ELIZABETH WILMSHURST: Yes.

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

15 MS ELIZABETH WILMSHURST: Yes, I decided --

16 BARONESS USHA PRASHAR: What were the reasons for that?

17 MS ELIZABETH WILMSHURST: Well, deciding to leave a job is
18 an enormously personal matter, isn't it? I didn't agree
19 with the law on a matter which was central to my job,
20 which was international law on the use of force and the
21 upholding of the United Nations in its function for
22 international peace and security, and I thought that
23 I would not feel comfortable supporting the government's
24 position that the war was lawful in various
25 international fora where I had to work.

1 BARONESS USHA PRASHAR: I mean, there are some deeper
2 questions here because Sir Michael Wood, I think, was
3 saying that, having given advice, and it is the Attorney
4 General's role to come to a decision, and once that
5 decision has been taken, then it is the job of a civil
6 servant to actually implement that. You obviously took
7 a different view.

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

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

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

21 MS ELIZABETH WILMSHURST: Thank you. I think most of the
22 issues have been brought up before you this morning.
23 One of them on the process of obtaining the law
24 officer's advice, it was clearly far from satisfactory,
25 and it seemed to have been left right until the end, the

1 request to him for his formal opinion, as if it was
2 simply an impediment that had to be got over before the
3 policy could be implemented, and perhaps a lesson to be
4 learned is that, if the law officer's advice needs to be
5 obtained, as it always does for the use of force issues,
6 then it should be obtained before the deployment of
7 substantial forces.

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

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

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

24 BARONESS USHA PRASHAR: Does that, in your view, raise an
25 issue, which again was -- has been touched on in

1 Sir Michael Wood's paper, on combining the functions of
2 the Attorney General as being a law officer and being
3 a minister of the government?

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

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

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

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

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

25 MS ELIZABETH WILMSHURST: The Attorney -- as I have said,

1 the formal advice was not asked until the very last
2 moment, when really it would have been very, very
3 difficult for him to give a different view without
4 giving a major public relations advantage to Iraq.

5 BARONESS USHA PRASHAR: Thank you.

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

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

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

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

23 Did you see the force of that argument?

24 MS ELIZABETH WILMSHURST: I saw the force of it. Of course
25 one would also wish that argument to be applied across

1 the board for all of the other resolutions that the
2 Security Council adopts and that are not implemented or
3 enforced.

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

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

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

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

21 Can I just ask you one other question, which is
22 slightly unrelated to this, but goes back again to
23 arguments that have been put to us, which is the view of
24 Sir Jeremy Greenstock, that his aim was to get to
25 a position with 1441 which replicated the position

1 of December 1998 with regard to Desert Fox. What did
2 you think of that view? Do you think he would have
3 succeeded?

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

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

21 SIR LAWRENCE FREEDMAN: You have answered it partly, which
22 is a question of the differences between the two, but
23 clearly one of them is that the British and the
24 Americans took military action without a further
25 determination by the Security Council.

1 The other is this question of material breach, that
2 in the case of December 1998 the head of UNSCOM,
3 Sir Richard Butler, had said that we are being
4 obstructed in what we are trying to do.

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

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

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

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

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

25 SIR LAWRENCE FREEDMAN: But you thought that was a stretch?

1 MS ELIZABETH WILMSHURST: It was a stretch.

2 SIR LAWRENCE FREEDMAN: Even then.

3 MS ELIZABETH WILMSHURST: Well, then particularly.

4 SIR LAWRENCE FREEDMAN: So it is really just a question of

5 the nature of the incidents. From what you have said,

6 you took the situation in 2003 more seriously because

7 what was involved was full-scale invasion rather than

8 the air attacks of December 1998? Is that fair?

9 MS ELIZABETH WILMSHURST: No, I think the two legal

10 situations were different, for the reasons I have given:

11 that 1441 set up a new inspection regime and made it

12 clear, in my view, that the Council had to assess

13 whether there was a breach sufficient to justify the use

14 of force. But it was for the Council to do. But even

15 with that, 1205 was a bit of a stretch.

16 SIR LAWRENCE FREEDMAN: So you would disagree then with

17 Sir Jeremy's view that he had got into a similar

18 position?

19 MS ELIZABETH WILMSHURST: Yes, I would, and I did read his

20 evidence very carefully. He did say that the wording of

21 1441 was equivocal, as to whether the Council had to

22 take the decision or whether it was left to member

23 states. Again, we come back to: should we go to war on

24 what even he accepted was simply equivocal?

25 SIR LAWRENCE FREEDMAN: Thank you.

1 THE CHAIRMAN: Roderic?

2 SIR RODERIC LYNE: If I can take you back one more time to

3 the Attorney General's advice, on 14 January 2002 the

4 Attorney gave the Prime Minister a draft of what

5 eventually became his advice and we heard from

6 David Brummell that then subsequently he engaged in

7 a long process, an extensive process, of analysis,

8 consideration, enquiry and discussion with a large

9 number of people before he formed his final view, and

10 those people, I think if I remember rightly, included

11 the Prime Minister, the Foreign Secretary, the

12 Foreign Office legal advisers, academic commentators and

13 so on.

14 Do you think it was appropriate and in line with

15 established practice for the Attorney to give what was

16 intended to be formal law officer's advice in draft to

17 its ultimate recipient, conceivably thereby opening up

18 a process of negotiation about it?

19 MS ELIZABETH WILMSHURST: I think that draft advice, as you

20 say, it became his ultimate advice, except it came with

21 a different result. I mean, his draft advice, his

22 provisional view, was that a second resolution was

23 needed, as I recall.

24 SIR RODERIC LYNE: That was -- you were informed of that

25 draft advice?

1 MS ELIZABETH WILMSHURST: I was shown it unofficially.

2 SIR RODERIC LYNE: Yes. It was handled fairly

3 restrictively, I think.

4 MS ELIZABETH WILMSHURST: It was, it was. But -- well,

5 certainly it is in accordance with practice for law

6 officers to receive political comments from their

7 colleagues on the consequences of, for example, mounting

8 a prosecution and they can take those considerations

9 into account. That's the closest -- that's the only

10 analogy I can think of. I'm not myself aware of

11 a previous precedent for this. I have to say that I was

12 surprised when I --

13 SIR RODERIC LYNE: Surprised that he --

14 MS ELIZABETH WILMSHURST: The process.

15 SIR RODERIC LYNE: -- handed it over in draft and with

16 a very restricted circulation?

17 MS ELIZABETH WILMSHURST: Yes.

18 SIR RODERIC LYNE: Okay, thank you very much.

19 THE CHAIRMAN: Thank you. I think that brings us almost to

20 the end. I have got one very general question, which

21 you may perfectly reasonably decline to respond to. It

22 follows from a question that Baroness Prashar was

23 asking, and I don't want to press further on your

24 personal decision to resign or retire, but it is rather

25 the more general thing.

1 In a Parliamentary democracy ministers decide and
2 must carry, if they can, the House of Commons. Should
3 they, in informing their decisions, pay special regard,
4 and, if so, how much, to professional opinion as opposed
5 to policy advice by professional, including legal,
6 medical, statistical, perhaps military, or should they
7 accord it absolute respect and deference?

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

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

23 So in that sense, at least, it would be advisable
24 for ministers to attach particular importance to legal
25 advice. That's the bottom line. I would like to say

1 that, for the reasons we were saying, that it is in the
2 interests of the United Kingdom to comply with
3 international law, that one ought to make particular
4 effort to keep within that.

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

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

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

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

22 THE CHAIRMAN: We have? Thank you. Can I thank you, the
23 witness, very much, both for your statement and for your
24 evidence this afternoon and thank those who have been in
25 the room to hear it.

1 We are resuming after a longer break than usual at
2 half past three when Mrs Margaret Beckett will be here
3 to give evidence about her time as Foreign Secretary.

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

6 (2.50 pm)

7 (Short break)

FINAL