IRAQ INQUIRY

Statement of Sir Daniel Bethlehem QC

1. By letter dated 6 May 2011 from the Secretary to the Iraq Inquiry, the Inquiry requested my views on 5 questions. These are set out below, together with my responses. As this is the first occasion on which I am providing evidence to the Inquiry, it may be helpful to provide some background about my position as well as some introductory observations to frame my responses to the questions posed.

My background

2. I was the Legal Adviser to the Foreign & Commonwealth Office from 2 May 2006 to 13 May 2011. I succeeded Sir Michael Wood to this position, and have recently been succeeded by Iain Macleod, both of whom have given evidence to the Inquiry based on their close involvement, in different roles, in developments in 2002-2003 and subsequently relevant to the legal basis for military action in Iraq and related questions. As Legal Adviser, I had overall responsibility for the management of the FCO legal team and for the legal advice that was provided to the Office.

3. Unlike my predecessors and successor, I was an external appointee to the Legal Adviser's post, not having been a member of the Diplomatic or Civil Service prior to appointment. My background was as a barrister in private practice in the field of public international law at the London Bar and Director of the Lauterpacht Centre for International Law at the University of Cambridge. I had previously been a lecturer in international law at the London School of Economics.

4. This non-FCO background is germane to this evidence as it highlights that I came to the post without any involvement in the work of the FCO and its legal team on issues concerning the military action in Iraq. I am not therefore in a position to attest, from personal knowledge, to the issues addressed in the evidence of Sir Michael Wood, Iain Macleod or the other legal witnesses to the Inquiry concerning the legal basis for military action in Iraq and related questions. Although, when I took office in May 2006, the FCO legal team continued to be engaged on Iraq issues, and I thus had some involvement in these issues from this point, the nature of that involvement was more settled and tended not to engage the kinds of critical legal questions with which the Inquiry has been principally concerned.

5. My external background also signals that I came to the Legal Adviser's post without any experience of the arrangements for the provision of legal advice within the FCO, of having worked in a diplomatic posting abroad (such as the UK's Mission to the United Nations in New York; UKMIS), or of the settled allocations of responsibility between the London-based legal team and legal advisers on postings abroad that has been the focus of some interest by the Inquiry. As a consequence, it is likely that I handled aspects of the job differently from my predecessors, no doubt at times to both advantage and disadvantage. I am not, however, best placed to comment on or draw lessons from this experience.

6. In his evidence to the Inquiry, Lord Goldsmith referred to the instruction of counsel in the event that a legal challenge was mounted to the decision to take military action.[1] A now declassified note of 13 March 2003 by David Brummell, the Legal Secretary to the Law Officers, which I saw for the first time on its declassification and publication on the Inquiry's website, records that "It was agreed that it might be worth also retaining David [sic] Bethlehem … to provide further assistance should this prove necessary." Reflecting this, at some point in the days following that note, I had a brief telephone conversation with Lord Goldsmith about this possibility and agreed to stand ready to receive instructions as counsel, were this to become necessary. As it happens, this was not necessary. I had no other involvement or contact with HMG on Iraq issues until my appointment as FCO Legal Adviser in May 2006.

7. In part in consequence of this potential involvement as external counsel, I did not publicly express any view on the legal issues that have been the focus of the Inquiry's attention, the only tangentially relevant comments that I have made being in written evidence of 7 June 2004 to the House of Commons Foreign Affairs Committee in the context of its examination of the *Foreign Policy Aspects of the War Against Terrorism*.[2]

8. Although, subsequent to my assumption of office as FCO Legal Adviser in May 2006, I had access to classified government papers concerning Iraq, it is in the nature of access to classified information, and of the pressing momentum of the normal work of the FCO Legal Adviser, that I did not, during my tenure, see any classified papers of significance concerning this matter other than those that may have been relevant to on-going work. As this statement follows my departure from the FCO, the only papers to which I have had access for purposes of its preparation are those that are in the public domain. For purposes of this evidence, I have familiarised myself with the evidence given to the Inquiry by the legal witnesses.

The FCO Legal Advisers' Office

9. Sir Michael Wood, in paragraphs 2–5 of his first written Statement of 15 January 2010, describes the structure and functioning of the FCO legal team during his tenure, and his responsibilities, in terms that are readily cognisable to me and with which I agree, save only that his description of some of the issues that occupied his time during this period are particular to him. As the structure of the legal team has changed in important aspects since this period, however, it may be helpful to update his description.

10. In the period to May 2011, the size of the legal advisory component of the FCO legal team grew by around 25% to around 35 London-based lawyers and a further 10 or so on postings abroad or external secondments.[3] This growth in numbers reflected an increase in the need for legal advice and services, in part in consequence of an increase in domestic litigation in which the FCO was either a party or otherwise had an interest and in part as a function of the acknowledged

[1] Transcript, p.195, lines 9–12.
[2] FAC, Seventh Report of Session 2003-04, Volume II, pp.100 *et seq.*
[3] The FCO Legal Advisers' office includes a number of components, only one of which is the legal advisory group comprising lawyers. Other components include treaties, office management and registry, library, maritime policy and foreign compensation claims teams.

importance within the FCO of the central role of law in the formulation and conduct of foreign policy.

11. With the growth in numbers, as well as for other internal management reasons (which, for the avoidance of doubt, I emphasise had nothing whatever to do with issues concerning Iraq), I took the decision to restructure the working of the legal team during the period of my tenure. This restructuring, which was undertaken incrementally over a number of years, was crystallised in 2010 with the organisation of the lawyers into a structure comprising four thematic teams, to which were also allocated various geographic groups: (a) EU and Wider Europe, (b) International Institutions and Security Policy, (c) Counter-Terrorism and Human Rights, and (d) General Law and Litigation. Reflecting the importance, in both organisational and operational terms, although not for purposes of line management, the internal organisational chart depicting the revised structure also indicated the FCO legal advisers on secondment or postings overseas, including in the Attorney General's Office and in the UK diplomatic missions in Brussels (UKREP), Geneva, The Hague, New York (UKMIS), Strasbourg and Washington.

12. Under this revised structure, legal advice was provided within the Office much as described in paragraphs 4 and 5 of Sir Michael Wood's first written Statement of 15 January 2010. The revised structure, however, affected a change in management and operational responsibility within the legal team, cover for absences, professional career development and other matters. Each team is led at legal counsellor (ie, SMS, or senior management) level, is composed of a number of more junior assistant legal advisers, and is overseen by a deputy legal adviser. Overall responsibility, however, both for management and operational advisory purposes, remains with the principal Legal Adviser, who reports and has direct access to the Permanent Under-Secretary and the Foreign Secretary.

13. As will have been clear from Sir Michael Wood's evidence, the role and responsibilities of the FCO Legal Adviser are wide ranging, with considerable and varied demands on his time. In the nature of things, therefore, the vast bulk of advisory work is undertaken by other members of the legal team, with the Legal Adviser being directly and actively engaged on only a small portion of it.

14. During my tenure, it was my practice to engage directly in an operational advisory capacity in a number of circumstances, including those that engaged the following types of issues: (a) issues that members of the legal team brought to me for involvement or review for whatever reason; (b) issues of particular complexity, novelty or weight on which my personal engagement was appropriate; (c) issues on which my personal involvement was for whatever reason requested by the Foreign Secretary, other ministers, the PUS or other senior policy colleagues; (d) issues that potentially engaged the reputational responsibility of HMG, the FCO, or its ministers or officials; (e) a small number of what may be described as redline issues, such as threshold questions concerning the UK use of military force, military targeting and other issues of similar moment; (f) issues on which there was an appreciable concern about a risk of unlawful conduct associated with any policy under consideration; (g) issues of an external representational nature engaging FCO, or HMG, interaction with foreign interlocutors on issues of international law; (h) issues on which legal advice provided by other members of the legal team might benefit appropriately, in bureaucratic terms, from senior endorsement; (i) issues on which it became apparent to me that further, senior-level engagement was necessary; and (j)

issues on which members of the legal team otherwise required support or assistance in their engagement with those they were advising or with whom they were dealing, whether in the FCO in London, in UK missions abroad, in other HMG departments or agencies, or elsewhere. Although these issues are not fleshed out in the evidence provided by Sir Michael Wood or the other FCO legal witnesses, I do not understand my engagement in these terms to be materially different from the engagement of Sir Michael.

15. In common with the arrangements during Sir Michael's tenure, the wider management and operational oversight of the legal team during my tenure was shared across a senior management team comprising the Legal Adviser and the three deputy legal advisers. I should add that, as was the case with Sir Michael, my responsibilities entailed considerable foreign travel. Day-to-day management of the legal team was therefore in practical terms in the hands of a managing deputy legal adviser, with the other deputy legal advisers alongside. The role of a managing deputy legal adviser, together with the team structure noted above, were important elements of the working arrangements put in place during my tenure.

16. As it may be germane to the Committee's appreciation of the issues, there is one further potentially relevant FCO-wide issue that warrants comment. In reading some of the evidence presented to the Inquiry, I have been struck by the formality, at times seemingly cumbersome, of the process of instruction from London to UKMIS in New York concerning the negotiating of what became Security Council resolution 1441 (2002). This is not intended as an observation on the bureaucracy of the engagement, the formality and accountability of which is entirely appropriate, but rather on its medium and technology. As I was not in the FCO at the time, I am not in a position to assess the accuracy of this appreciation, but my experience of the way in which the London-based FCO (and indeed, as appropriate to the issues, the Whitehall-wide) policy and legal teams have engaged with those in UKMIS in more recent years on issues concerning the negotiation of Security Council resolutions is that, save in a small number of exceptional cases, this has included emailing, with multiple copy-addressees as appropriate (including by blackberry emailing, folding in those out of the office), video conferencing, and other mechanisms which enable timely, inclusive and interactive communication. This is quite apart from the use of more formal egrams (or electronic telegrams), which crystallise instructions and statements of position at a moment in time for all to see (perhaps on a daily or other intermittent basis) but which are less readily interactive and inclusive.

17. As is addressed further below, from what I have seen of the issues, I agree fully with the observations that have been made in evidence to the Inquiry about the wholly exceptional nature of the negotiations that led to resolution 1441 (2002). I am not in a position to comment on whether they were appropriate to the time and the circumstances. What I can say, however, is that the modalities of that negotiating process are not typical of the modalities of the processes that operate in respect of the negotiation of Security Council resolutions more generally. There are no doubt many reasons for this, including the close personal involvement of the then Foreign Secretary in the negotiating process, the particular political significance of that resolution, the sensitivity of the issues in question, their security classification, and the likely or potential consequences that would follow from the resolution. It may also be, however, that an additional factor was the usual modality of communication between those engaged on the matter, whether for reasons of technical facility or of common

practice. Certainly, my experience suggests that, save in exceptional cases, usually of high sensitivity and classification, all those in London, New York or elsewhere who ought to be aware of any on-going policy and legal discussion of HMG's negotiating position, are readily able to be a part of that loop, and usually are. If greater communications flexibility is a feature of a change of practice since 2002-03, the Inquiry will no doubt wish to be cautious about making any recommendations which may be contingent on operational modalities that no longer accurately reflect current practice.

The exceptional nature of the negotiating process leading to Security Council resolution 1441 (2002)

18. It is not necessary or appropriate to enter too deeply into the exceptional nature of the SCR 1441 negotiating process, or how it differed from other SCR negotiating processes, but it is important to underline the point.[4] Simply on the basis of what is in the public domain about this and other SCR negotiating processes, the SCR 1441 negotiating process was highly exceptional. The then Foreign Secretary was closely engaged, on an on-going basis, and at a level of technical detail, in the negotiations, including with his foreign counterparts. The negotiations were protracted, lasting over weeks and months. Important elements of appreciation hinged on the interpretation of antecedent resolutions of the Security Council adopted in the previous 12 years, critically, resolutions 678 (1990) and 687 (1991). The revival theory at the heart of the issue was, as has been expressed in evidence to the Inquiry by those involved at the time, unique to the Iraq issue. The issues addressed in the resolution engaging the role and involvement of the United Nations Special Commission (UNSCOM), the International Atomic Energy Agency (IAEA), the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC), and others were exceptional. The factual situation on the ground, going back to the Iraqi invasion of Kuwait in August 1990, but also through the important developments in the late 1990s, and those on the ground in the region in 2002-03, was unique. The likely or potential consequences of the resolution, while not perhaps unique, were nonetheless uncommon.

19. Given these factors, the atypical nature of that process does not, at least from my vantage point, translate easily into more generalised evaluations of wider application.

20. This being said, as the incumbent FCO Legal Adviser in May 2006, the shadow of Iraq left me with a very clear sense of the importance of maintaining the practice of engaged FCO legal advice on comparable issues, including the challenge of ensuring that a legal voice was present around the appropriate tables when such issues were discussed. This is addressed further below in response to the fifth question put to me for response by the Inquiry.

Questions for Response

(1) During your time as the FCO Legal Adviser, what were the arrangements for, and actual practice within, the FCO regarding the provision of legal advice to those

[4] It is not *necessary* to enter deeply into this issue as the point has been already made in evidence to the Inquiry by others. It is not *appropriate* to enter deeply into this issue as to do so would require fuller explanation of the negotiating process of other resolutions which may have a continuing currency and are not otherwise within the Inquiry's focus.

negotiating significant Security Council Resolutions, in particular, those resolutions relating to threats to international peace and security

21. Before engaging with this question directly, some contextual explanation is necessary.

22. During my tenure as FCO Legal Adviser, the UN Security Council adopted 306 resolutions and issued 212 Presidential Statements. I note the Presidential Statements as well as the resolutions as the PRSTs, as they are commonly referred to, are closely negotiated and reflect a consensus of the Members of the Council. Although PRSTs do not in principle have binding effect as decisions of the Security Council pursuant to articles 25 and 48 of the United Nations Charter, they are nonetheless statements of the Council of some considerable importance. In the five years of my tenure, the Security Council thus adopted or issued some 518 resolutions or PRSTs, all of which in some manner engaged the Council's primary responsibility for the maintenance of international peace and security, in accordance with article 24(1) of the Charter.

23. Of the 306 resolutions of the Council during this period, over half – some 163 – contained express reference, on the face of the resolution, to action under Chapter VII of the Charter, ie, that part of the Charter concerned with "action with respect to threats to the peace, breaches of the peace, and acts of aggression". A further handful of resolutions, while not referring in terms to Chapter VII of the Charter, contained an express determination of a threat to the peace in accordance with article 39 of the Charter, ie, the opening article of Chapter VII. Other resolutions, while containing neither an express reference to Chapter VII nor an article 39 determination, cross-referred to other resolutions of the Council which had been adopted under Chapter VII or addressed non-Chapter VII dimensions (concerning, for example, the pacific settlement of disputes, addressed in Chapter VI of the Charter) of situations other aspects of which were the subject of resolutions adopted under Chapter VII. In the case of the Security Council's engagement on Afghanistan, for example, some resolutions made express reference to Chapter VII, and were clearly intended to be binding as decisions taken on that basis, while other resolutions made no such reference, and were less normative and more hortatory in character, but nonetheless addressed inter-related aspects of the wider circumstances in Afghanistan with which the Council was seized.

24. To add to the nuance, the legal and operational complexity, and political sensitivity, of Council resolutions varies considerably in ways that are not always self-evident simply from the bare text of the resolution. It is not necessarily the case, for example, that a resolution adopted under Chapter VII and containing "all necessary measures" language requires closer negotiating attention than another that appears superficially to be less challenging. By way of illustration, resolution 1948 (2010), concerning the situation in Bosnia and Herzegovina, contains 26 preambular paragraphs and 22 operational paragraphs, extending over 6 pages. It determines that the situation in the region continues to constitute a threat to international peace and security, expressly states that the Council is acting under Chapter VII of the Charter, and goes on to authorise UN Member States acting through or in cooperation with the EUFOR multinational stabilisation force and NATO "to take all necessary measures" in implementation of various aspects of the mandate laid down in the

resolution.[5] Given its terms, on first review, this resolution suggests the need for close negotiating attention, including of a legal nature.

25. In contrast, resolution 1860 (2009) contains 9 preambular paragraphs and 10 operational paragraphs, covering less than 2 pages. It does not contain any determination of a threat to the peace, nor make any reference to Chapter VII of Charter. It does not authorise the use of "all necessary measures". The strongest language used in the resolution is "calls for". On first review, there is little in the text that would seem to have required close negotiating attention.

26. The reality, however, is different. Resolution 1948 (2010) was essentially a rollover resolution, repeating, affirming and extending the terms of resolution 1895 (2009), and others before it, including in its "all necessary measures" authorisations.[6] While important, and of normative quality, it was relatively straightforward legally and politically. In contrast, resolution 1860 (2009) concerned the situation in the Middle East and was adopted in the middle of the Israeli Operation Cast Lead military action against Hamas in Gaza on 8 January 2009. As the UN Press Release noting the adoption of the resolution indicates, present in the Council and speaking to the issues for the United Kingdom was the then Foreign Secretary David Miliband, alongside the then French Foreign Minister, Bernard Kouchner and US Secretary of State, Condoleezza Rice (as well as other foreign ministers), all of whom had been directly and closely involved in the negotiation of resolution.[7]

27. Resolutions also differ considerably in their legal complexity and reach in ways and for reasons that may not always be readily apparent. For example, resolutions imposing sanctions of some variety, which engage, whether directly or indirectly, the interests of private persons, have legal and practical implications that reach into the domestic legal sphere. Even if there is no particular novelty in their formulation, therefore, or indeed political controversy in their adoption, they tend to require close negotiating attention and legal input. Resolution 1904 (2009), for example, which addressed the Al Qaida / Taliban sanctions regime first established by resolution 1267 (1999), is a highly complex text extending over 15 pages. One element of the resolution was the establishment of the Office of the Ombudsperson to assist the Security Council Sanctions Committee in its consideration of delisting requests. The importance and effect of this resolution were considerable, requiring close legal involvement and advice.

28. The preceding will not be unfamiliar to the Inquiry. I set it out in these terms, however, to emphasise that it is not necessarily straightforward to identify and differentiate what the question put to me describes as "significant UN Security Council Resolutions", in contrast to those that may be regarded as less significant. Similarly, given the Security Council's primary responsibility under the Charter for the maintenance of international peace and security, a responsibility that informs all of its work and the adoption and issuing of each of the 518 resolutions and Presidential Statements over the period of my tenure, differentiating "resolutions relating to threats to international peace and security" from resolutions that do not so relate may not ultimately be either a useful or a meaningful exercise.

[5] See OP14, 15 and 16.
[6] See OP14, 15 and 16 of the earlier resolution.
[7] SC/9567, 8 January 2009.

29. For purposes of preparing this statement, I reviewed each of the 306 resolutions adopted by the Security Council during the period of my tenure. I was familiar with some, and indeed had a hand in advising on some aspect of the texts in draft. I was unaware of others, such was their routine or uncontroversial nature and content. While an external observer may have been able to identify many that would have attracted close negotiating attention and legal input, many others of importance would not have been readily apparent.

30. I turn, against this background, to the specifics of the question put to me. In his Third Statement to the Inquiry of 15 March 2011, Sir Michael Wood described the arrangements for providing legal advice to those negotiating SCR 1441, noting the roles of the then legal counsellor and the deputy legal adviser on this matter and that virtually all significant pieces of written legal advice were a cooperative effort. This is an exemplar of best practice, engaging sustained and senior-level attention appropriate to the circumstances with which they were concerned.

31. On the generality of the practice during my tenure, the nature of the legal input turned on the specifics of the text with which we were concerned. Resolutions that were routine, uncontroversial and legally straightforward, such as a peacekeeping mandate rollover resolution, would not have required much legal input, if any. In contrast, complex sanctions resolutions required and received detailed legal input at every stage of the process, with the lawyers working alongside their policy colleagues leading on the matter.

32. Responsibility for providing legal advice on Security Council resolutions, and on UN-related matters more generally, rested in the first instance with the legal adviser advising the International Organisations Department. This tended to be a legal counsellor (ie, SMS, senior management) level lawyer, although for some period during my tenure, for staffing reasons, this role was performed by a deputy legal adviser. Depending on the issues, others in the legal team would be drawn in to assist or take on a lead role as appropriate; for example, the lawyer advising the relevant geographic or thematic FCO policy team, if the draft resolution concerned, say, the Middle East, piracy, non-proliferation, etc. The legal team is sufficiently small, homogenous and concentrated within the Office that it was a straightforward matter of common practice for those with an interest in the issues to discuss the matter as required.

33. Legal advice was fed into the drafting and negotiating process on an on-going basis. Depending on the issues, the lawyers worked closely with their policy colleagues, advising on the legal issues as they arose. As a matter of general practice, a good deal of the discussion took place by email, copying in all who had an interest in the matter. When appropriate, formal instructions, whether of a drafting nature or going to such issues as wider engagement to secure political support, were addressed in egrams or more targeted and formal correspondence.

34. Within the legal team, issues of particular complexity, novelty or weight attracted wider discussion and, as appropriate, were escalated up for more senior input. In this way, although I was not, as a general matter, drawn into advising on draft resolutions, particular issues were regularly drawn to my attention and my input sought. Resolution 1851 (2008), concerning piracy off the coast of Somalia, is one such example of a draft text that occasioned close

legal engagement, including on my part, the particular issue of importance in this case being the terms and scope of the "all necessary measures" authorisation in OP6 of the resolution.

35. These drafting / negotiating discussions amongst the London-based team also drew in the policy and legal teams in UKMIS, UKREP (Brussels) and elsewhere, as appropriate to the issues and circumstances. It was not uncommon, for example, in respect of key sanctions resolutions, for the London-based team (policy and legal) to have video conferencing discussions about the drafting and negotiating process with the policy and legal teams in both UKMIS and UKREP.

36. The preceding goes to the generality of the practice of providing legal advice on the drafting and negotiation of Security Council resolutions, including those of particular importance relating to threats to international peace and security. Having been closely engaged on these issues, and having reflected on the practice over the period of my tenure, I am of the view that the arrangements generally work well. I have also been particularly, and favourably, struck by how consummately well and effectively the FCO / HMG engages on these issues (including their legal aspects). In my experience, legal advice and appreciation is central to policy formulation within the FCO, and in HMG more generally. In cases in which there are challenges or strains, these tend to emerge because of the high sensitivity and security classification of the issues being addressed, which complicates easy communication and correspondence, or because of the political sensitivity of the issues, which may raise questions going to the objectives of the texts and the policy to which they relate, or more simply for capacity reasons, given the small size of the legal team or of the pressures faced by those involved in the matter more generally.

37. Given the context of the question put to me, two further points may assist the Inquiry's consideration of the matter. First, the Inquiry's focus, for present purposes, is on the negotiation of resolution 1441 (2002), which took place in September to early November 2002 but which began to take on a wider significance into 2003, especially as the possibility of securing a further resolution receded. As I read the legal evidence to the Inquiry on this point, I am struck by what may have been a dissonance between the perceived weight-bearing quality of the resolution at the point of its negotiation and the weight-bearing character that it came to have in the period thereafter. The point goes to a matter of evident interest to the Inquiry as it is raised in the third question put to me going to the absence of discussion of the draft resolution between Sir Michael Wood and Iain Macleod. I address that specific question further below, but it may assist the Inquiry to have an example that may shine further light on the issue from the perspective of an entirely different case.

38. I noted above my involvement in advising on various aspects of resolution 1851 (2008) concerning piracy off the coast of Somalia. An important aspect of that resolution was the authorisation, in OP6, that "States and regional organisations … may undertake all necessary measures that are appropriate in Somalia, for the purposes of suppressing acts of piracy and armed robbery at sea …" (emphasis added). The critical issue here was that the Security Council was authorising the use of all necessary measures on the land territory of Somalia, not just off its coast at sea, for purposes of suppressing piracy at sea. There was no controversy or doubt about this authorisation and its object and intention.

39. Although I was engaged in discussions on this issue with the London-based policy and legal teams, and others had closer and on-going involvement on the wider aspects of the resolution, I do not recall having had any discussion of this resolution at any point with the legal team in UKMIS New York, even though we may well have been speaking about a range of other issues at the time. The reason for this is simply that there was no apparent need for any such discussion. Although there was a sizeable international naval flotilla off the Somali coast engaged in anti-piracy operations, using military force on occasion, and acute concern about the economic and personal effects of the piracy that was emanating from pirate "bases" on land in Somalia, the terms of the resolution and its process of negotiation were not such as to leave me with any pressing sense of imperative to discuss them with the legal team in New York for purposes of clarifying some or other issue.

40. If, however, in subsequent reliance on that resolution, there were to have been, in the six months that followed, a massive deployment of many thousands of troops from the offshore naval flotilla onto Somali territory for purposes of tackling the geographic source of the pirate threat, and with consequences that went beyond anything that might have been said to have been in contemplation when the resolution had been adopted, I can imagine that it might have been put to me, perhaps with a degree of incredulity, why it was that I had not had a discussion about the terms of the resolution with the legal team at UKMIS in New York at the time that the resolution was being negotiated. But the answer would have been straightforward: viewed at the point of the negotiations looking forward, rather than with hindsight and in the face of events that subsequently unfolded, there was no particular reason why such a conversation seemed necessary. The appreciation of the weight-bearing character of the resolution at the point of its negotiation and adoption was not the same as that which it came to have subsequently as the circumstances changed.

41. This analogy is not, of course, on all fours with the circumstances surrounding the negotiation and adoption of resolution 1441 (2002) but the general point is, I believe, germane.

42. The second additional point concerns the readacross from the generality of the practice that I described above, concerning the arrangements for the provision of legal advice to those negotiating significant Security Council resolutions, to the circumstances of the negotiation of resolution 1441 (2002). As I have noted above, the circumstances surrounding the negotiation of that resolution appear to me to have been in every way atypical and exceptional. I would therefore urge caution about drawing too many conclusions from the generality of the practice as I have described it, and which I expect also reflects the generality of the practice during Sir Michael Wood's tenure, for purposes of an evaluation of whether the practice that was followed in respect of resolution 1441 (2002) was appropriate. An assessment of the propriety or otherwise of the negotiating process of resolution 1441 (2002) must ultimately, in my view, hinge on the particularities of that case.

(2) What were the arrangements for, and actual practice regarding, the exchange of information and views between FCO Legal Advisers and members of the UK Mission to the UN?

43. Insofar as this question is focused on an exchange of views concerning the drafting and negotiation of resolutions of the Security Council, the general

practice is addressed in response to question (1) above. More broadly, it is not possible to address, in any meaningful way, the arrangements and actual practice for the exchange of information in the abstract, divorced from any particular issue. The London-based legal team engaged constantly as a matter of common practice with the UKMIS legal and policy teams on any given issue, by email, by VTC (video conferencing), by telephone and, on occasion, by meetings in person, usually in New York.

44. In saying this, I emphasise that I do not understand this practice under my tenure to have been materially different to the practice under the tenure of my predecessors, save only that the technological ease of communications, and the common practice regarding such communications, may have developed over time. I also emphasise that I do not believe that this general practice sheds much useful light on the negotiation of resolution 1441 (2002). There are certainly circumstances within my experience, where the issues in questions were of high sensitivity and classification, and were being addressed on a narrow close-hold basis by a small number of officials, in which the general practice described above was not followed for good and proper reasons.

(3) Sir Michael Wood said in his third witness statement: "I do not recall discussing the negotiation of SCR 1441 with Sir Jeremy Greenstock or Iain MacLeod … Nor in my view would it have been appropriate for Iain MacLeod and me to have conducted some sort of 'back channel' discussion among lawyers on the course of the negotiations and the ever-changing texts. It would have short-circuited the regular process for feeding in combined policy and legal considerations into the instructions sent to New York. And in the particular circumstances of this negotiation, it would have risked crossing wires, and might been seen as interfering in matters of great political sensitivity".

Do you have any comment on this observation in the light of practice during your time as FCO Legal Adviser?

45. I am not in a position to comment with any meaningful insight on this observation, both for the reason that I have no direct and personal knowledge of the circumstances in issue, not having been in the FCO at the time, and because, as noted above, the negotiation of resolution 1441 (2002) seems to me to have been in every way exceptional and not therefore usefully amenable to analogy or evaluation from the perspective of the general practice. I note, also, that, in the extract of the statement excised from that set out above, Sir Michael notes that he and Iain Macleod were seeing many of the same papers and that legal advice was fully incorporated into the instructions and reporting between London and New York.

46. Beyond this, I can, in the abstract, see many reasons why it would not be necessary and or may not be appropriate for there to be the kind of discussion to which the question alludes. One possibility, going to the need for such a discussion, has been addressed above, in the context of what I described as the appreciation in the moment of the weight-bearing character of the resolution in question. Appreciations of both need and propriety may also be engaged in circumstances in which, for example, the Legal Adviser has been advising the Foreign Secretary, PUS, Political Director or other senior official directly on a personal and confidential basis. Other examples are also apparent.

(4) Sir Michael Wood said in the same statement: "As regards the Attorney's views it should be borne in mind that, given the convention that neither the advice of the Law Officers nor the fact that they had advised was to be disclosed, there was a general practice to the effect that their advice would not be sent to posts overseas."

Do you have any comment on this observation in the light of practice during your time as FCO Legal Adviser?

47. As I understand it, Sir Michael correctly describes the convention regarding the advice of the Law Officers, ie, that neither the fact that the Law Officers have advised nor the content of their advice should be publicly disclosed. This convention, as I understand it, applies to those within the executive branch of Government, ie, the obligation of non-disclosure applies to disclosure beyond the Government but not within or across Government. As such, the convention would not preclude the passing of Law Officers' advice to appropriately cleared government officials in overseas posts and, indeed, in my experience, this does indeed occur in appropriate circumstances.

48. This being said, as is reflected in the exchange between Sir Roderic Lyne and Lord Goldsmith, in the latter's evidence to the Inquiry,[8] there are often, as was the case in this instance, very significant considerations about sensitivity and security associated with the advice of the Law Officers. There may also be questions about (a) the security classification and named addressee of Law Officers' advice, (b) the provisional or final character of the advice, (c) whether, for purposes of wider dissemination and operational application, advice of a technical or lengthy nature may be appropriately summarised or drawn upon by departmental legal advisers for purposes of operational legal advice to be circulated more widely, (d) the risks of inadvertent disclosure of the advice or of a breach of the convention regarding Law Officers' advice, and (e) perhaps other considerations as well, that may dictate that particular advice from the Law Officers is kept on close hold and is not circulated more widely, including to posts overseas.

49. It is not immediately clear to me from Sir Michael Wood's statement extracted above, and of interest of the Inquiry, what "views" of the Attorney are in contemplation. As I noted in opening, I have not had the benefit of seeing any papers available to the Inquiry other that those in the public domain, including as declassified and published by the Inquiry. By reference to these documents, it does not surprise me that the Attorney General's note of 30 July 2002, addressed to the Prime Minister, and marked "Secret and Strictly Personal – UK Eyes Only", would have been kept on very close hold. The same appreciation applies to other notes and correspondence of similar classification from the Law Officers.

(5) Do you wish to offer the Inquiry any observations or lessons from the evidence that the Inquiry has heard on the arrangements for and actual practice regarding the provision of legal advice to HM Government on the legal basis for military action in Iraq?

50. My appreciation of the issues concerning the provision of legal advice on the legal basis for military action in Iraq comes largely indirectly from the evidence provided to the Inquiry. I have no first hand insight into the issues. As such, I

[8] Transcript, p.74, lines 10–16.

am not in a position to offer the Inquiry any meaningful and reliable observations that go specifically to the point in question, ie, the arrangements for and actual practice regarding the provision of legal advice on the legal basis for military action in Iraq.

51. This being said, I have seen, in the evidence provided to the Inquiry, a number of important questions of a more general nature going to the provision of legal advice to Government in such circumstances to which it may be useful to add my voice.

52. I agree with the relevance and importance of the point raised in evidence by Sir Michael Wood and others about the timeliness of seeking and securing legal advice, both from the Law Officers and from departmental legal advisers. Although, in my experience, this is not generally a problem, it can sometimes be the case, whether at the political or senior official level, that there is resistance or antipathy to the involvement of lawyers, and to the seeking of legal advice, at an early stage in the policy formulation process. There may appear, on occasion, to be sensible and benign reasons for this hesitation – for example, so as not to formalise a blue-skies thinking process – although these concerns are, to my mind, unwarranted and, in their implementation, unwise. In my view, it is an essential part of coherent policy formulation that a legal voice is around the table from the outset, just as one would expect to have present in the discussion the relevant geographic and thematic policy experts. In the case of circumstances such as those in the Inquiry's focus, I agree fully with the observations that have been made that the timeliness of seeking and securing legal advice is and would have been of considerable importance.

53. I also agree with the importance and relevance of the point raised in the evidence of Sir Michael Wood, and addressed in the evidence of others, including Lord Goldsmith, about the appropriate threshold when advising on the legality of action in contemplation, ie, is the appropriate test one of a "reasonable case", a "respectable case", an "arguable case", or some other evaluation of the strength of the assessment, such as an "on balance" assessment or a statement of evaluation of what constitutes "the better view".[9] As with Sir Michael's evidence, I do not here offer a concluded view on what that threshold should be, and observe that it is likely, quite properly, to be different in different circumstances.

54. Although this is not a guide apposite to the particular circumstances under consideration, it may be useful to note that the England & Wales Bar Standards Board Code of Conduct prohibits a barrister from advancing a contention or a submission in legal proceedings that he or she "does not consider to be properly arguable".[10] This injunction applies to advocacy rather than to advice, and advice, covered by legal professional privilege in part, precisely, to encourage candour in the provision of advice, has the function of providing a considered assessment of legality. The question remains, therefore, as to what the appropriate standard ought to be in the kinds of circumstances under consideration.

55. Separate from these issues, the Inquiry put to Lord Goldsmith the question of whether it was normal for a lawyer to put to a client "a preliminary draft of what

[9] In this regard, I note the evidence of Lord Goldsmith on this point at Transcript, p.125, lines 22-25 to p.126, lines 1-6.
[10] BSB Code of Conduct, at paragraphs 704(b) and 708(f).

eventually becomes the formal advice of the law officer?"[11] Although it is only a passing point, fully addressed by Lord Goldsmith in response, it is a matter of wider practice on which I might usefully comment. As a barrister, it is entirely common, especially on matters of some complexity, and on which the lawyer advising may not be in possession of all the facts, for draft advice to be prepared for discussion with the client. This allows the key issues relevant to the advice to be identified in writing, and the client, who will often be expert in and thoughtful about the details, to bring other relevant considerations to the attention of the lawyer concerned. The fact of draft or preliminary advice is not a device to afford the client an opportunity to change the mind of the lawyer. It is a drafting mechanism to enable a lawyer to be properly informed of all relevant issues as he or she formulates his or her assessment of the complexities of the matter in question. As with Lord Goldsmith, this is an approach that I adopted commonly in private practice and, as FCO Legal Adviser, often required of counsel, precisely so as to ensure that those advising would have an opportunity to discuss their thinking as they were formulating their final views.

56. Beyond these issues, there are two others, closely related, that I would raise for consideration by the Inquiry that go to wider machinery of government considerations in the provision of legal advice in the kinds of circumstances with which the Inquiry is concerned. In raising them, I emphasise, however, that I neither make nor imply any comment about their likely or potential impact on any element of the provision of legal advice on the matters with which the Inquiry in concerned.

57. The first issue is that in my view the Attorney General should *ex officio* be a member of the Cabinet and attend Cabinet meetings. I note that this accords with Lord Goldsmith's view, expressed in evidence to the Inquiry,[12] and agree with it unreservedly. While, based on my experience as an external appointee to the FCO Legal Adviser's seat, I am of the view that the FCO – and other Whitehall departments and agencies more widely (such that I had experience of them) – does law rather well, in the sense that the departmental legal team is fully engaged alongside their policy colleagues in the formulation and execution of policy, I am not persuaded that the same can be said of the office of the Prime Minister and of the Cabinet.

58. It is not simply that the absence of the Government's most senior lawyer, and the constitutional authority on questions requiring legal advice, sends signals about the place and weight of law in policy formulation and execution; which it does. It is that the provision of timely, considered, informed and effective legal advice requires a legal adviser to have an early and rounded appreciation of the context of the issues on which he or she is advising. The Attorney General is also the Government's legal adviser, not the Prime Minister's legal adviser. As things stand, the Attorney General probably has more to do directly with the various departmental legal advisers who seek the advice of the Law Officers than he or she has to do with the Secretary of State to whom those legal advisers ultimately report. This is, in my view, a shortcoming in the central government arrangements for informed and effective legal advice at the heart of government.

59. The second issue is closely related to the first, and flows from the same considerations. It is the absence of a legal adviser, at official level, in the Prime

[11] Transcript, p.73, lines 4-6.
[12] Transcript, p.102, lines 19-24.

Minister's office, as part of his or her immediate advisory team. As things stand, there is no provision in our governmental arrangements for a position akin to that of White House counsel in the US, or similar positions in other countries. Although a recent innovation, and therefore outside the Inquiry's purview, it is striking that the UK National Security Council does not include amongst its team any dedicated legal component. Insofar as the NSC machinery was preceded by Cabinet Office machinery that operated, at least at official level, in a broadly similar fashion during the period under consideration by the Inquiry, this aspect of governmental structure remains the same. The question of whether there ought, as a machinery of government consideration, to be a position of Legal Adviser to No.10, as well as a dedicated legal component to the National Security Council, continues therefore, at least in my view, to be germane.

60. For the avoidance of doubt, I should add that this is not by any means a straightforward issue, free from legitimate debate and strong countervailing considerations. It is not therefore an issue that the Inquiry could responsibly address without careful further consideration, including as to its relevance to the matters properly within its purview. I raise it nonetheless as, as I have reflected on the events concerning Iraq, through the prism of my experience over five years as FCO Legal Adviser, it seems to me that, alongside the absence, as a matter of course, of the Attorney General from Cabinet meetings, the absence of a day-to-day senior and engaged legal component in the immediate team around the Prime Minister is and ought to be a matter for careful review. As things stand, the Prime Minister is only in receipt of legal advice either indirectly, through departmental legal advice incorporated, invariably in summary form, in departmental papers provided to him, or, more formally and intermittently, through advice sought from and provided by the Attorney General. Yet, legal issues, as with departmental Secretaries of State, arise for consideration by the Prime Minister on an on-going basis, as an intimate part of decision-making and policy formulation. The Prime Minister ought to have the benefit of such advice. This would not guarantee better decisions, or decision-making (leaving open the question of whether and what flawed decisions might have been taken). But it would facilitate better informed decisions and decision-making, as well as sending important signals about the role and place of law in central government policy formulation at the most senior levels.

Daniel Bethlehem QC

24 June 2011