

## **LEGALITY OF MILITARY ACTION IN IRAQ DISCLOSURE STATEMENT**

1. This Disclosure Statement is made by the Cabinet Office and the Legal Secretariat to the Law Officers.
2. The Attorney General's advice of 7 March 2003 on the legality of military action against Iraq is already in the public domain and is attached to this Statement as Annex A.
3. The advice considered two questions<sup>1</sup>:
  - Whether United Nations Security Council resolution 1441 (2002) was capable in principle of "reviving" the authority for the use of force against Iraq contained in resolution 678 (1990). In other words, was the "revival argument" a sound legal basis in principle?
  - Whether, on the true construction of resolution 1441, a further Council *decision* was required in order to revive the authorisation to use force in resolution 678, or whether it was sufficient for there to be a further Council *discussion*.

### **Process from the adoption of resolution 1441 up to 7 March 2003**

4. The Attorney General's advice of 7 March 2003 was given following a process of analysis, consideration, inquiry and discussion with ministerial colleagues, officials and others, in the course of which he asked questions, gave preliminary advice and explored the competing arguments<sup>2</sup>. In particular:
  - The Attorney took account of the views of Foreign and Commonwealth Office lawyers on the relevant principles of international law and in particular the interpretation of resolution 1441, together with previous UK practice in relation to the use of force against Iraq.
  - The Attorney considered academic and other legal commentary on the issues, together with previous Law Officers' advice.
  - He considered the history of the relevant UN resolutions, the negotiations leading to those resolutions and the written

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<sup>1</sup> See paragraph 6 of the 7 March 2003 advice.

<sup>2</sup> See also *Review of Intelligence on Weapons of Mass Destruction* (HC 898) (the Butler Review), paragraph 377; paragraphs 1, 8, 9 and 10 of the 7 March 2003 advice.

records of those negotiations. He indicated that he would welcome the opportunity to hear the views of his US counterparts on the interpretation of those resolutions (see below).

- He had discussions with the Prime Minister, the Foreign Secretary and senior officials from their departments.
- He took account of information provided by the Foreign Secretary and by Sir Jeremy Greenstock (the UK Permanent Representative to the United Nations, with whom the Attorney had a meeting on 23 January 2003), on the history of the negotiations which led to Resolution 1441 (see paragraph 13 below for further details).
- On 10 February the Attorney had meetings in Washington with members of the US Administration who had been closely involved in the drafting and negotiation of resolution 1441. These included lawyers at the White House, the State Department, the Department of Justice and the Department of Defense<sup>3</sup>.

5. A principal purpose of these inquiries and discussions was for the Attorney General to inform himself about the negotiating history of resolution 1441, and in particular whether the resolution was intended to require a further Council decision, or merely a Council discussion, in order to trigger the authorisation to use force in resolution 678.

#### **Revival argument<sup>4</sup>**

6. Resolution 678 was adopted by the Security Council on 29 November 1990 following the invasion of Kuwait by Iraq in August 1990. It authorised the use of force against Iraq and provided the legal basis for Operation Desert Storm (the first Gulf War). That operation had been brought to an end by the cease-fire, the terms of which were set out by the Security Council in resolution 687 (1991). Resolution 687 set out the steps which the Council required Iraq to take in order to restore international peace and security in the area. Resolution 687 suspended, but did not terminate, the authority to use force in resolution 678. The UK's position was that a determination by the Security Council that Iraq was in material breach of its obligations under resolution 687 was capable of reviving the authorisation to use force in resolution 678.

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<sup>3</sup> See Parliamentary Written Answer, 30 November 2004 (Commons, Column 48W).

<sup>4</sup> See paragraphs 7-11 of the 7 March 2003 advice.

7. Although the revival argument was and remains controversial, it had previously been relied on by the UK government and others as the legal basis for the use of force against Iraq – between 13 and 18 January 1993, and in December 1998 (Operation Desert Fox).

8. The Attorney considered that, in principle, the use of force in resolution 678 was capable of being revived by a determination of the Security Council that Iraq was in material breach of its obligations under resolution 687 (as his predecessors had advised in previous cases). Further, he considered that the argument was strengthened by the adoption of resolution 1441, given that it expressly recalled the authorisation to use force in resolution 678, provided that Iraq had been and remained in breach of its obligations, and recalled that “serious consequences” would result from continued violation of those obligations.

### **Sufficiency of resolution 1441<sup>5</sup>**

9. Notwithstanding the determination of material breach in paragraph 1 of resolution 1441, it was clear that the Council did not intend the authorisation in resolution 678 should revive *immediately* following the adoption of resolution 1441, since paragraph 2 afforded Iraq a “final opportunity” to comply with its disarmament obligations.

10. The question the Attorney needed to resolve was whether, on its true construction, resolution 1441 required a further Council *decision* in order to trigger the authorisation to use force, or whether it was sufficient for there to be a Council *discussion*.

11. This was a question of interpretation of resolution 1441. In the language of the resolution there were indications pointing both ways. In preparing his advice, the Attorney weighed the competing arguments. On the one hand, the Council had determined in paragraph 4 that “failure by Iraq *at any time* to comply with, and cooperate *fully* in the implementation of, this resolution” [emphasis added] would constitute “a further material breach” of its obligations. Thus the Council had determined *in advance* that any such failure would amount to a material breach. On the other hand, resolution 1441 went on to say that any such failure was to be “reported to the Council for assessment”, and that the Council would then convene “in order to consider the situation and the need for full compliance with all the relevant Council resolutions in order to secure international peace and security”. Did that mean the Council had to take a further *decision* in order to authorise the use of force?

12. In considering these arguments, as mentioned the Attorney General analysed the text of the resolution and the negotiating history

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<sup>5</sup> See paragraphs 12-14 of the 7 March 2003 advice.

of the resolution and took account of information provided by the FCO lawyers, the Foreign Secretary, Sir Jeremy Greenstock and members of the US Administration who had been closely involved in those negotiations.

13. The interpretation of the Foreign Secretary, Sir Jeremy Greenstock and the US Administration, in the light of those negotiations, was that a further decision of the Security Council was not required. The Attorney General's attention was drawn to the fact that some members of the Council had made proposals to insert a requirement for the second resolution to authorise any use of force, but had lost, and knew they had lost (see paragraph 22 of the 7 March advice). Instead, paragraph 4 of resolution 1441 provided that if there were a further material breach this would "be reported to the Council for assessment in accordance with paragraphs 11 and 12 below". Paragraph 12 then provided for the Council to convene immediately "in order to *consider* the situation ..." (emphasis added). The UK negotiators did not agree, as the earlier wording had proposed, that the Council would "decide". Instead they deliberately chose the word "consider"<sup>6</sup>.

14. Having heard and considered those arguments, the Attorney General concluded that a reasonable case could be made that resolution 1441 was capable in principle of reviving the authorisation in resolution 678 without a further resolution.

15. The Attorney General informed the Prime Minister's Chief of Staff (Mr Powell), his Foreign Policy Adviser (Sir David Manning) and Baroness Morgan of his conclusions at a meeting on 27 February 2003<sup>7</sup>. The Prime Minister's Office subsequently asked the Attorney General to put those views in writing. This he did in his minute to the Prime Minister of 7 March.

### **7-17 March 2003**

16. Between the giving of that advice on 7 March and the Attorney General's statement to Parliament of 17 March, events moved quickly.

17. In his 7 March advice the Attorney stated his opinion that "the safest course would be to secure the adoption of a further resolution to authorise the use of force" [paragraph 27]. But he went on to say: "The legal analysis may, however, be affected by the course of events over the next week or so, e.g. the discussions on the draft second resolution. If we fail to agree on the adoption of a second resolution, we would need to consider urgently at that stage the strength of our legal case in the light of circumstances at that time" [paragraph 31].

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<sup>6</sup> See also the Foreign Secretary's statement to Parliament, 25 November 2002, especially Column 53.

<sup>7</sup> Not 28 February as mistakenly stated in paragraph 378 of the Butler Review.

18. In the event, it became clear that a second resolution was unlikely to be forthcoming. Nevertheless, negotiations at the UN Security Council continued throughout the week. Throughout this period, the Attorney General continued to reflect on the legal arguments.

19. On 11 March, as set out in the Prime Minister's Official Spokesman's briefing from that day<sup>8</sup>, there were a number of meetings in Downing Street, some of which were attended by the Attorney General. At one of those meetings, the Chief of the Defence Staff said he would need a clear indication of the legal position for the purposes of his directive to members of the Armed Forces. As the CDS subsequently put it in a media interview, he needed an "unambiguous black-and-white statement saying it would be legal for us to operate if we had to"<sup>9</sup>. At the same Downing Street meeting, the Cabinet Secretary also asked whether civil servants would require a similar directive<sup>10</sup>.

20. On 12 March, the Legal Adviser to the Ministry of Defence wrote to the Legal Secretary to the Law Officers, following up on the Chief of the Defence Staff's comments the previous day. In that letter the MoD Legal Adviser recorded that he had informed the CDS that "if the Attorney General has advised that he is satisfied that the proposed military action by the UK would be in accordance with national and international law, [the CDS] can properly give his order committing UK forces"<sup>11</sup>.

21. In addition, the Treasury Solicitor, as head of the Government Legal Service, indicated to the Attorney General that a clear statement as to the lawfulness of military action was required both for the military and for the civil service, who might be involved in giving assistance to any military effort and would need to have clear guidance that they were acting lawfully.

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<sup>8</sup> See <http://www.number-10.gov.uk/output/Page3253.asp>

<sup>9</sup> Observer, 1 May 2005.

<sup>10</sup> See also Sir Andrew Turnbull's evidence to the Public Administration Select Committee, 10 March 2005, where Sir Andrew Turnbull commented: "What he [the Attorney General] provided, which was needed by ministers making a decision, the Chief of Defence Staff committing troops and I, on behalf of civil servants committing the spending of money, was a clear view as to whether what they were doing was legal and he provided that and he provided the rationale for it in that statement [of 17 March 2003]."

<sup>11</sup> See paragraph 382 of the Butler Review.

22. The Attorney General recognised therefore that he needed to indicate his clear view as to whether military action would be lawful and that the Government would need to set out its position publicly<sup>12</sup>.

23. On 13 March the Attorney General discussed the matter with his Legal Secretary. It was clear to the Attorney that there was a sound basis for the revival argument in principle. The question was whether the conditions for the operation of the revival doctrine applied in this case.

24. As the Legal Secretary recorded at the time, the Attorney confirmed in that discussion that, after further reflection, having particular regard to the negotiating history of resolution 1441 and his discussions with Sir Jeremy Greenstock and the representatives of the US Administration, he had reached the clear conclusion that the better view was that there was a lawful basis for the use of force without a second resolution. The crucial point was that Operative Paragraph 12 of resolution 1441 did not stipulate that there should be a further *decision* of the Security Council before military action was taken, but simply provided for reports of further breaches by Iraq to be *considered* by the Council. The Attorney General made it clear that he had fully taken into account the contrary arguments as set out in his 7 March minute to the Prime Minister. In coming to the conclusion that the better view was that a further resolution was not legally necessary, he had been greatly assisted by the background material he had seen on the negotiation of resolution 1441.

25. It was agreed during that discussion that it would be proper for the Legal Secretary to confirm to the Ministry of Defence Legal Adviser that the proposed military action would be in accordance with national and international law. It was also decided to prepare a statement setting out the Attorney's view of the legal position and to send instructions to counsel to help in the preparation of that public statement<sup>13</sup>.

26. Also on 13 March, following that discussion with his Legal Secretary, the Attorney informed Baroness Morgan and Lord Falconer at a meeting of his conclusion that action would be lawful without a further resolution<sup>14</sup>.

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<sup>12</sup> See also the Attorney General's evidence to the House of Lords Constitution Committee, 22 March 2006:

<http://www.publications.parliament.uk/pa/ld/lduncorr/const220306.pdf>

<sup>13</sup> See Parliamentary Answers given on 28 February 2005 (Lords, Column WA1) and 8 March 2005 (Commons, Column 1639W).

<sup>14</sup> See paragraph 381 of the Butler Review.

27. On 14 March, the Legal Secretary wrote to the MoD Legal Adviser confirming that the Attorney was satisfied that the proposed military action would be lawful<sup>15</sup>.

28. Also on 14 March, the Legal Secretary wrote to the Private Secretary to the Prime Minister seeking confirmation (previously given orally) that “it is unequivocally the Prime Minister’s view that Iraq has committed further material breaches as specified in paragraph 4 of resolution 1441”<sup>16</sup>.

29. The Prime Minister’s Private Secretary wrote confirming this on the following day, 15 March<sup>17</sup>. Also on that day Baroness Morgan wrote, in a two-line internal Downing Street e-mail for the record, that the Attorney was “happy with” this confirmation<sup>18</sup> and that he would “make clear in the course of the week that there is a sound legal basis for action should that prove necessary”.

30. Drafts of the Attorney General’s written statement to Parliament were drawn up over the weekend 15-16 March, as was the fuller statement of the legal position contained in the Foreign Secretary’s memorandum to the Foreign Affairs Select Committee<sup>19</sup>.

31. On 17 March the Attorney made his written statement to Parliament setting out his concluded view of the legal basis for the use of force against Iraq. This statement is attached as Annex B.

32. On the same day the Foreign Secretary submitted a memorandum to the Foreign Affairs Select Committee which gave further detail of the legal position. This is attached at Annex C.

33. Other than the documents referred to in this statement, the Cabinet Office and Legal Secretariat to the Law Officers hold no further information from the period 7 to 17 March 2003 relating to the preparation of the Attorney General’s Parliamentary Answer on 17 March 2003.

Cabinet Office and Legal Secretariat to the Law Officers

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<sup>15</sup> See paragraph 382 of the Butler Review.

<sup>16</sup> See paragraph 383 of the Butler Review.

<sup>17</sup> See paragraph 384 of the Butler Review.

<sup>18</sup> While the e-mail does not refer specifically to the letter of 15 March, it is presumed that Baroness Morgan was referring to that letter.

<sup>19</sup> See Parliamentary Answers referred to in footnote 13 above as well as those given on 1 March 2005 (Commons, Column 1075) and 20 July 2005 (Commons, Column 1703W).