

IRAQ INQUIRY

Supplementary Memorandum by the Rt Hon Jack Straw MP

1. This memorandum is supplementary to the one which I submitted to the Inquiry in advance of my first evidence session of 21 January 2010. It deals specifically with the issue of legal advice.
2. The Inquiry has already received extensive oral evidence in respect of the legal position regarding military action, including from the Attorney General at the time, the Rt Hon Lord Goldsmith QC, Sir Michael Wood, FCO Legal Adviser, Ms Elizabeth Wilmshurst, FCO Deputy Legal Adviser, and Mr David Brummell, Legal Secretary to the Law Officers.
3. From this and other evidence, the Inquiry is well aware that there were two views as to the proper interpretation of UNSCR 1441, and that throughout the period up to 18 March 2003 Sir Michael, and Ms Wilmshurst, had consistently been of the opinion that 1441 did not of itself provide sufficient authorisation for military action; a specific second resolution would be required. Given that, I am sure that a key question which the Inquiry will have in mind is why (by a minute of 29 January) I chose “not to accept” advice from Sir Michael (dated 24 January) couched in those terms.
4. I begin the answer to that question with some observations on what I consider to be the proper relationship between Ministers and officials, including legal advisers.
5. In four senior posts in Government, over nearly thirteen years, I have always sought to act in a way which shows proper respect for the differing constitutional roles of Ministers and officials, and the creation of an open environment in which officials, in practice as well as theory, feel comfortable about offering challenging views.

6. I have also seen it as my duty to protect officials, wherever possible. All the major Departments I have run have operations which expose the Department and its Secretary of State to the unexpected – not least the old, very large pre-2007 Home Office. I was unimpressed by those who sought to dilute Ministerial responsibility to Parliament by the casuistry of claiming that they were “accountable but not responsible”, delegating the responsibility to senior officials. What Parliament and the public expect is that the Secretary of State shoulders a personal responsibility for his/her Department.
7. Part of the duty to protect officials is about effective process. It is plainly better all round if the personal relationships between Ministers and officials are not starchy, but, in my view, good governance requires a degree of formality in process, including proper record-keeping. Thus it has been my consistent practice, in addition to meetings, to make decisions on the basis of written submissions, to endorse and date any official document which I have read, and to ensure that any comments are conveyed to officials in writing. I regard all this not as “bureaucracy” but fundamental to proper running of the system, and to Ministers’ responsibility to Parliament.
8. As the records - both declassified and still classified - show, as Foreign Secretary I took a very close interest in the question of the lawfulness of any military action in which the United Kingdom might be involved. I readily accepted the advice that neither self-defence nor overwhelming humanitarian necessity could provide a proper legal base for a possible invasion of Iraq. Régime change in itself was plainly unlawful.
9. The key issue was whether, and if so in what circumstances, the better view was that military action to deal with Iraq’s Weapons of Mass Destruction would be lawful.

10. There had been some earlier question as to whether in certain circumstances the extant UNSCRs dating back to 1990 could themselves provide a lawful basis for military action against Iraq. But by late July 2002 the question of proceeding without further UNSC authorisation was rather academic since I could see no prospect of Cabinet or Parliamentary approval for military action in the absence of the UK being successful in “going down the UN route.” Without prejudice to my settled view, I did have publicly to protect our negotiating position with other UNSC partners.
11. As has been the settled constitutional position, the definitive legal advice on any military action would be a matter for the Attorney General alone.
12. In the event, we were successful in securing the unanimous passage of UNSCR 1441, and so the focus shifted to the text of that resolution, and its interpretation when set against the behaviour of Iraq.
13. Following a private meeting in mid January 2003 with the then US Vice President Richard Cheney, the usual rather cryptic summary of my conversation was issued in a confidential FCO telegram (Washington 93). Reading this, Sir Michael sent me his minute of 24 January which, with my response, has been the subject of considerable interest by the Inquiry, and publicly.
14. Far from “ignoring” this advice, as has been suggested publicly, I read Sir Michael’s minute with great care, and gave it the serious attention it deserved. So much so that I thought I owed him a formal and personal written response, rather than simply having a conversation with him.
15. This response was conveyed in my minute of 29 January. This opened by saying “I note your advice, but I do not accept it”, and then explained why.

16. I came to this view because I was struck by the categorical nature of the advice I was being offered in the minute, and its contrast with the very balanced and detailed advice the same Legal Adviser had proffered to the Attorney General. The minute sent to me said, in terms, “But I hope that there is no doubt in anyone’s mind that without a further decision of the Council, and absent extraordinary circumstances (of which at present there is no sign) the United Kingdom cannot lawfully use force against Iraq to ensure compliance with its SCR WMD obligations. To use force without authority would amount to a crime of aggression.” (emphasis added)
17. It was however incorrect to claim that there was “no doubt” about the position. There was of course no doubt about the illegality of self-defence, overwhelming humanitarian necessity, or regime change per se, as a basis for military action and no one was suggesting the contrary. But there was doubt about the position, in so far as two views were set out in Sir Michael’s letter of 9 December to the Attorney General’s Office, in considerable detail. This was at the heart of the debate on lawfulness. In turn and in part this depended on the “negotiating history” – “the discussions leading to [1441], the Charter provisions involved and in general all circumstances that might assist in determining the legal consequences of the resolution” – as the Namibia ICJ Advisory Opinion, to which the Legal Adviser’s letter of 9 December to the Attorney General’s Office had also drawn attention (para 18), had suggested.
18. I am not, famously, an international lawyer, but I had lived and breathed the negotiation of 1441, and therefore had an intense appreciation of its negotiating history. I also had an acute understanding of what, in particular, the French (and Russian and Chinese) governments had said following the passage of 1441 in their Explanations of Vote, and in the 2003 Ministerial Security Council meetings, and – crucially – what they had not said. I believed that all of this should be weighed in the balance before a decision on the lawfulness or otherwise of any military action in

which we could be involved. That decision was one for the Attorney General alone - a fact to which no reference had been made nor qualification offered in the Legal Adviser's minute to me of 24 January.

19. Once the Attorney General had uttered on this question, that would have been the end of the matter; as on any other similar legal question. It would be wholly improper of any Minister to challenge, or not accept, such an Attorney General decision, whatever it was. But we were not at that stage. It would surely be a novel, and fundamentally flawed, constitutional doctrine that a Minister was bound to accept any advice offered to him/her by a Department's Legal Adviser as determinative of an issue, if there were reasonable grounds for taking a contrary view. Such a doctrine would wholly undermine the principle of personal Ministerial responsibility and give inappropriate power to a Department's Legal Advisers.
20. I readily acknowledge that, however serious and weighty were the matters with which I dealt as Home Secretary, none compared with the potential gravity of the potential decision facing us over Iraq – whether to take military action.
21. That was one difference between my experience as Home Secretary and Foreign Secretary. The second is that in domestic matters we can secure authoritative determination of the law from the courts. In this area of international law, recourse to the courts is not available. This means that international law must be inherently less certain, and that, given the seriousness of the issues, great care has to be taken in coming to a view. But the absence of an external tribunal means that a view has in the end to be taken by the Attorney General, on whose shoulders rests a great weight of responsibility.
22. The decision by the Attorney General was not a decision on the merits of taking military action; it was a question as to whether we could consider those merits. The two are different. Advice that we had a legal option to

take military action then allowed us to consider the moral and political case for that military action. The former was not a proxy for the latter.

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