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To: Ms Davis, MED

cc: Ms Rees, UND
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1. I have now seen a copy of the minutes of last week's Cabinet Office meeting about Iraq.
2. Paragraph 7(a) seems to assume rather easily that if Iraq blocked UNMOVIC, there would be "a justification" for military action. If this is intended to mean that such behaviour by Iraq would provide a sound legal basis for military action, I do not agree.
3. The threat or use of force is prohibited by international law. There are only two recognised exceptions: one, action in self defence (by the State attacked or by it collectively with other States), and two, military action authorised by the Security Council. HMG and others have argued that an imminent or actual humanitarian catastrophe justifies a limited use of proportionate military force, but this alleged exception to the fundamental norm against the use of force remains controversial, and very much dependent on the facts of the situation.
4. It is true that Iraqi obstruction of UNSCOM in 1997 and 1998 led eventually to military action by the UK and the US. But:
 - (a) It was not simply a matter of Iraq blocking UNSCOM's activities. Iraq had pursued a confrontational course with the Security Council on a range of issues in the months which led up to the military action;
 - (b) Iraq's conduct was condemned on several occasions by the Security Council;
 - (c) The legal argument put forward by the UK and the US as justifying the use of force in that context relied on the fact that Iraq was behaving in manifest and fundamental breach of the commitments it had accepted in the cease fire which ended the Gulf War, and on the fact that this breach on the part of Iraq had been recognised as such by the Security Council. This (we claimed) revived the use-of-force authorisation given by the Security Council in 1991,

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so that the UK and the US were entitled once again to rely on that earlier authorisation. On this rather convoluted reasoning, we claimed in 1998 to be acting on behalf of the Security Council in bombing Iraq.

A crucial element of the legal argumentation in 1998 was that the Security Council could be said to have implicitly endorsed the UK/US use of force, by its finding that Iraq had acted in fundamental breach of the 1991 cease-fire agreement. In other words, Iraqi obstructionism did not, even in 1998, of itself, justify the use of force. Nor - and this is a crucial point - did we (the UK) claim that we and the US had an independent right to resort to the use of force against Iraq; we claimed to be acting for the international community as a whole, drawing on a mandate given by the Security Council (albeit 7 years, earlier).

5. This was a strained legal argument in 1998, and highly dependent on the facts and the political atmosphere at the time. Things are very different now in the Security Council; and it must be doubtful whether the facts will allow the Law Officers to reach a similar conclusion in future. At all events, we would be doing ourselves and Ministers a disservice if we continued to make policy on the easy assumption that obstruction of UNMOVIC by Iraq would automatically justify the use of military force against Iraq. It did not in 1998, and it will not necessarily do so in future.

6. Two other points:

- (a) a draft letter is being prepared on the humanitarian justification for the Southern NFZ. Obviously you will wish to put the case at its strongest, but the FCO cannot say one thing to the Attorney and another to senior officials here. (The point is that a recent MED policy paper on Iraq observed that "There is a serious question mark over whether the southern zone achieves its humanitarian objective" That seems to me a substantial weakening of the line FCO took with the Attorney last year (Mr Patey's letter of 18 January to LSLO);
- (b) When it is convenient we need to decide what to do about the self defence argument (paragraph 7(c) of the minutes of last week's meeting).

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