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LEGAL SECRETARY

THE LEGAL SECRETARIAT TO THE LAW OFFICERS
ATTORNEY GENERAL'S CHAMBERS
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LONDON SW1E 6JP

Mr Tom McKane
Defence and Overseas Secretariat
70 Whitehall
London SW1A 2AS

12 February, 2001

Dear Tom,

IRAQ: NO FLY ZONES (NFZs)

1. Thank you for your letter of 8 February. I have submitted your letter to the Attorney General for his consideration together with the Joint Intelligence Committee (JIC) Assessment of 13 December 2000 ("Impact of the NFZs on Iraqi Persecution"), William Patey's letters of 29, 30 and 31 January 2001 and Rosemary Davies' letter of 9 February.
2. The Attorney General is grateful for these materials which have been submitted to him in the context of his request last year for an updated assessment of the situation in the north and south of Iraq, having regard to the need to keep under continuous review the lawfulness of UK and US activities in the NFZs. The views of the Attorney are recorded below.
3. The Attorney recalls that the threat or use of force to settle international disputes is generally prohibited. International law permits the use of force where this is authorised by a Security Council resolution under Chapter VII of the United Nations Charter, or where force is used in individual or collective self-defence.

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4. The Attorney recalls that, in addition, the Law Officers have previously accepted that a respectable legal argument that force is justified on grounds of overwhelming humanitarian necessity can be made if:

(a) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;

(b) it is objectively clear that there is, in all the circumstances, no practicable alternative to the use of force if lives are to be saved; and

(c) the proposed use of force is both necessary and proportionate to the aim being pursued (i.e. the relief of humanitarian need) and is strictly limited in time and scope to that aim: that is to say, that it is the minimum necessary to achieve that end.

5. The Attorney also recalls the written answer of Baroness Symons, then Parliamentary Under-Secretary of State at the Foreign and Commonwealth Office, to a Parliamentary question on 16 November 1998:

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“There is no general doctrine of humanitarian necessity in international law. Cases have nevertheless arisen (as in northern Iraq in 1991) when, in the light of all the circumstances, a limited use of force was justifiable in support of purposes laid down by the Security Council but without the Council’s express authorisation when that was the only means to avert an immediate and overwhelming humanitarian catastrophe. Such cases would in the nature of things be exceptional and would depend on an objective assessment of the factual circumstances at the time and of the terms relevant decisions of the Security Council bearing on the situation in question”.

6. The Attorney General notes the statement in William Patey’s letter of 30 January 2001 that “we are not aware of any significant changes in the factual position” since the assessments submitted to the Law Officers in December 1999 and January 2000.

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7. The Attorney also notes the assessments, endorsed by the Foreign and Defence Secretaries, as set out in your letter of 8 February. This states at paragraph 6 that:

"The Joint Intelligence Committee has assessed that the abolition of the Northern No Fly Zone would be likely to lead to a refugee crisis at least comparable to 1996. In the event that Saddam faced widespread opposition to an assault to recover the North, a humanitarian refugee crisis comparable to 1991 would follow.

8. Paragraph 7 of your letter states, in relation to the Northern No Fly Zone, that:

"Our overall judgment remains that there is an unacceptably high risk that, in the event that we cease patrolling the Southern No Fly Zone, extreme humanitarian distress would result on a scale comparable to that which led to grave humanitarian crisis and the establishment of the zones in 1991 and 1992".

9. The Attorney notes that the assessment in relation to the Southern No Fly Zone would appear weaker than that provided in William Patey's letter of 18 January 2000 that:

"Without the no fly zones, we can be confident that further oppression would result, on a scale comparable to that which led to a grave humanitarian crisis and the establishment of the zones in 1991 and 1992".

He also notes the statement in paragraph 5 of your letter that, if UK and US operations in the No Fly Zones were to cease, it would be more difficult to sustain the necessary political support for the Northern No Fly Zone. However, he considers it questionable whether any weight may be attached to this in considering the legal justification for the Southern No Fly Zone.

10. The Attorney also notes, having regard to William Patey's letter of 29 January, "that there may be scope for adjustment" to the operation of the Northern No Fly Zone, but that, in relation to the Southern No Fly Zone, "military commanders have not been able to identify a solution that would obviate the requirement for regular

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patrols inside Iraq". The Attorney stresses, having regard to the criterion at paragraph 4(b), that every effort must be made to ensure that it is **objectively** clear that there is, in all the circumstances, no practicable alternative to the use of force if lives are to be saved.

11. The Attorney also stresses that every effort must be made to avoid incidental loss of civilian life, injury to civilians and damage to civilian objects. He recalls his earlier advice that the occurrence of such casualties and damage is relevant to the legitimacy of the NFZ policy as a whole. He notes the statement in Mr Patey's letter that:

"..we cannot make any sensible estimate of the number of people (whether military or civilian) who have been killed or injured as a result of coalition action in self-defence since January 1999".

In these circumstances, the Attorney stresses that it is only possible for him to take a view on the legal justification for the NFZs on the understanding that Ministers are satisfied that every effort is indeed made to avoid civilian casualties.

12. Finally, the Attorney General notes the significant diminution of international support for the Zones, and indeed in some cases overt criticism of the Zones, in contrast to the wider consensus in favour of the establishment of the Zones in 1991 and 1992. While such support, or criticism, is not itself determinative of the issue, it undoubtedly assists in establishing the lawfulness of military action of humanitarian need.
13. Having regard to the above points, the Attorney considers that it is now more questionable whether a respectable legal argument can be maintained that force is justified on grounds of overwhelming humanitarian necessity. However, on the basis of the assurances set out in your letter of 8 February the Attorney accepts that it is still **possible** on balance to argue that the maintenance of the No Fly Zones is justified as a necessary and proportionate use of force to prevent a humanitarian crisis. He stresses that the judgement as to whether such an argument can still be advanced is a very fine one.
14. The Attorney General reiterates that such a legal basis for the existence of the Zones cannot justify military action for other, ulterior motives, such as action to punish Saddam Hussein, or to enforce

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other UK or US objectives in the area such as the maintenance of the security of neighbouring States.

15. The Attorney also emphasises that it is vitally important to keep constantly in view the precarious nature of the legal basis for the UK and US action in the No Fly Zones. It is not yet generally accepted that there is a right in international law to prevent or avert a humanitarian catastrophe (and some would argue that Allied action in the No Fly Zones in any event goes beyond what such a right might justify). He notes that there is a considerable body of legal opinion which holds that such a right is not at present clearly established in international law. In this regard he recalls the conclusion of the Foreign Affairs Committee in the context of their enquiry last year into the Kosovo conflict that:

"...at the very least, the doctrine of humanitarian intervention has a tenuous basis in customary international law...".

16. The Attorney notes that the assessment provided in your letter will be kept under review. He also notes that active consideration is currently being given to the maintenance of the Zones. He would be grateful if he could be informed of any changes which may be material to his consideration of this matter.
17. Having regard to the need to keep under continuous review the legal justification for the No Fly Zones, and the evolving political and military circumstances relating to the Zones, the Attorney General would in any event be grateful for a further update of the situation in the north and south of Iraq, consideration of alternatives to the maintenance of the Zones, and information on any civilian casualties associated with UK and US operations in relation to the Zones by the end of May 2001.
18. Finally, **the Attorney General stresses the continuing necessity to satisfy the criteria set out at sub-paragraphs 4(a), (b) and (c) above.**
19. Copies of this letter go to John Sawers (No.10), Simon Webb (MOD), Martin Hemming (MOD), Alan Goulty (FCO), William Patey (FCO), Michael Wood (FCO) and Jon Day (Cabinet Office).

Yours ever,

David

DAVID BRUMMELL

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