20 March 2003

The Hon Simon Crean MP
Leader of the Opposition
Parliament House
Canberra ACT 2600

Dear Mr Crean

LEGALITY OF USE OF FORCE AGAINST IRAQ

You have asked us to provide our opinion on the legality under international law of the use of force by Australia against Iraq in the absence of a further Security Council resolution.

We conclude that military force can only be used against Iraq where:
1. it has been authorised by a further Security Council resolution; or
2. there is evidence to suggest that Iraq is planning an imminent attack on Australia, or on another State requesting Australia’s aid, such that the use of force by Australia would be an act of individual or collective self-defence.

There is also the possibility under international law that force might be used under the emerging principle of humanitarian intervention.

On current information, none of the above grounds is satisfied. As a consequence, the use of force by Australia against Iraq would breach international law and the Charter of the United Nations.

Charter of the United Nations

Australia has been a party to the Charter of the United Nations since the establishment of the United Nations in 1945. According to the cardinal principle of *pacta sunt servanda*, the
provisions of the United Nations Charter are binding upon Australia, and must be performed in good faith. Moreover, the Charter has the status of a higher law in the international legal order. Article 103 of the Charter provides that Member States’ obligations under the Charter shall prevail over other international obligations.

Australia’s obligations under the Charter must be considered in light of the object and purpose of the Charter. The Preamble sets out the object of the establishment of the United Nations as being ‘to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind’, with an overriding aim of ensuring ‘that armed force shall not be used, save in the common interest’. Based on the experience of two world wars, the drafters of the Charter established a world order based on two interrelated underlying principles: first, to bring about the resolution of international disputes by peaceful means and, second, recognition that the use of force would only be justified as a last resort in the interest of the international community, and not individual States.

Under the legal framework established by the United Nations Charter, the use of force is prohibited by Article 2(4). This is a cardinal principle of law, which has attained the status of *jus cogens* (*Nicaragua Case (Merits) (1986) ICJ Reports 3, para 190*). The prohibition is subject to two exceptions: (a) Security Council authorisation under Chapter VII of the Charter; and (b) self-defence under Article 51 of the Charter.

Although the Charter was intended to be a comprehensive statement of the law relating to the use of force, it is well-recognised that international law must remain flexible to respond to new threats. Accordingly, we also consider below whether the use of force might be justified under a third possible (although not yet universally accepted) exception not mentioned in the Charter relating to (c) humanitarian intervention.

**(a) Security Council authorisation**

Under Chapter VII of the Charter, the Security Council is charged with responsibility to determine what action should be taken in response to threats to the peace, breaches of the peace and acts of aggression. Article 42 states that ‘should the Security Council consider that [non-forcible] measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security’. The Security Council has, for example, authorised Member States to use force in Korea in 1950, against Iraq in 1990 and 1991, in Somalia, Haiti, Rwanda and Bosnia in the early 1990s and in Afghanistan in 2001.

The practice of the Security Council indicates that the authorisation to use force is made by express words, usually in terms of an authorisation to use ‘all necessary means’ to combat the threat or breach of the peace. This was the language used in Security Council resolutions authorising force in Somalia, Haiti, Rwanda, Bosnia and to liberate Kuwait. Security resolution 1368 in relation to Afghanistan used the term “all necessary steps”.

Of the matrix of Security Council resolutions adopted in relation to Iraq since the invasion of Kuwait, three resolutions are relevant as to whether the Security Council has authorised the use of force in Iraq proposed by the ‘coalition of the willing’:

(i) Security Council resolution 678 (1990);
(ii) Security Council resolution 687 (1991); and
The full text of these resolutions can be found at http://www.un.org/Docs/sc/unsc_resolutions.html.

(i) Security Council resolution 678

Security Council resolution 678 authorised the use of force against Iraq after its invasion of Kuwait. The express terms of the resolution authorise ‘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’. The context of the resolution, and the specific language of the authorisation, clearly tie the use of force to the liberation of Kuwait. This resolution does not authorise the use of force against Iraq to address the threat posed by Saddam Hussein’s alleged possession of weapons of mass destruction. To interpret the language of resolution 678 as authorising the use of force in the present circumstances would set a dangerous precedent. It would suggest that authorisations by the Security Council can be regarded as ‘blank cheques’ to use force against a State even a decade or more later without further action by the Security Council. The idea of a ‘blank cheque’ is inconsistent with the legal framework established by the Charter of the United Nations.

(ii) Security Council resolution 687

Security Council resolution 687 brought an end to the forceful measures against Iraq authorised by the Security Council. In express terms, it amends previous Security Council resolutions to bring about ‘a formal cease-fire’.

It has been argued that the ceasefire declared by resolution 687 was conditional upon Iraq’s fulfillment of the conditions required of it in that resolution. This view is based upon the fact that resolution 687 included specific instructions to Iraq to ‘unconditionally accept the destruction, removal, or rendering harmless, under international supervision, of … all chemical and biological weapons’ and to ‘unconditionally agree not to acquire or develop nuclear weapons or nuclear-weapons-usable materials’.

However, the terms of the resolution do not make the cease-fire following the Gulf War conditional upon Iraq’s disarmament. The resolution instead states that the formal ceasefire will take effect ‘upon official notification by Iraq to the Secretary-General and to the Security Council of its acceptance of the provisions above’. The crux of resolution 687 was the transformation of the temporary cessation of hostilities into a permanent ceasefire upon Iraq’s acceptance of, and not compliance in perpetuity with, its terms.

The resolution then leaves it to the Security Council ‘to take such further steps as may be required for the implementation of the present resolution’. No State or coalition of States acting outside the authorisation of the Council retains the right to use force, even to punish Iraq for breaches of the resolution or to compel its compliance.

Further weight is given to this interpretation by the fact that the resolution expressly maintains the right to use force ‘to guarantee the inviolability of the [boundary between Iraq and Kuwait]’, and then only by the Security Council and not by individual States. The Council expressly reserved to itself the right to use force in the event Iraq failed to respect the inviolability of the Kuwait border, but not in the event Iraq failed to disarm. It would be illogical for resolution 687 to require Security Council action to authorise force against

(iii) Security Council resolution 1441

Security Council resolution 1441 does not authorise military action against Iraq. The resolution contains no automatic trigger enabling any single State or group of States to use force against Iraq in the event of a ‘material breach’ of Iraq’s obligation to disarm. The procedure, clearly described in paragraphs 4, 11 and 12 of the resolution, is that, in the event of a material breach being reported to the Security Council, the Security Council will ‘convene immediately’ to consider the situation. Based upon the plain meaning of the text of the resolution as well as upon the past practice of the Security Council, the ‘reminder’ in the final paragraph of the resolution that Iraq will face ‘serious consequences’ if it fails to comply is not sufficient to authorise the use of force against Iraq.

The background to the adoption of resolution 1441 adds further support to the view that it does not authorise military action. The draft resolution originally submitted by the United Kingdom and the United States, which in the event of a further material breach of Iraq’s obligations would have authorised Member States ‘to use all necessary means to restore international peace and security in the area’, was unacceptable to other members of the Security Council; in particular France and Russia, either of which could have vetoed the draft’s adoption as permanent members of the Security Council.

Statements made on behalf of several Security Council members immediately after the adoption of resolution 1441 confirm that it does not authorise military action (see UN Doc. S/PV.4644). The representative of Mexico stated that ‘the use of force is valid only as a last resort, with prior explicit authorization required from the Security Council’. The representative of Ireland said that ‘it is for the Council to decide on any ensuing action’. The representative of Syria said that ‘[t]he resolution should not be interpreted, through certain paragraphs, as authorizing any State to use force. It reaffirms the central role of the Security Council in addressing all phases of the Iraqi issue.’ The representative of China said that ‘[t]he text no longer includes automaticity for authorizing the use of force’. The United Kingdom said ‘There is no ‘automaticity’ in this resolution. If there is a further Iraqi breach of its disarmament obligations, the matter will return to the Council for discussion as required in paragraph 12. We would expect the Security Council then to meet its responsibilities.’

It should be noted that the United States took a different view. Its representative said ‘[i]f the Security Council fails to act decisively in the event of further Iraqi violations, this resolution does not constrain any Member State from acting to defend itself against the threat posed by Iraq or to enforce relevant United Nations resolutions and protect world peace and security’.

Ultimately, in deciding on the appropriate interpretation of an international legal instrument, it is well established that the correct approach is to read the instrument in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the instrument’s object and purpose (see Article 31 of the Vienna Convention on the Law of Treaties). The plain meaning of the text of resolution 1441 is that it is left to the Security Council to decide how to respond to any material breaches by Iraq notified to it.
It is clear that nothing in the language of resolution 1441 authorises States to unilaterally take military action against Iraq.

(b) Self-defence

Article 51 of the Charter provides that States may use force in the exercise of ‘the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security’. The inherent right of self-defence in the event of an armed attack has been held to extend to the right of States to use force in the event of a threat of an armed attack. States need not await the armed attack before they are entitled to act to defend themselves. However, reliance on self-defence is only justified in these circumstances where there is ‘a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation’ (The Caroline (exchange of diplomatic notes between Great Britain and the United States, 1842), 2 Moore’s Digest of International Law 409, 412 (1906)). The limitations of necessity, immediacy and proportionality are inextricably tied to the principle of self-defence under international law.

In the absence of evidence that Iraq has current plans to attack, or to assist a terrorist attack on a State, there is no justification for resort to the doctrine of self-defence.

(c) Possible Exception: ‘Humanitarian Intervention’

By its very nature, international law is of necessity in a constant state of development in response to the emergence of new weapons, new actors and new threats, usually in hindsight.

A key example of circumstances in which a re-invention of the law may be justified came with the recent conflict in the former Yugoslavia, where States found themselves in a situation in which the existing international legal regime was inadequate. In the face of widespread and ongoing ethnic cleansing of the Kosovar Albanians by Bosnian Serb forces, the international legal community found itself unable to act. Self-defence was clearly not available, as the only State able to exercise this right was the State perpetrating the genocide. The Security Council was deadlocked by the threatened veto of China and Russia. This threat was based not on the objection by these States to relief for the Kosovar Albanians, but on considerations on the implications of this precedent for China and Russia. In these circumstances, the NATO forces launched military strikes in the absence of Security Council authorisation. The action, in hindsight, has been deemed to be legitimate by the international community, and the international legal order was not damaged. Rather, it has led to the development of an emerging principle of international law, albeit not yet universally accepted, of ‘humanitarian intervention’.

The question is therefore whether the present circumstances involving Iraq might justify the further development of this aspect of international law. The current United States led coalition has sought from time to time to argue that the situation of the Iraqis is analogous to that of the Kosovar Albanians, thereby seeking to rely on the Kosovo precedent as a justification for any military strike. In the face of Iraq’s violations of human rights, it has been argued that action is a moral imperative. However, by itself the undoubted suffering of the Iraqi people does not equate to a legal justification. Built into the principle of humanitarian intervention are five
fundamental criteria which must be met before military force is justified in the absence of Security Council authorisation:

(1) **Urgency of the action**: is there time to address the situation by means other than the resort to force?
(2) **Inefficacy of Security Council**: is the Security Council unreasonably deadlocked such that it is unable to act to address the situation?
(3) **Proportionality**: will the collective harm inflicted by a resort to force be a proportionate response to the harm it seeks to address?
(4) **Acceptability**: does a majority of the international community accept that force is an appropriate response?
(5) **Objectivity**: is the decision to use force based on an objective belief that it is for the benefit of the international community?

At the present time, these criteria have not been met. In particular, on the information available, and for the following reasons, it seems unlikely criteria (1), (2) or (4) are satisfied.

First, the threat has not been described as imminent. It does not appear that there is a compelling need for the use of force instead of a peaceful alternative.

Second, the Security Council is not unreasonably deadlocked. The apparent reluctance on the part of a majority of the Security Council not to authorise force is based on their individual assessment that force in the present circumstances would not be justified. Moreover, certain States have expressed a desire to act to address the situation through other measures.

Third, a majority of the international community does not appear to accept that the use of force would be justified. At the date of writing, the United States has identified 29 out of 191 States in the international community that would support the use of force, including Afghanistan, Albania, Australia, Azerbaijan, Bulgaria, Colombia, the Czech Republic, Denmark, El Salvador, Eritrea, Estonia, Ethiopia, Georgia, Hungary, Italy, South Korea, Latvia, Lithuania, Macedonia, the Netherlands, Nicaragua, the Philippines, Poland, Romania, Slovakia, Spain, Turkey, the United Kingdom and Uzbekistan. We have not included Japan (although it was in the United States’ list) because Japan has only indicated its support as a ‘post-conflict member’ of the coalition.

**Conclusion**

Australia will breach international law and the Charter of the United Nations if it engages in military action in Iraq as part of a United States led coalition. The use of force has not been authorised by a Security Council resolution, nor can it be seen as an act of self-defence. Even if international law does come to recognise a humanitarian basis for the use of force, it appears unlikely on present information that the use of force against Iraq could satisfy the required legal criteria.

Yours sincerely

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