

# Law and War

## Lord Goldsmith

*This is the full text of Lord Goldsmith's advice to Prime Minister Blair 'on the legality of military action against Iraq without a further resolution of the Security Council', dated 7 March 2003. Blair eventually authorised its release in 2005 after much of the text had appeared in the press.*

*Peter Goldsmith was Blair's Attorney-General for six years, from 2001 to 2007. He resigned on 27 June of that year, the same day Blair departed office. He had been closely involved in the preparations for the war on Iraq. At the Prime Minister's meeting in Downing Street on 23 July 2002 (recorded in what has become known as the Downing Street Memo – see Spokesman 105), Goldsmith warned that:*

*'the desire for regime change was not a legal base for military action. There were three possible legal bases: self-defence, humanitarian intervention, or United Nations Security Council authorisation. The first and second could not be the base in this case. Relying on UN Security Council Resolution 1205 of three years ago would be difficult. The situation might of course change.'*

*Blair was already looking for a way round the legal obstacles. He said:*

*'it would make a big difference politically and legally if Saddam refused to allow in the UN inspectors. Regime change and weapons of mass destruction were linked in the sense that it was the regime that was producing the WMD.'*

*Amongst the action points arising from the Prime Minister's meeting was a caution that:*

*'We must not ignore the legal issues: the Attorney-General would consider legal advice with Foreign and Commonwealth Office/Ministry of Defence legal advisors.'*

*A few days later, on 29 July 2002, Goldsmith apparently put in writing to Blair the advice he had given verbally in Downing Street. On 29 November 2009, the Mail on Sunday revealed the existence of the Attorney-General's memorandum, saying*

*'In it, Lord Goldsmith set out in uncompromising terms why he believed war was illegal. He pointed out that:*

- *War could not be justified purely on the grounds of 'regime change'.*
- *Although United Nations rules permitted 'military intervention on the basis of self-defence', they did not apply in this case because Britain was not under threat from Iraq.*
- *While the UN allowed 'humanitarian intervention' in certain instances, that too was not relevant to Iraq.*
- *It would be very hard to rely on earlier UN resolutions in the Nineties approving the use of force against Saddam.*

*Lord Goldsmith ended his letter by again saying "the situation might change"...*

*On 8 November 2002, Resolution 1441 had been passed unanimously by the UN Security Council, among other things giving Iraq a 'final opportunity' to come into compliance with UN resolutions. On 7 December of that year, Iraq submitted its 'currently full, accurate and complete' declaration of its holdings which could be related to weapons of mass destruction (see Spokesman 84 for the account of Dr Amir al Saadi who was responsible for compiling the declaration). During January and February 2003, the weapons inspectors reported to the Security Council, variable but generally improving Iraqi co-operation. But the US/UK military timetable for war marched on. By 7 March 2003, when it was apparent that there would be no second Security Council resolution authorising the use of force against Iraq, as Blair had hoped, he asked Goldsmith for advice on the legality of military action in those circumstances. This is what the Attorney-General said.*

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SECRET

ATTORNEY-GENERAL

PRIME MINISTER

IRAQ: RESOLUTION 1441

1. You have asked me for advice on the legality of military action against Iraq without a further resolution of the Security Council. This is, of course, a matter we have discussed before. Since then I have had the benefit of discussions with the Foreign Secretary and Sir Jeremy Greenstock, who have given me valuable background information on the negotiating history of resolution 1441. In addition, I have also had the opportunity to hear the views of the US Administration from their perspective as co-sponsors of the resolution.

This note considers the issues in detail in order that you are in a position to understand the legal reasoning. My conclusions are summarised at

paragraphs 26 to 31 below.

Possible legal bases for the use of force

2. As I have previously advised, there are generally three possible bases for the use of force:

- (a) self-defence (which may include collective self-defence);
- (b) exceptionally, to avert overwhelming humanitarian catastrophe; and
- (c) authorisation by the Security Council acting under Chapter VII of the UN Charter.

3. Force may be used in **self-defence** if there is an actual or imminent threat of an armed attack; the use of force must be necessary, i.e. the only means of averting an attack; and the force used must be a proportionate response. It is now widely accepted that an imminent armed attack will justify the use of force if the other conditions are met. The concept of what is imminent may depend on the circumstances. Different considerations may apply, for example, where the risk is of attack from terrorists sponsored or harboured by a particular State, or where there is a threat of an attack by nuclear weapons. However, in my opinion there must be some degree of imminence. I am aware that the USA has been arguing for recognition of a broad doctrine of a right to use force to pre-empt danger in the future. If this means more than a right to respond proportionately to an imminent attack (and I understand that the doctrine is intended to carry that connotation) this is not a doctrine which, in my opinion, exists or is recognised in international law.

4. The use of force to avert **overwhelming humanitarian catastrophe** has been emerging as a further, and exceptional, basis for the use of force. It was relied on by the United Kingdom in the Kosovo crisis and is the underlying justification for the No-Fly Zones. The doctrine remains controversial, however. I know of no reason why it would be an appropriate basis for action in present circumstances.

5. Force may be used where this is **authorised by the UN Security Council** acting under Chapter VII of the UN Charter. The key question is whether resolution 1441 has the effect of providing such authorisation.

### **Resolution 1441**

6. As you are aware, the argument that resolution 1441 itself provides the authorisation to use force depends on the revival of the express authorisation to use force given in 1990 by Security Council resolution 678. This in turn gives rise to two questions:

- (a) is the so-called 'revival argument' a sound legal basis in principle?
- (b) is resolution 1441 sufficient to revive the authorisation in resolution 678?

I deal with these questions in turn. It is a trite, but none the less relevant

observation given what some commentators have been saying, that if the answer to these two questions is ‘yes’, the use of force will have been authorised by the United Nations and not in defiance of it.

### **The revival argument**

7. Following its invasion and annexation of Kuwait, the Security Council authorised the use of force against Iraq in resolution 678 (1990). This resolution authorised coalition forces to use all necessary means to force Iraq to withdraw from Kuwait and to restore international peace and security in the area. The resolution gave a legal basis for Operation Desert Storm, which was brought to an end by the cease-fire set out by the Council in resolution 687 (1991). The conditions for the cease-fire in that resolution (and subsequent resolutions) imposed obligations on Iraq with regard to the elimination of weapons of mass destruction and monitoring of its obligations. Resolution 687 suspended, but did not terminate, the authority to use force in resolution 678. Nor has any subsequent resolution terminated the authorisation to use force in resolution 678. It has been the United Kingdom’s view that a violation of Iraq’s obligations under resolution 687 which is sufficiently serious to undermine the basis of the cease-fire can revive the authorisation to use force in resolution 678.

8. In reliance on this argument, force has been used on certain occasions. I am advised by the Foreign Office Legal Advisers that this was the basis for the use of force between 13 and 18 January 1993 following United Nations Presidential Statements on 8 and 11 January 1993 condemning particular failures by Iraq to observe the terms of the cease-fire resolution. The revival argument was also the basis for the use of force in December 1998 by the United States and United Kingdom (Operation Desert Fox). This followed a series of Security Council resolutions, notably, resolution 1205 (1998).

9. Law Officers have advised in the past that, provided the conditions are made out, the revival argument does provide a sufficient justification in international law for the use of force against Iraq. That view is supported by an opinion given in August 1992 by the then United Nations Legal Counsel, Carl-August Fleischauer. However, the United Kingdom has consistently taken the view (as did the Fleischauer opinion) that, as the cease-fire conditions were set by the Security Council in resolution 687, it is for the Council to assess whether any such breach of those obligations has occurred. The United States have a rather different view: they maintain that the fact of whether Iraq is in breach is a matter of objective fact which may therefore be assessed by individual Member States. I am not aware of

any other state which supports this view. This is an issue of critical importance when considering the effect of resolution 1441.

10. The revival argument is controversial. It is not widely accepted among academic commentators. However, I agree with my predecessors' advice on this issue. Further, I believe that the arguments in support of the revival argument are stronger following adoption of resolution 1441. That is because of the terms of the resolution and the course of the negotiations which led to its adoption. Thus, preambular paragraphs 4, 5 and 10 recall the authorisation to use force in resolution 678 and that resolution 687 imposed obligations on Iraq as a necessary condition of the cease-fire. Operative paragraph (OP)1 provides that Iraq has been and remains in material breach of its obligations under relevant resolutions, including the resolution 687. Operative paragraph 13 recalls that Iraq has been warned repeatedly that 'serious consequences' will result from continued violations of its obligations. The previous practice of the Council and statements made by Council members during the negotiation of resolution 1441 demonstrate that the phrase 'material breach' signifies a finding by the Council of a sufficiently serious breach of the cease-fire conditions to revive the authorisation in resolution 678 and that 'serious consequences' is accepted as indicating the use of force.

11. I disagree, therefore, with those commentators and lawyers, who assert that nothing less than an explicit authorisation to use force in a Security Council resolution will be sufficient.

### **Sufficiency of resolution 1441**

12. In order for the authorisation to use force in resolution 678 to be revived, there needs to be a determination by the Security Council that there is a violation of the conditions of the cease-fire and that the Security Council considers it sufficiently serious to destroy the basis of the cease-fire. Revival will not, however, take place, notwithstanding a finding of violation, if the Security Council has made it clear either that action short of the use of force should be taken to ensure compliance with the terms of the cease-fire, or that it intends to decide subsequently what action is required to ensure compliance. Notwithstanding the determination of material breach in operative paragraph 1 of resolution 1441, it is clear that the Council did not intend that the authorisation in resolution 678 should revive immediately following the adoption of resolution 1441, since operative paragraph 2 of the resolution affords Iraq a 'final opportunity' to comply with its disarmament obligations under previous resolutions by cooperating with the enhanced inspection regime described in operative paragraphs 3 and 5-9. But operative paragraph 2 also states that the Council has determined that compliance with

resolution 1441 is Iraq's last chance before the cease-fire resolution will be enforced. Operative paragraph 2 has the effect therefore of suspending the legal consequences of the operative paragraph 1 determination of material breach which would otherwise have triggered the revival of the authorisation in resolution 678. The narrow but key question is: on the true interpretation of resolution 1441, what has the Security Council decided will be the consequences of Iraq's failure to comply with the enhanced regime.

13. The provisions relevant to determining whether or not Iraq has taken the final opportunity given by the Security Council are contained in operative paragraphs 4, 11 and 12 of the resolution.

– operative paragraph 4 provides that false statements or omissions in the declaration to be submitted by Iraq under operative paragraph 3 and failure by Iraq at any time to comply with and cooperate fully in the implementation of resolution 1441 will constitute a further material breach of Iraq's obligations and will be reported to the Council for assessment under paragraphs 11 and 12 of the resolution.

– operative paragraph 11 directs the Executive Chairman of UNMOVIC and the Director-General of the International Atomic Energy Agency to report immediately to the Council any interference by Iraq with inspection activities, as well as any failure by Iraq to comply with its disarmament obligations, including the obligations regarding inspections under resolution 1441.

– operative paragraph 12 provides that the Council will convene immediately on receipt of a report in accordance with paragraphs 4 or 11 'in order to consider the situation and the need for compliance with all of the relevant Council resolutions in order to secure international peace and security'.

It is clear from the text of the resolution, and is apparent from the negotiating history, that if Iraq fails to comply, there will be a further Security Council discussion. The text is, however, ambiguous and unclear on what happens next.

14. There are two competing arguments:

(i) that provided there is a Council discussion, if it does not reach a conclusion, there remains an authorisation to use force;

(ii) that nothing short of a further Council decision will be a legitimate basis for the use of force.

### **The first argument**

15. The first argument is based on the following steps:

(a) operative paragraph 1, by stating that Iraq 'has been and remains in

material breach' of its obligations under relevant resolutions, including resolution 687 amounts to a determination by the Council that Iraq's violations of resolution 687 are sufficiently serious to destroy the basis of the cease-fire and therefore, in principle, to revive the authorisation to use force in resolution 678;

(b) the Council decided, however, to give Iraq 'a final opportunity' (operative paragraph 2) but because of the clear warning that it faced 'serious consequences as a result of its continued violations' (operative paragraph 13) was warning that a failure to take that 'final opportunity' would lead to such consequences;

(c) further, by operative paragraph 4, the Council decided in advance that false statements or omissions in its declaration and 'failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution' would constitute 'a further material breach'; the argument is that the Council's determination in advance that particular conduct would constitute a material breach (thus reviving the authorisation to use force) is as good as its determination after the event;

(d) in either event, the Council must meet (operative paragraph 12) 'to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security', but the resolution singularly does not say that the Council must decide what action to take. The Council knew full well, it is argued, the difference between 'consider' and 'decide' and so the omission is highly significant. Indeed, the omission is especially important as the French and Russians made proposals to include an express requirement for a further decision, but these were rejected precisely to avoid being tied to the need to obtain a second resolution. On this view, therefore, while the Council has the opportunity to take a further decision, the determinations of material breach in operative paragraphs 1 and 4 remain valid even if the Council does not act.

### **The second argument**

16. The second argument focuses, by contrast, on two provisions in particular of the resolution: first, the final words in operative paragraph 4 ('and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below') and, second, the requirement in operative paragraph 12 for the Council to 'consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security'. Taken together, it is argued, these provisions indicate that the Council decided in resolution 1441 that in the

event of continued Iraqi non-compliance, the issue should return to the Council for a further decision on what action should be taken at that stage.

### **Discussion**

17. So far as operative paragraph 4 of the resolution is concerned, one view is that the words at the end of this paragraph indicate the need for an assessment by the Security Council of how serious any Iraqi breaches really are and whether they are sufficiently serious to destroy the basis of the cease-fire. This argument is supported by public statements to the effect that only serious cases of non-compliance will constitute a further material breach. Thus, the Foreign Secretary stated in Parliament on 25 November that 'material breach means something significant; some behaviour or pattern of behaviour that is serious. Among such breaches could be action by the government of Iraq seriously to obstruct or impede the inspectors, to intimidate witnesses, or a pattern of behaviour where any single action appears relatively minor but the action as a whole add up to something deliberate and more significant: something that shows Iraq's intention not to comply'. If that is right, then the question is who makes the assessment of what constitutes a sufficiently serious breach. In the United Kingdom's view of the revival argument (though not the United States view) that can only be the Council, because only the Council can decide if a violation is sufficiently serious to revive the authorisation to use force.

18. It is right to say, however, that such an argument has less force if operative paragraph 4 operates automatically. Thus, the wording of operative paragraph 4 indicates that any failure by Iraq to comply with and cooperate fully in the implementation of the resolution will constitute a further material breach (leaving aside the question of whether false statements or omissions in the operative paragraph 3 declaration is an additional requirement). If operative paragraph 4 means what it says: the words 'cooperate fully' were included specifically to ensure that any instances of non-cooperation would amount to a further material breach. This is the United States analysis of operative paragraph 4 and is undoubtedly more consistent with the view that no further decision of the Council is necessary to authorise force, because it can be argued that the Council has determined in advance that any failure will be a material breach.

19. It has been suggested that it is possible to establish that Iraq has failed to take its final opportunity through the procedures in operative paragraphs 11 and 12 without regard to operative paragraph 4, in which

case it is unnecessary to consider the effect of the words ‘for assessment’. I do not consider that this argument really assists. First, the resolution must be read as a whole. Second, I accept that it is possible that a Council discussion under operative paragraph 12 may be triggered by a report from Blix and El-Baradei under operative paragraph 11 and that this may have the effect of establishing that Iraq has failed to take the final opportunity granted by operative paragraph 2. But I do not consider that it can be argued seriously that operative paragraph 4 does not apply in these circumstances. It is clear from a comparison of the wording of paragraphs 4 and 11 that any Iraqi conduct which would be sufficient to trigger a report from the inspectors under operative paragraph 11 would also amount to a failure to comply with and cooperate fully in the implementation of the resolution and would thus also be covered by operative paragraph 4. In addition, the reference to paragraph 11 in operative paragraph 4 cannot be ignored. It is not entirely clear what this means, but the most convincing explanation seems to be that it is a recognition that an operative paragraph 11 inspectors’ report would also constitute a report of further material breach within the meaning of operative paragraph 4 and would thus be assessed by the Council under operative paragraph 12. Moreover, the United States see operative paragraph 4 as an essential part of the mechanism for establishing that Iraq has failed to take its final opportunity.

20. It has also been suggested that the final words of operative paragraph 4 were chosen carefully to avoid the implication that it was for the Security Council to assess whether Iraqi conduct constituted a further material breach. The French proposed to amend operative paragraph 4 so that Iraqi conduct would only amount to a further material breach ‘when assessed’ as such by the Council, but this amendment was not accepted. I am not wholly convinced by this argument: if, for the reasons discussed in paragraph 17 above, operative paragraph 4 requires an assessment of Iraq’s conduct by the Council, the alternative language makes little difference. However, I do accept that the negotiating history indicates that the words at the end of operative paragraph 4 ‘and shall be reported to the Council for assessment in accordance with paragraphs 11 and 12’ were added at a late stage, but in substitution for other language which would clearly have had the effect of making any finding of further material breach subject to a further Council decision.

21. Whether a report comes to the Council under operative paragraph 4 or operative paragraph 11, the critical issue is what action the Council is required to take at that point. In other words, what does operative

paragraph 12 require. It is clear that the language of operative paragraph 12 was a compromise by the United States from their starting position that the Council should authorise in advance the use of all necessary means to enforce the cease-fire resolution in the event of continued violations by Iraq. It is equally clear, however, that the language does not expressly provide that a further Council decision is necessary to authorise the use of force. The paragraph indicates that in the event of a report of a further material breach (whether under operative paragraph 4 or operative paragraph 11) there will be a meeting of the Council to consider the situation and the need for compliance in order to secure international peace and security. The Council thus has the opportunity to take a further decision expressly authorising the use of force or, conceivably, to decide that other enforcement means should be used. But the Council might fail to act. The resolution does not state what is to happen in those circumstances. The clear US view is that, whatever the reason for the Council's failure to act, the determination of material breach in operative paragraphs 1 and 4 would remain valid, thus authorising the use of force without a further decision. My view is that different considerations apply in different circumstances. The operative paragraph 12 discussion might make clear that the Council's view is that military action is appropriate but that no further decision is required because of the terms of resolution 1441. In such a case, there would be good grounds for relying on the existing resolution as the legal basis for any subsequent military action. The more difficult scenario is if the views of Council members are divided and a further resolution is not adopted either because it fails to attract 9 votes or because it is vetoed.

22. The principal argument in favour of the view that no further decision is required to authorise force in these circumstances is that the language of operative paragraph 12 (ie 'consider') was chosen deliberately to indicate the need for a further discussion, but not a decision. As I have indicated, it is contended that this interpretation is supported by the negotiating history. The French and Russians both made proposals to amend operative paragraph 12 to include an express requirement for a further decision, but these proposals were not accepted. The US Administration insist that they made clear throughout that they would not accept a text which subjected the use of force to a further Council decision. The French (and others) therefore knew what they were voting for. The US are confident that in accepting operative paragraphs 4 and 12, they were conceding a Council discussion and no more. The US, of course, approached the negotiation of resolution 1441 from a different starting point because, as I explained in paragraph 9 above, they have always taken the view that 'material breach'

is a matter of objective fact and does not require a Security Council determination. (By contrast, the United Kingdom position taken on the advice of successive Law Officers, has been that it is for the Security Council to determine the existence of a material breach of the cease-fire.) Therefore, while the US objective was to ensure that the resolution did not constrain the right of action which they believed they already had, our objective was to secure a sufficient authorisation from the Council in the absence of which we would have had no right to act. I have considered whether this difference in the underlying legal view means that the effect of the resolution might be different for the United States than for the United Kingdom, but I have concluded that it does not affect the position. If operative paragraph 12 of the resolution, properly interpreted, were to mean that a further Council decision was required before force was authorised, this would constrain the United States just as much as the United Kingdom. It was therefore an essential negotiating point for the United States that the resolution should not concede the need for a second resolution. They are convinced that they succeeded.

23. I was impressed by the strength and sincerity of the views of the US Administration which I heard in Washington on this point. However, the difficulty is that we are reliant on their assertions for the view that the French (and others) knew and accepted that they were voting for a further discussion and no more. We have very little hard evidence of this beyond a couple of telegrams recording admissions by French negotiators that they knew the United States would not accept a resolution which required a further Council decision. The possibility remains that the French and others accepted operative paragraph 12 because in their view it gave them a sufficient basis on which to argue that a second resolution was required (even if that was not made expressly clear). A further difficulty is that, if the matter ever came before a court, it is very uncertain to what extent the court would accept evidence of the negotiating history to support a particular interpretation of the resolution, given that most of the negotiations were conducted in private and there are no agreed or official records.

24. The counter view of operative paragraph 12 is that this paragraph must imply a decision by the Council. Three particular arguments support that approach:

(i) when taken with the word ‘assessment’ in operative paragraph 4, the language of operative paragraph 12 indicates that the Council will be assessing the seriousness of any Iraqi breach; this is especially powerful if in truth some assessment is necessary;

(ii) there is a special significance in the words ‘in order to secure international peace and security’. They reflect not only the special responsibility of the Security Council under Article 39 of the UN Charter (‘The Security Council shall determine the existence of any threat to the peace, breach of the peace, or acts of aggression and shall make recommendations, or decide what measures shall be taken to maintain or restore international peace and security’), but also pick up the language of both resolution 678 (which authorised the use of force ‘to restore international peace and security in the area’) and resolution 687 (which referred to the objective of ‘restoring international peace and security in the area as set out in its recent resolutions’). The clear inference, it will be argued, is that this shows the Council was to exercise a deliberative role on that issue, ie to determine what it is necessary to secure international peace and security;

(iii) any other construction reduces the role of the Council discussion under operative paragraph 12 to a procedural formality. Others have jibbed at this categorisation, but I remain of the opinion that this would be the effect in legal terms of the view that no further resolution is required. The Council would be required to meet, and all members of the Council would be under an obligation to participate in the discussion in good faith, but even if an overwhelming majority of the Council were opposed to the use of force, military action could proceed regardless.

25. Where the meaning of a resolution is unclear from the text, the statements made by members of the Council at the time of its adoption may be taken into account in order to ascertain the Council’s intentions. The statements made during the debate on 8 November 2002 are not, however, conclusive. The United States and United Kingdom stated that further breaches would be reported to the Council ‘for discussion’. Jeremy Greenstock then added that we would then expect the Council to ‘meet its responsibilities’, although (implicitly) we would be prepared to act without Council backing to ensure that the task of disarmament is completed. Only the United States explicitly stated that it believed that the resolution did not constrain the use of force by States to enforce relevant United Nations resolutions and protect world peace and security regardless of whether there was a further Council decision. Conversely, two other Council members, Mexico and Ireland, made clear that in their view a further decision of the Council was required before the use of force would be authorised. Syria also stated that ‘the resolution should not be interpreted, through certain paragraphs, as authorising any State to use force’. Most other Council members were less clear in their comments. The joint statement of France,

Russia and China is somewhat opaque, but seems to imply that a further decision is required. Many delegations welcomed the fact that there was 'no automaticity' in the resolution with regard to the use of force. But it is not clear what they meant by this. It could indicate that they did not consider that the resolution authorised the use of force in any circumstances by means of the revival argument. On the other hand there is some evidence from the negotiating history that their main concern was that the resolution should not authorise force immediately following its adoption on the basis of 'material breach' in operative paragraph 1 plus 'serious consequences' in operative paragraph 13. The United Kingdom and United States indicated that 'no automaticity' meant that there would be a Council discussion before force was used.

### **Summary**

26. To sum up, the language of resolution 1441 leaves the position unclear and the statements made on adoption of the resolution suggest that there were differences of view within the Council as to the legal effect of the resolution. Arguments can be made on both sides. A key question is whether there is in truth a need for an assessment of whether Iraq's conduct constitutes a failure to take the final opportunity or has constituted a failure fully to cooperate within the meaning of operative paragraph 4 such that the basis of the cease-fire is destroyed. If an assessment is needed of that sort, it would be for the Council to make it. A narrow textual reading of the resolution suggests that sort of assessment is not needed, because the Council has pre-determined the issue. Public statements, on the other hand, say otherwise.

27. In these circumstances, I remain of the opinion that the safest legal course would be to secure the adoption of a further resolution to authorise the use of force. I have already advised that I do not believe that such a resolution need be explicit in its terms. The key point is that it should establish that the Council has concluded that Iraq has failed to take the final opportunity offered by resolution 1441, as in the draft which has already been tabled.

28. Nevertheless, having regard to the information on the negotiating history which I have been given and to the arguments of the US Administration which I heard in Washington, I accept that a reasonable case can be made that resolution 1441 is capable in principle of reviving the authorisation in 678 without a further resolution.

29. However, the argument that resolution 1441 alone has revived the authorisation to use force in resolution 678 will only be sustainable if there

are strong factual grounds for concluding that Iraq has failed to take the final opportunity. In other words, we would need to be able to demonstrate hard evidence of non-compliance and non-cooperation. Given the structure of the resolution as a whole, the views of UNMOVIC and the International Atomic Energy Agency will be highly significant in this respect. In the light of the latest reporting by UNMOVIC, you will need to consider extremely carefully whether the evidence of non-cooperation and non-compliance by Iraq is sufficiently compelling to justify the conclusion that Iraq has failed to take its final opportunity.

30. In reaching my conclusions, I have taken account of the fact that on a number of previous occasions, including in relation to Operation Desert Fox in December 1998 and Kosovo in 1999, UK forces have participated in military action on the basis of advice from my predecessors that the legality of the action under international law was no more than reasonably arguable. But a 'reasonable case' does not mean that if the matter ever came before a court I would be confident that the court would agree with this view. I judge that, having regard to the arguments on both sides, and considering the resolution as a whole in the light of the statements made on adoption and subsequently, a court might well conclude that operative paragraphs 4 and 12 do require a further Council decision in order to revive the authorisation in resolution 678. But equally I consider that the counter view can be reasonably maintained. However, it must be recognised that on previous occasions when military action was taken on the basis of a reasonably arguable case, the degree of public and Parliamentary scrutiny of the legal issue was nothing like as great as it is today.

31. The analysis set out above applies whether a second resolution fails to be adopted because of a lack of votes or because it is vetoed. As I have said before, I do not believe that there is any basis in law for arguing that there is an implied condition of reasonableness which can be read into the power of veto conferred on the permanent members of the Security Council by the United Nations Charter. So there are no grounds for arguing that an 'unreasonable veto' would entitle us to proceed on the basis of a presumed Security Council authorisation. In any event, if the majority of world opinion remains opposed to military action, it is likely to be difficult on the facts to categorise a French veto as 'unreasonable'. The legal analysis may, however, be affected by the course of events over the next week or so, eg the discussions on the draft second resolution. If we fail to achieve 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.

**Possible consequences of acting without a second resolution**

32. In assessing the risks of acting on the basis of a reasonably arguable case, you will wish to take account of the ways in which the matter might be brought before a court. There are a number of possibilities. First, the General Assembly could request an advisory opinion on the legality of the military action from the International Court of Justice. A request for such an opinion could be made at the request of a simple majority of the States within the General Assembly, so the United Kingdom and United States could not block such action. Second, given that the United Kingdom has accepted the compulsory jurisdiction of the International Court of Justice, it is possible that another State which has also accepted the Court's jurisdiction might seek to bring a case against us. This, however, seems a less likely option since Iraq itself could not bring a case and it is not easy to see on what basis any other State could establish that it had a dispute with the United Kingdom. But we cannot absolutely rule out that some State strongly opposed to military action might try to bring such a case. If it did, an application for interim measures to stop the campaign could be brought quite quickly (as it was in the case of Kosovo).

33. The International Criminal Court at present has no jurisdiction over the crime of aggression and could therefore not entertain a case concerning the lawfulness of any military action. The ICC will however have jurisdiction to examine whether any military campaign has been conducted in accordance with international humanitarian law. Given the controversy surrounding the legal basis for action, it is likely that the Court will scrutinise any allegations of war crimes by UK forces very closely. The Government has already been put on notice by CND that they intend to report to the ICC Prosecutor any incidents which their lawyers assess to have contravened the Geneva Conventions. The ICC would only be able to exercise jurisdiction over United Kingdom personnel if it considered that the UK prosecuting authorities were unable or unwilling to investigate and, if appropriate, prosecute the suspects themselves.

34. It is also possible that CND may try to bring further action to stop military action in the domestic courts, but I am confident that the courts would decline jurisdiction as they did in the case brought by CND last November. Two further, though probably more remote possibilities, are an attempted prosecution for murder on the grounds that the military action is unlawful and an attempted prosecution for the crime of aggression. Aggression is a crime under customary international law which automatically forms part of domestic law. It might therefore be argued that international aggression is a crime recognised by the common law which

can be prosecuted in the UK courts.

35. In short, there are a number of ways in which the opponents of military action might seek to bring a legal case, internationally or domestically, against the United Kingdom, members of the Government or UK military personnel. Some of these seem fairly remote possibilities, but given the strength of opposition to military action against Iraq, it would not be surprising if some attempts were made to get a case of some sort off the ground. We cannot be certain that they would not succeed. The General Assembly route may be the most likely, but you are in a better position than me to judge whether there are likely to be enough States in the General Assembly who would be willing to vote for such a course of action in present circumstances.

### **Proportionality**

36. Finally, I must stress that the lawfulness of military action depends not only on the existence of a legal basis, but also on the question of proportionality. Any force used pursuant to the authorisation in resolution 678 (whether or not there is a second resolution):

- must have as its objective the enforcement of the terms of the cease-fire contained in resolution 687 (1990) and subsequent relevant resolutions;
- be limited to what is necessary to achieve that objective; and
- must be a proportionate response to that objective, i.e. securing compliance with Iraq's disarmament obligations.

That is not to say that action may not be taken to remove Saddam Hussein from power if it can be demonstrated that such action is a necessary and proportionate measure to secure the disarmament of Iraq. But regime change cannot be the objective of military action. This should be borne in mind in considering the list of military targets and in making public statements about any campaign.

### **ATTORNEY-GENERAL**

**7 March 2003**

\* \* \*

*Ten days later, on 17 March 2003, the Attorney-General shifted his position and went on the public record in unequivocal terms, in a written answer in the House of Lords to the question 'What is the Attorney-General's view of the legal basis for the use of force against Iraq?' (See Lord Steyn's article elsewhere in this number, which quotes the Attorney-General's written answer in full.)*