I was the Legal Adviser to the Foreign & Commonwealth Office between 1991 and 1999, having been immediately prior to that, as Deputy Legal Adviser, temporarily in charge of legal affairs in the FCO at the time Iraq invaded Kuwait, and I retained the day-to-day responsibility for the dossier thereafter. I was therefore intimately associated with the drafting of all Security Council Resolutions (SCRs) on the question, and with the policy considerations that went into them, from SCR 660 onwards and at least as far as SCR 687, acting in this respect as the direct liaison to the Attorney General and his legal staff. After I took over the post of Legal Adviser in November 1991, however, the day-to-day responsibility passed into other hands, and mine became one of general supervision and oversight. Throughout the period I would normally have been directly responsible for any written case put to the Law Officers for their formal advice (unless at any given moment I was abroad), and would of course have taken responsibility towards the Foreign Secretary for all legal advice given by the FCO Legal Advisers.

I remain proud of what was achieved, in response to Iraq's invasion of Kuwait, by way of resourceful exploration of the potential inherent in the UN Charter, through a close and continuous union of legal advice with the formation and execution of British policy. Looking back, I have only two regrets.

The first touches the No-Fly Zones (Northern as well as Southern), and relates to the way in which the policy and practice in maintaining those Zones was allowed progressively to become detached from the rationale behind them, and detached as well from the fact that their legal justification had never been more solid than a speculative assessment closely tied to a particular set of factual circumstances.

The second is more substantial, and relates to my share of the responsibility for allowing what I will refer to as the 'revival argument' to gain ground, and in its train the misleading concept of 'material breach.' I refer of course to the thesis that SCR 678 conferred a continuing authorization to use force against Iraq, not limited in time, and capable of being revived in appropriate circumstances. I can't now recall when this thesis was first called into play by the British Government as a justification for their actions, or whether I was associated, directly or indirectly, with the discussions that lay behind its invocation. I do remember specifically (though not when) querying the soundness of the thesis from the legal point of view, and being shown then the text of internal advice given by the then UN Legal Counsel (since deceased) on which considerable reliance was being placed although the Legal Counsel's advice was not generally known. In essence, the Legal Counsel was advising the Secretary-General that the Security Council's authorization under SCR 678 could potentially be revived, but subject to two important conditions each of which required further action by the Council itself: the first being that the Council should determine in some

appropriate form that Iraq was in breach of the obligations laid upon it by the Council (sc. in mandatory decisions under Chapter VII of the UN Charter), and the second that the Council should consider the breach to be serious enough (in itself or in its consequences) to warrant a forcible response by the military means foreseen by SCR 678. I could not pretend to remember when or in what terms the revival argument was specifically put to the Law Officers for their advice as to its soundness, though I must assume that it was, at the very least before the Government first relied on it as the legal basis for limited military action against Iraq.

I have read the declassified documents on the Inquiry's website that go to the legal aspects of joining the US attack on Iraq in March 2003, and I have studied the written and oral evidence given by the then Attorney General, Foreign Secretary, and Prime Minister, and by Sir Michael Wood and other government lawyers. Give or take, perhaps, the odd shading of phraseology here and there, my views are in most respects close to Sir Michael's.

I should elaborate on my retrospective regrets as to the 'revival argument' and the associated doctrine of 'material breach.'

I begin with the preliminary observation that too much of the evidence given to the Inquiry by the Attorney General, other Ministers, or senior policy officials has treated the interpretation of the key Resolutions and decisions of the Security Council, and their consequences for the rights and obligations of UN Member States, in the abstract, as if the Resolutions and decisions were painted on a blank canvas. This is not right. The canvas was, it should hardly need saying, the comprehensive system of law laid down by the UN Charter, creating the framework for dealing with international peace and security in the period since the Second World War. Under the Charter, Member States accept important restraints on their untrammelled sovereign decision-making, and agree also that their Charter obligations are to be understood as having superior legal force to their other rights and obligations, except in the very limited number of specific areas – such as the inherent right of self-defence – where the Charter explicitly puts matters otherwise. Not only that, but (again, self-evidently) the source of the powers which the Security Council is exercising is itself the Charter. Once this basic premise is accepted (as it must be), consequences flow automatically as to the default position in international law, and also as to the interpretation of the decisions of the Security Council, which I will come to below.

I think that one can take it as common ground between all witnesses before the Inquiry – rightly, in my view – that, despite what may on occasion have been said by other States, and despite the rhetorical invocation of other factors as part of the policy justification for deciding to make use of claimed rights, the question whether the United Kingdom was <u>legally</u> entitled to attack Iraq in March 2003 turned simply and

exclusively on whether the attack had been authorized by the Security Council in exercise of its compulsory powers for the maintenance and restoration of international peace and security under Chapter VII of the Charter. The enquiry therefore turns on what the Council was itself empowered to do, and what in fact it did do.

Although doubts and alternative interpretations were voiced at the time, there is I think now no dispute, since the passage of SCR 678, that the Council is empowered under Chapter VII to authorize Member States to employ military force to carry out its decisions. But, for that to be legally effective, the Council must not only determine the existence of a threat to the peace, breach of the peace, or act of aggression, and that military force should be used to deal with it, it must itself so authorize the States concerned. There is no room for self-authorization: that flows from the general economy of the Charter and from the primary nature of the Security Council's powers, but it is expressly reinforced by Article 48 of the Charter, which firmly states that the action required to carry out the decisions of the Security Council for the maintenance of peace and security "shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine" (my underlining). Nor, in my submission (and again, despite a limited amount of academic speculation to the contrary) is there any room for the Council to delegate its Charter powers to some or all Member States: there is no trace of that in the Charter's text, it is inconsistent with the description of the Council's powers in Articles 24 and 25, and I have seen no sign in the Council's practice of its ever wishing or intending to do so. Delegation by the Council of its powers would be radically inconsistent with the whole economy of the legal system under the UN Charter. It is therefore more than just a *pro forma* recitation when the Council commonly decides at the end of its Resolutions 'to remain seized of the matter.'

It follows, I think, that a casual, or inadvertent, or purely implicit, authorization by the Council is inconceivable, from a legal point of view, and particularly so in face of the gravity of the decision at stake.

The above is not however to say that the Council cannot, either when requiring the States concerned to do what is authorized or merely entitling them to do so, leave room for those States to exercise their own judgement. It is not however an autonomous judgement, but one subject to the overall authority of the Council, which means in turn that the judgement must be made in good faith, and with the aim of fulfilling the Council's objectives not their own.

Applying this analysis to the advice given by the UN Legal Counsel in the context of the revival of a sleeping authority in the Iraq case enables one to see that what he was referring to as the two prerogatives that must be retained by the Council itself can barely be distinguished from what would constitute a fresh decision by the Council conveying a fresh authorization: the Council determines that there has been a breach, how serious it is,

and what means are proper to redress it. It seems to me to follow inexorably that these are not decisions the Council could make prospectively, in advance of the facts; they require the Council to determine and weigh up the particular facts, and determine the consequences to follow from that.

To revert, however, to the 'revival argument' itself in its essence, its damaging flaw can now be seen clearly, in the light of experience, to have been its detachment from both the time element and the circumstantial element associated with the original authorization: specifically, the idea it portrayed that the Security Council had not only had the power to, but wished in 1990 to grant rolling authority to Member States for an unlimited period of time, and moreover to do so in such a way that (so long as the Council determined that there was a serious situation of non-compliance) the judgement passed to a limited group of Member States to decide on their own that military action (and what military action) was the appropriate way to deal with it. At its most extreme, this idea could take the form of a belief that the Council had handed out in 1990 a sort of prize, which its recipients at the time were entitled to hug jealously to their chests until it was actually taken away from them. It should have been an obvious part of any legal analysis, either of the international position on its own terms or by analogy with similar institutions of national law, that the more time that had elapsed since the authorization had been given, and the more the circumstances had changed since those against which it had been given, the less likely it became that the authorization could still validly be relied on. Governments are often constrained, or at least tempted, for perfectly understandable reasons of consistency, to cleave to legal positions they have adopted in the past. But what that seems to have metamorphosed into in the present case is the attitude of mind that merely because something had been done in the past therefore it could properly be done again. As Sir Michael Wood pointed out however in his evidence (and apparently in internal advice as well), the previous invocation of the revival argument had proved controversial and was strongly opposed in some quarters internationally. That ought to have flashed a powerful warning light on the proposed invocation of the same argument a further five years later, and in justification moreover of military plans that were qualitatively of a wholly different character.

I might at this point add a brief word on what I refer to above as the misleading doctrine of 'material breach.' Again, although I certainly remember this notion being part of the argument in play in the 1990s, I have no personal memory of who it was worked up by, or when, or on what legal rationale. The idea is self-evidently borrowed from the Vienna Convention on the Law of Treaties, and that in itself serves to illuminate the difficulties inherent in translating it to the present context: because, whatever Security Council decisions may be, and though they are of course arrived at by a collective process of negotiation and adoption, they

are certainly not treaties; because, in the present context, the breach is not by a party to the instrument itself, but by an outside party on whom the obligations under the instrument are imposed; and because, in the treaty context, what the Vienna Convention allows is for the material breach to be used as a ground for termination or suspension of the treaty (on notice). In the present situation, far from there being any question of the termination or suspension of the regime laid down by the Security Council, the aim was its rigorous reinforcement. But in any event the Security Council does not need any legal pretext in order to entitle it to change, modify, abrogate, or develop the terms of its earlier Resolutions. It is possible that the concept of material breach was called into play with a more specific eye to the cease-fire brought into effect at the end of actual hostilities against Iraq in 1991, treating that as a form of continuing treaty-like arrangement between the Coalition and Iraq. If so, its value as an argument must have diminished steeply over time, and it would, in any case, beg the essential question of the revival of the Security Council authorization, since the removal of any bar the cease-fire might have imposed could not do more than reinstate the situation as it had existed under that authorization.

I don't think that it would add anything of value for me to enter into the debate over the interpretation of SCR 1441. The interpretation of Security Council resolutions is not a science. The aim is to ascertain, in good faith, what the Council's collective intention was, from the terms in which that intention was expressed in a quasi-legislative instrument. If there is an analogy with treaty interpretation, it is only at the most general level. There is however a striking and characteristic difference from the treaty situation, namely that the Security Council is designed deliberately to be an organ in continuous operation (Article 28(1) of the Charter). That opens the possibility of reverting to the Council at any moment to resolve difficulties of interpretation or implementation, an opportunity which is not available in the treaty situation. That there was a seething difference of opinion as to whether SCR 1441 did or did not in itself authorize military action against Iraq is not in doubt. In that circumstance the orthodox way to resolve the issue was to go back to the Council. The same conclusion would follow on general principles wherever an agent is in doubt as to the extent of the authority given him by his principal. It may be said that that would have been a pointless exercise; the Council would not have been able to agree. In that case the point can be put the other way round: the test of whether SCR 1441 constituted an authorization to use force is whether, if that question had been put to the Members of the Council, they would have confirmed that it did. The answer must be obvious.

A final word may be in place about the notion that a legitimate method of interpretation may be *ex post facto* consultation with one of the promoters of a Council resolution. There is an element in this of disingenuousness, if not downright naivety. Every negotiator who gives

his eventual agreement to an ambiguous text then reports back to his superiors that he has achieved his essential objective or satisfied the terms of their instructions; that merely states the problem, it doesn't solve it. There is good reason why private and personal accounts of the course of a negotiation are not admissible materials for interpretation in the treaty context under Articles 31 or 32 of the Vienna Convention, and special status would never be given to the individual views of the State which promoted a particular text if an issue arose as to the meaning of the final outcome. Those reasons must be every bit as valid in the context of a decision by an international organization. In earlier days (i.e. until quite recently in the history of the Security Council) the practice was never to attribute draft resolutions to particular Member States as sponsors, in order to underline the collective nature of the Council's functions.

My last observation goes to the hypothetical question of the actual situation in law following a valid revival of the authority granted under SCR 678. This is a point of some cardinal importance which was strangely missing from the reams of public discussion over SCR 1441, although it is remarked upon with characteristic acuity by Lord Bingham in *The Rule of Law*, and it has begun to emerge to an extent in the examination of the issue by the Inquiry. Supposing for the moment a valid revival of authority, then, in the absence of any contrary decision by the Council, the authority revived can only have been that which had been granted under SCR 678. Operative paragraph 2 of SCR 678 authorizes "Member States co-operating with the Government of Kuwait" to use "all necessary means" to "uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area." It was, in other words, not an invitation to all the world, but a mandate to a particular group of States, identified not by name but by description; it was directed to a specified end; and the means to be used were defined by their relationship to the end result. This is as one would expect; without the inclusion of those three controlling elements, there would indeed have been room for doubt in 1990 as to whether the authorization was *intra vires* the Security Council at all. That is, accordingly, the authorization that would have revived. It does not, however, seem to have entered the minds of the responsible policy makers in 2002/2003 whether an authority granted to 'Member States co-operating with the Government of Kuwait,' and thus plainly envisaging collective action by a wider group of States, and linked to the Iraqi threat to Kuwait, could legitimately be read down several years later to mean the USA on its own – or the USA together with a small number of its own allies – and possibly against the wishes of the majority of the group of States who were the recipient of the original authorization. It seems likewise not to have entered into policy thinking how the scope of the original authority, which had not been interpreted at the time, even in the face of flagrant aggression, as justifying the invasion and occupation of Iraq, could be read several years

later as encompassing just that, as the response to Iraqi breaches of a more limited kind. The crucial final step in the argument would moreover appear to have been an assessment that invasion and occupation, with a view to overturning the governing regime and replacing it by a new one under new constitutional arrangements, were the only – or, if not the only, then at least the most conveniently available – means of stopping Iraq's weapons programmes (assuming that they did in fact exist). Crucial as it was, that step in the argument seems never to have been given central public prominence, but rather to have been swept into an underlying assumption. The evident disproportion, though, between the ostensibly limited end and the overweening means used to achieve it draws sharp attention to the degree of substantial policy judgement involved. And on the facts that judgement was plainly the sole product of the assessments made amongst themselves by the small grouping of States who claimed to be clothed in the Security Council's authority. There is no trace whatever, so far as I am aware, of the Council ever considering, on a collective basis, whether its original authorization in 1990 encompassed the occupation of Iraq and the overthrow of its government, or deciding, in later years, that that was the appropriate and necessary means for dealing with persistent Iraqi defiance over the restrictions on its weaponry. If one were to apply, once again, a reality check on the same lines as that suggested above for the argument over SCR 1441 itself, can there be any doubt as to the result? If this argument holds, then – even on the basis that a revival of authority had taken place – the way in which the scope of the authority was construed and then implemented involved a usurpation by a small group of Member States of the functions of the Security Council, as the source of the authority they claimed to be exercising.

I ought to conclude with a comment on the question of the strength of the legal case required, since that is clearly an issue about which the Inquiry has rightly become concerned. The question is linked to that of the interpretation of Security Council Resolutions, and also to the particular context under consideration, that of an authorization by the Security Council of some Member States to use military force against another Member State. The occurrence is, in other words, a rare and exceptional one. The record shows how very sparingly the Council has done this in the history of its existence. That, taken together with the default position under international law I mention above, suggests that, when the Council does choose to do so, it will be at some pains to make its meaning clear. If so, questions of interpretation will hardly arise, except perhaps peripherally. That was certainly the case in 1990, with both SCR 665 and SCR 678. Leaving aside the euphemism of 'all necessary means' in SCR 678 (whose meaning was well understood by all), there was no need for any philosophy of interpretation in order to carry out the Council's mandate in good faith. So the question of the 'strength of the case' simply did not arise.

That leaves, however, a valid question as to the 'strength of the case,' but at the domestic level, not on the international one. In my official life at the Foreign Office I think I took it as axiomatic that the magnitude of the issues at stake in a piece of legal advice conditioned how clear the Government's legal position had to be when it came to a policy decision based on that advice, and so far as I could judge all the Law Officers (English and Scottish) to whom I put papers during that time saw matters the same way. So it came as something of a shock to see amongst the Inquiry's papers a former Foreign Secretary complaining, in tones of evident irritation, that while he was at the Home Office his advisers were willing to accept that issues could be argued either way whereas his FCO advisers were more dogmatic. Presumably in the latter context he was referring to the present matter, in which case it seems truly extraordinary not to take into account that the Home Office issues he had in mind were subject to final binding decision in the courts and were ones where an executive decision overturned by the court was in principle capable of being made good by an award of monetary damages or other relief. I express myself deliberately in strong terms when I say that it is rationally inconceivable in a mature democracy, that a decision to go to war, where the State's own interests are not directly affected and where there is no inherent legal entitlement, could properly be taken on a balance of legal probabilities, or an arguable case, or even a good arguable case. Nothing less than an overwhelmingly clear legal case will do; the decision is one which will, after all, result in British servicemen and women being sent to their death, and cause by deliberate decision death and widespread destruction in a foreign country.

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