

SPECIAL FEATURE

ADVICE ON THE USE OF FORCE AGAINST IRAQ

The *Melbourne Journal of International Law* was founded with the intention of providing a forum for the informed and considered discussion of issues of international law, with a specific focus, wherever possible, on the Asia-Pacific region. In furtherance of this objective, we have decided to publish the following Special Feature of advice provided to the Government and the Leader of the Opposition of the Commonwealth of Australia concerning the use of force against Iraq. We have taken this decision on the grounds that these are important primary documents for international lawyers, which should be made easily available for the purpose of academic study and debate.

Each of the three pieces of advice that we are publishing in this Special Feature is currently available on the Internet, but the Editors are firmly of the opinion that the collation of this advice in permanent, published form, and its broad dissemination, is of value to any continuing debate.

We present first the Memorandum of Advice provided to the Commonwealth Government by Bill Campbell QC of the Attorney-General's Department and Chris Moraitis of the Department of Foreign Affairs and Trade. This is followed by two letters of advice provided to the Leader of the Federal Opposition, the Hon Simon Crean MP, one by George Williams and Devika Hovell of the University of New South Wales, and the other by Grant Niemann of the Flinders University of South Australia.

The Editors wish to thank the authors of the memorandum and letters; the Office of International Law, Attorney-General's Department; the Copyright Office, Department of Communications, Information Technology and the Arts; the Department of Foreign Affairs and Trade; the Table Office, Department of the House of Representatives, Commonwealth Parliament; and the Leader of the Opposition for their assistance in facilitating the publication in the *Melbourne Journal of International Law* of these important documents.

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Editors, *Melbourne Journal of International Law*
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**MEMORANDUM OF ADVICE TO THE COMMONWEALTH
GOVERNMENT ON THE USE OF FORCE AGAINST IRAQ***

[1] We have been asked whether, in the current circumstances, any deployment of Australian forces to Iraq and subsequent military action by those forces would be consistent with Australia's obligations under international law. The short answer is 'yes'. Existing United Nations Security Council resolutions provide authority for the use of force directed towards disarming Iraq of weapons of mass destruction and restoring international peace and security in the area. This existing authority for the use of force would only be negated in current circumstances if the Security Council were to pass a resolution that required member states to refrain from the use of force against Iraq.

BACKGROUND

[2] Under art 2(4) of the *Charter of the United Nations* ('the *Charter*'),

[a]ll members [of the United Nations] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

[3] The well-recognised exceptions to this requirement to refrain from the use of force are the right of self-defence in art 51 of the *Charter* and action authorised by the Security Council pursuant to Chapter VII of the *Charter*.¹ Other justifications have been put forward such as 'humanitarian intervention'. Given our view that authority for the use of force in Iraq in current circumstances is found in existing Security Council resolutions, it is not necessary to consider in this advice self-defence or other possible bases for the use of force.

[4] Following Iraq's invasion of Kuwait, the Security Council adopted *Resolution 678* (1990) ('*SCR 678*').² Operative paragraph 2 of *SCR 678* provides as follows:

* Tabled by the Prime Minister in the House of Representatives, Parliament of Australia: Commonwealth, *Votes and Proceedings of the House of Representatives*, 18 March 2003, 788 (John Howard, Prime Minister); and by the Leader of the Government in the Senate, Parliament of Australia: Commonwealth, *Journals of the Senate*, 18 March 2003, 1577 (Senator Robert Hill, Leader of the Government in the Senate and Minister for Defence). Prepared by the Commonwealth Attorney-General's Department and the Department of Foreign Affairs and Trade on 12 March 2003. Copyright © 2003 Commonwealth of Australia. Reproduced by permission.

¹ Chapter VII deals with 'Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression'. Under art 39, the Security Council

shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Under art 42, those measures may include the use of armed forces of members of the United Nations to take such action as may be necessary to restore international peace and security.

² *Resolution 678*, SC Res 678, UN SCOR, 45th sess, 2963rd mtg, UN Doc S/RES/678 (1990).

Authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, 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.

[5] Operative paragraph 3 of *SCR 678* provides:

Requests all States to provide appropriate support for the actions undertaken in pursuance of paragraph 2 above.

[6] *SCR 678* and the other resolutions of the Security Council mentioned below were adopted under Chapter VII of the *Charter*. Acting pursuant to the authority given in *SCR 678*, armed action was taken against Iraq in 1991.

[7] Following that action, the UN adopted *SCR 687* (1991) on 3 April 1991.³ Operative paragraph 1 of that *Resolution* provides:

Affirms all thirteen resolutions noted above, except as expressly changed below to achieve the goals of the present resolution, including a formal cease-fire.

The resolutions affirmed included *SCR 678*.

[8] *SCR 687* required Iraq to

unconditionally accept the destruction, removal, or rendering harmless, under international supervision of:

- (a) all chemical and biological weapons and all stocks of agents ...
- (b) all ballistic missiles with a range greater than one hundred and fifty kilometres.⁴

It also required Iraq to yield the chemical and biological weapons to a Special Commission and to destroy the missiles under the supervision of the Commission.

[9] Paragraphs 33 and 34 of *SCR 687* provides:

- 33 Declares that, upon official notification by Iraq to the Secretary-General and to the Security Council of its acceptance of the above provisions, a formal cease-fire is effective between Iraq and Kuwait and the Member States co-operating with Kuwait in accordance with *resolution 678* (1990);
- 34 Decides to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the region.

[10] Between the adoption of *SCR 687* and the present day, the Security Council has found that Iraq has failed to comply with its obligations under *SCR 687*.⁵

³ *Resolution 687*, SC Res 687, UN SCOR, 46th sess, 2981st mtg, UN Doc S/RES/687 (1991).

⁴ *Ibid* [8].

This culminated in the adoption by the Security Council under Chapter VII of the *UN Charter* of *SCR 1441* (2002) on 2 November 2002.⁶ In its preamble, this resolution recalled that *SCR 678* authorised member states to use all necessary means to uphold and implement *SCR 660*⁷ and all relevant resolutions subsequent to *SCR 660* and to restore international peace and security to the area. It also recalled that *SCR 687* ‘imposed obligations on Iraq as a necessary step for the achievement of its stated objective of restoring international peace and security in the area’. Furthermore, the preamble provides:

Recalling that in its *resolution 687* (1991) the Council declared that a ceasefire would be based on acceptance by Iraq of the provisions of that resolution, including the obligations on Iraq contained therein.

[11] The operative paragraphs of *SCR 1441* include:

- 1 Decides that Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687 (1991), in particular through Iraq’s failure to cooperate with United Nations inspectors and the IAEA, and to complete the actions required under paragraphs 8 to 13 of resolution 687 (1991);
- 2 Decides, while acknowledging paragraph 1 above, to afford Iraq, by this resolution, a final opportunity to comply with its disarmament obligations under relevant resolutions of the Council;
- ...
- 4 Decides that false statements or omissions in the declarations submitted by Iraq pursuant to this resolution and failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution shall constitute a further material breach of Iraq’s obligations and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below;
- ...
- 12 Decides to convene immediately upon receipt of a report in accordance with paragraphs 4 or 11 above, in order to consider the situation and need for full compliance with all of the relevant Council Resolutions in order to secure international peace and security;

⁵ For example, *Resolution 1115*, SC Res 1115, UNSCOR, 52nd sess, 3792nd mtg, [1], UN Doc S/RES/1115 (1997) (‘Condemns the repeated refusal of the Iraqi authorities to allow access to sites designated by the Special Commission, which constitutes a clear and flagrant violation of the provisions of Security Council resolutions 687 (1991)’); *Resolution 1137*, SC Res 1137, UNSCOR, 52nd sess, 3831st mtg, [1], UN Doc S/RES/1137 (1997) (‘Condemns the continued violations by Iraq of its obligations under the relevant resolutions to co-operate fully and unconditionally with the Special Commission’); *Resolution 1194*, SC Res 1194, UNSCOR, 53rd sess, 3924th mtg, [1], UN Doc S/RES/1194 (1998) (‘Condemns the decision by Iraq of 5 August 1998 to suspend cooperation with the Special Commission and the IAEA, which constitutes a totally unacceptable contravention of its obligations under [*Resolution*] 687 (1991)’); and *Resolution 1205*, SC Res 1205, UNSCOR, 53rd sess, 3939th mtg, [1], UN Doc S/RES/1205 (1998) (‘Condemns the decision by Iraq of 31 October 1998 to cease co-operation with the Special Commission as a flagrant violation of *resolution 687* (1991) and other relevant resolutions’).

⁶ *Resolution 1441*, SC Res 1441, UNSCOR, 57th sess, 4644th mtg, UN Doc S/RES/1441 (2002).

⁷ *Resolution 660*, SC Res 660, UNSCOR, 45th sess, 2929th mtg, UN Doc S/RES/660 (1990).

- 13 Recalls, in that context, that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violation of its obligations;
- 14 Decides to remain seized of the matter.

[12] Since that *Resolution* was adopted, Dr Blix, the Executive Chairman of UNMOVIC has briefed the Security Council on a number of occasions. In his briefing on 7 March 2003, Dr Blix was positive about advances in Iraqi co-operation. However, he noted that co-operation ‘cannot be said to constitute “immediate” co-operation. Nor do they [initiatives] necessarily cover all areas of relevance’.⁸ The claimed destruction of all WMD⁹ remains unverified. There is no doubt that Iraq remains in breach of its obligations under Security Council resolutions. *SCR 1441* confirms a continuing breach of *SCR 687* and other relevant resolutions. Dr Blix’s conclusions confirm the failure to comply with and co-operate fully and immediately in the implementation of *SCR 1441*.

[13] A further draft Security Council resolution was tabled by the US, UK and Spain on 24 February 2003. A UK/US draft amended Resolution was tabled on 7 March 2003.

REASONS

[14] In our view, Iraq’s past and continuing material breaches of *SCR 687* have negated the basis for the ‘formal cease-fire’. Iraq, by its conduct subsequent to the adoption of *SCR 687*, has demonstrated that it did not and does not ‘accept’ the terms of *SCR 687*. Consequently, the cease-fire is not effective and the authorisation for the use of force in *SCR 678* is reactivated.

[15] We do not believe that the authorisation contained in *SCR 678* has expired¹⁰ or that, coupled with *SCR 687*, it was confined to the limited purpose of ensuring Iraq’s withdrawal from Kuwait. Nor do we believe that the Security Council has either expressly or impliedly withdrawn the authority for the use of force in *SCR 678* in all circumstances.

[16] Operative paragraph 2 of *SCR 678* set out above itself contains no limitations in terms of time. Nor is the purpose for which the authority to use force was given confined to restoration of the sovereignty and independence of Kuwait. The authority to use force also was to uphold and implement ‘all subsequent relevant resolutions and to restore international peace and security to the area’. That purpose holds as good today as it did in 1990. There is no finite time under the *Charter* in which the authority given in a Security Council resolution expires. Nor is there any indication in resolutions subsequent to *SCR*

⁸ United Nations Monitoring, Verification and Inspection Commission, *Security Council 7 March 2003: Oral Introduction of the 12th Quarterly Report of UNMOVIC Executive Chairman Dr Hans Blix* (2003) <<http://www.un.org/Depts/unmovic/recent%20items.html>> at 1 May 2003.

⁹ Weapons of mass destruction.

¹⁰ *Resolution 1441*, in its preamble, recalled *SCR 678* in terms consistent with it having continuing force.

678 that the authority for the use of force contained in that resolution has expired. Indeed, subsequent resolutions indicate to the contrary.¹¹

[17] Given the existing authority for the use of force, suggestions that there is a legal requirement for a further resolution are misplaced. Also, suggestions that the use of force in Iraq in the absence of a further Security Council Resolution would be ‘unilateral’ are wrong.

[18] It has been suggested¹² that a number of relevant UN Security Council Resolutions refer to further action being taken by the UN Security Council, thus precluding UN member states themselves from taking further action. In this respect, reference has been made to operative paragraph 34 of *SCR 687* that states, in part, that the Security Council may ‘take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the region’. In our view, this does not remove the authority given to member states in *SCR 687*.

[19] As at the date of this advice, the Security Council is considering a further draft resolution tabled by the United States, the UK and Spain. The content of that resolution is not settled. However, failure to adopt that resolution would not, in our view, negate the existing authority to use force. As noted above, in current circumstances that authority would only be negated by a Security Council resolution requiring member states to refrain from using force against Iraq.

BILL CAMPBELL[†] AND CHRIS MORAITIS[‡]

¹¹ See, eg, *Resolution 833*, SC Res 833, UNSCOR, 48th sess, 3224th mtg, preambular paragraph 5, UN Doc S/RES/833 (1993):

Reminding Iraq of its obligations under resolution 687 (1991), and in particular paragraph 2 thereof, and other relevant resolutions of the Council, and of its acceptance of the resolutions of the Council adopted pursuant to Chapter VII of the Charter of the United Nations, which forms the basis for the cease-fire.

See also *Resolution 949*, SC Res 949, UNSCOR, 49th sess, 3438th mtg, UN Doc S/RES/949 (1994).

¹² For example, Angus Martyn, ‘Disarming Iraq under International Law’ (Current Issues Brief No 9, [2002–03]).

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**ADVICE TO HON SIMON CREAN MP
ON THE USE OF FORCE AGAINST IRAQ**

We have been asked 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 *UN Charter* since the establishment of the United Nations in 1945. According to the cardinal principle of *pacta sunt servanda*,¹ the provisions of the *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*.² 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 *Charter*, the use of force is prohibited by art 2(4). This is a cardinal principle of law, which has attained the status of *jus cogens*.³ The prohibition is subject to two exceptions: (a) Security

¹ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 26 ('*VCLT*').

² *Ibid* art 31.

³ *Military and Paramilitary Activities against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 3, [190] ('*Nicaragua Case*').

Council authorisation under Chapter VII of the *Charter*; and (b) self-defence under art 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

[s]hould 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 1950,⁴ against Iraq in 1990⁵ and 1991,⁶ in Somalia,⁷ Haiti,⁸ Rwanda⁹ and Bosnia¹⁰ in the early 1990s and in Afghanistan in 2001.¹¹

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.¹² Security Council *Resolution 1368* in relation to Afghanistan used the term 'all necessary steps'.¹³

Out 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);¹⁴
- (ii) Security Council *Resolution 687* (1991);¹⁵ and
- (iii) Security Council *Resolution 1441* (2002).¹⁶

⁴ *Resolution 83*, SC Res 83, UNSCOR, 5th sess, 474th mtg, UN Doc S/1511 (1950).

⁵ *Resolution 678*, SC Res 678, UNSCOR, 45th sess, 2963rd mtg, UN Doc S/RES/678 (1990).

⁶ *Resolution 687*, SC Res 687, UNSCOR, 46th sess, 2981st mtg, UN Doc S/RES/687 (1991).

⁷ *Resolution 794*, SC Res 794, UN SCOR, 47th sess, 3145th mtg, UN Doc S/RES/794 (1992).

⁸ *Resolution 940*, SC Res 940, UNSCOR, 49th sess, 3413rd mtg, UN Doc S/RES/940 (1994).

⁹ *Resolution 929*, SC Res 929, UNSCOR, 49th sess, 3392nd mtg, UN Doc S/RES/929 (1994).

¹⁰ *Resolution 816*, SC Res 816, UNSCOR, 48th sess, 3191st mtg, UN Doc S/RES/816 (1993).

¹¹ *Resolution 1368*, SC Res 1368, UNSCOR, 56th sess, 4370th mtg, UN Doc S/RES/1368 (2001).

¹² *Resolution 794*, above n 7, [10]; *Resolution 940*, above n 8, [4]; *Resolution 929*, above n 9, [3]; *Resolution 816*, above n 10, [4]; *Resolution 678*, above n 5, [2].

¹³ *Resolution 1368*, above n 11, [5].

¹⁴ *Resolution 678*, above n 5.

¹⁵ *Resolution 687*, above n 6.

¹⁶ *Resolution 1441*, SC Res 1441, UN SCOR, 57th sess, 4644th mtg, UN Doc S/RES/1441 (2002).

The full text of these resolutions can be found at <http://www.un.org/Docs/sc/unsc_resolutions.html>.

1 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[.]¹⁷

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 a 'blank cheque' 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 *UN Charter*.

2 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'.¹⁸

It has been argued that the cease-fire declared by *Resolution 687* was conditional upon Iraq's fulfilment 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 ... [a]ll chemical and biological weapons'¹⁹ and to 'unconditionally agree not to acquire or develop nuclear weapons or nuclear-weapons-usable material'.²⁰

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 above provisions'.²¹ 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'.²² No

¹⁷ *Resolution 678*, above n 5, [2].

¹⁸ *Resolution 687*, above n 6, [1].

¹⁹ *Ibid* [8].

²⁰ *Ibid* [12].

²¹ *Ibid* [33] (emphasis added).

²² *Ibid* [34].

state or coalition of states acting outside the authorisation of the Security 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]’,²³ 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 threatened boundary violations, yet dispense with such action if Iraq violated another provision of the *Resolution*.²⁴

3 *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.²⁵

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.²⁶ 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’.²⁷ The representative of Ireland said that ‘it is for the Council to decide on any ensuing action’.²⁸ 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

²³ *Resolution 678*, above n 5, [2].

²⁴ See further Jules Lobel and Michael Ratner, ‘Bypassing the Security Council: Ambiguous Authorisations to Use Force, Cease-Fires and the Iraqi Inspection Regime’ (1999) 99 *American Journal of International Law* 124.

²⁵ *Resolution 1441*, above n 16, [13].

²⁶ See UN SCOR, 57th sess, 4464th mtg, UN Doc S/PV.4644.

²⁷ *Ibid* 6.

²⁸ *Ibid* 7.

phases of the Iraqi issue.²⁹ The representative of China said that '[t]he text no longer includes automaticity for authorizing the use of force'.³⁰ The UK said

[t]here 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.³¹

It should be noted that the US 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.³²

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.³³ 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'.³⁴ 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.

²⁹ Ibid 10.

³⁰ Ibid 13.

³¹ Ibid 5.

³² Ibid 3.

³³ *VCLT*, above n 1, art 31.

³⁴ 'The *Caroline* (Exchange of Diplomatic Notes between Great Britain and the United States, 1842)' in John Moore, *Digest of International Law* (1906) vol 2, 409, 412.

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 of 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 US 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 US 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 UK and Uzbekistan. We have not included Japan (although it was in the US's list) because Japan has only indicated its support as a 'post-conflict member' of the coalition.

CONCLUSION

Australia will breach international law and the *UN Charter* if it engages in military action in Iraq as part of a US 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.

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**ADVICE TO HON SIMON CREAN MP
ON THE USE OF FORCE AGAINST IRAQ**

In this advice I have been asked to address two questions:

- 1 Whether existing Security Council Resolutions relative to Iraq provide continuing legal authority for Australia to take military action in Iraq? **Answer: No.**
- 2 Whether, in the circumstances, the taking of such military action would render Australian military service personnel liable to international criminal sanction because military action is unauthorised? **Answer: No.**

WHETHER EXISTING SECURITY COUNCIL RESOLUTIONS RELATIVE TO IRAQ
PROVIDE CONTINUING LEGAL AUTHORITY FOR AUSTRALIA TO
TAKE MILITARY ACTION IN IRAQ?

Legal Considerations

The *United Nations Charter* of 1945 Article 2(4) expressly mandates that nation states shall refrain from the use of force against the territorial integrity of any state or ‘in any manner inconsistent with the purposes of the United Nations’.

Under Article 2(7) a similar restraint is placed upon the United Nations except for the taking of enforcement measures (by the Security Council) under Chapter VII.

In the *Tadic Jurisdictional Appeal Case*¹ Judge Sidhwa of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, in his separate but not dissenting decision, held that nation states had by force of the *Charter* transferred their sovereignty to the Security Council when it came to deciding when something constitutes a breach of international peace and security and what action (if any) should be taken to restore peace and security.

His Honour said the Security Council is the —

sole judge of when and where to act or when and where to enlarge or restrict the exercise of its jurisdiction²

and is

alone empowered to determine the existence of any threat to peace ... and decide what decision should be taken in accordance with Articles 41³ and 42⁴[.]⁵

¹ *Prosecutor v Tadic (Defence Motion for Interlocutory Appeal on Jurisdiction)*, Case No ICTY IT-94-1-AR72 (2 October 1995) [21]–[23] (Separate Opinion of Judge Sidhwa) (*‘Tadic’*).

² *Ibid* [22].

³ *UN Charter* art 41:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decision, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail sea air postal telegraphic, radio and other means of communication and the severance of diplomatic relations.

His Honour went on to hold that —

in order to prevent an ‘aggravation of the situation’, the Security Council, under Article 40,⁶ before making recommendations or deciding upon the measures provided for in Article 39, may call upon the parties concerned to comply with provisional measures it deems desirable and the duty (of those states) to take account of the failure to comply with such provisional measures ... Should measures provided for in Article 41 be considered inadequate or prove to be inadequate (then) under Article 42, *the Security Council* can take military action as may be necessary to maintain or restore international peace and security”.⁷

Member states of the United Nations have expressly agreed to ‘accept and carry out the decisions of the Security Council’.⁸ A state that did not ‘accept and carry out’ the decisions of the Security Council would be in breach of the *Charter* and thus acting contrary to international law.

By *Resolution 1441* of 8 November 2002 the Security Council decided that Iraq was in material breach of its obligations under previous resolutions, including *Resolution 687* of 1991, but that notwithstanding this material breach the Security Council had resolved to give Iraq

a final opportunity to comply with its disarmament obligations under relevant resolutions of the Council and accordingly decides to set up an enhanced inspection regime with the aim of bringing to full and verified completion the disarmament process established by *resolution 687* (1991) and subsequent resolutions of the Council.⁹

The Security Council then set out in the resolution what it required Iraq to do and then said that a failure to comply with the resolution would constitute a further breach, which breach will be reported to the [Security] Council for assessment (par 4) ... ‘in order [for the Security Council] to consider the situation and the need for full compliance with all the relevant Council

⁴ *Ibid* art 42:

Should the Security Council consider that 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. Such action may include demonstrations, blockade and other operations by air sea or land forces of Members of the United Nations.

⁵ *Tadic (Defence Motion for Interlocutory Appeal on Jurisdiction)*, Case No ICTY IT-94-1-AR72 (2 October 1995) [60] (Separate Opinion of Judge Sidhwa).

⁶ *Ibid* art 40:

In order to prevent an aggravation of the situation, the Security Council may before making recommendations or deciding upon measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of the failure to comply with such provisional measures.

⁷ *Tadic (Defence Motion for Interlocutory Appeal on Jurisdiction)*, Case No ICTY IT-94-1-AR72 (2 October 1995) [60] (Separate Opinion of Judge Sidhwa) (emphasis added).

⁸ *UN Charter* art 25.

⁹ *Resolution 1441*, SC Res 1441, UN SCOR, 57th sess, 4644th mtg, [1]–[2], UN Doc S/RES/1441 (2002).

resolutions in order to secure international peace and security.’¹⁰ The Security Council concluded by stating that it ‘remains seized of the matter’.

In my opinion¹¹ Security Council *Resolution 1441* is a resolution pursuant to Article 41 of the *UN Charter*.¹² Article 41 contemplates the use of measures of a non-military nature. There is nothing to prevent a further Article 41 resolution being passed at this particular point in the proceedings notwithstanding numerous previous resolutions.¹³ In relation to the current crisis the Security Council had not resolved to take military action pursuant to Article 42,¹⁴ but as military action was likely to be the next step there is every reason why the Security Council might elect to pass one final Article 41 resolution. Indeed the Security Council was left in no doubt that the United States was contemplating military action as the next step, at the time of the passing of *Resolution 1441*.

When one considers that the maintenance of international peace and security is the primary object of the United Nations, and more specifically the Security Council, it is to be expected that the authorisation of military force should be the measure of last resort. An Article 42 resolution, authorising the use of military force, should be difficult to achieve if any credence is to be given to the purpose and intent of the *UN Charter*.

The fact that *Resolution 1441* expressly states that the Security Council ‘remain seized of the matter’ demonstrates that the Security Council reserves to itself the sole right to deal with Iraq. *Resolution 1441* gives Iraq the ‘last chance to comply’. By *Resolution 1441*, Australia is, by implication, restrained by the Security Council from taking military action without further resolution of the Council.

Indeed the history of the passage of *Resolution 1441* demonstrates the point nicely. The lead up to *Resolution 1441* was a drawn out affair taking some 7 weeks of negotiation. France, Russia and China initially refused to agree to *Resolution 1441* fearing that it might be used by the United States as approval to take military action against Iraq if it failed to cooperate with weapons inspectors. It was only after the United States assured France, Russia and China that the United States would return to the Security Council if weapons inspections failed, that they finally agreed to support the resolution.¹⁵

There is nothing in *Resolution 1441* which makes it subject to the right of Australia to take separate military action against Iraq pursuant to *Resolution 678*.

¹⁰ Ibid [12].

¹¹ Some might argue that *Resolution 1441* was a resolution made under art 40 but this is unlikely because the *Resolution 1441* states that the Security Council is acting under Chapter VII. In *Prosecutor v Tadic (Defence Motion for Interlocutory Appeal on Jurisdiction)*, Case No ICTY IT-94-1-AR72 (2 October 1995) [33] (Judgment of the Court), the Appeals Chamber doubted that an art 40 resolution was a Chapter VII measure. However this does not affect the conclusion that the resolution was not a resolution authorising the use of military force pursuant to art 42 of the *Charter*.

¹² *UN Charter* art 41.

¹³ *Prosecutor v Tadic (Defence Motion for Interlocutory Appeal on Jurisdiction)*, Case No ICTY IT-94-1-AR72 (2 October 1995) [31] (Judgment of the Court): ‘The Security Council has a wide discretion in choosing what action it might take under the *Charter*’.

¹⁴ *UN Charter* art 42.

¹⁵ Thalif Deen, Inter Press Services, *UN Security Council Split on Meaning of Iraq Vote*, 11 November 2002 <http://www.cyberdyaryo.com/features/f2002_111_02.htm> at 1 May 2003.

Nor is there any reason to conclude that *Resolution 678* or *Resolution 687* override the effect of *Resolution 1441*.¹⁶ *Resolution 1441* is clear and unequivocal as to its intent: Iraq is given one final opportunity to comply — failing this the Security Council will decide what needs to be done in order to achieve compliance.

Accordingly, in order to ascertain what action the Security Council has decided is appropriate for Iraq in the present circumstances and more importantly what authority States have to use military force against Iraq, one need go no further than read *Resolution 1441*. *Resolution 1441* does not authorise the use of military force. In view of this there is really no need to consider the effect of previous Security Council resolutions relative to Iraq including *Resolution 678* and *Resolution 687*; however I have been asked to consider these resolutions so I will.

It has been argued that *Resolution 678* authorised states to take military action against Iraq pursuant to Article 42 of the *UN Charter*. It is further argued that *Resolution 687* determined the basis upon which a cease fire would exist. As Iraq has not complied with the conditions of the cease fire then (so the argument goes), Member states are authorised to take military action against Iraq pursuant to the approval given in *Resolution 678*.¹⁷

The problem with this reasoning is that it ignores the fact that resolution 678 expressly deals with the 1990–91 conflict between Iraq and Kuwait. The current dispute has little or nothing to do with Iraq's illegal invasion and annexation of Kuwait. *Resolution 660*, upon which *Resolution 678* is based, condemns the invasion of Kuwait and demands Iraq's immediate and unconditional withdrawal. *Resolution 678* notes Iraq's refusal to comply with *Resolution 660* and authorises the use of force to compel compliance with *Resolution 660*. There is nothing in *Resolution 678* which would justify the conclusion that when the Security Council made *Resolution 678* that it had in mind authorising military action some 12 years later in respect to an entirely different issue.¹⁸

¹⁶ It does not help to argue that *Resolution 678*, SC Res 678, UN SCOR, 45th sess, 2963rd mtg, UN Doc S/RES/678 (1990) is still operative. While not accepting the argument that *Resolution 678* still authorises the use of force against Iraq, if it is operative for this purpose, it would only be operative according to its terms, which relates to the right to take military action against Iraq in the event that it were to again invade Kuwait. The better view is that after this lapse in time, even if Iraq were to again invade Kuwait, a further art 42 resolution would be required. In any event further resolutions of the Security Council including *Resolution 1154*, SC Res 1154, UN SCOR, 53rd sess, 3858th mtg, UN Doc S/RES/1154 (1998) and *Resolution 1141*, above n 9, now put the matter beyond doubt.

¹⁷ Prior to the *UN Charter* when there did not exist a Security Council, a cease fire could be concluded between warring states. If one of the States breached the cease fire, then under the *Hague Convention Respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907, [1910] ATS 8 (entered into force 26 January 1910), *Regulations* art 40 the other state could recommence hostilities. Of course none of this has any further application because it is only the Security Council that can decide whether or not military action can be taken. There exists no bilateral treaty between Iraq and Australia such that Australia can resume military action under old art 40. If any agreement does exist it is between the offending state (Iraq) and the Security Council, notwithstanding the possible intervention of states as agents of the Security Council.

¹⁸ Resolutions of the Security Council are not to be interpreted as one might interpret a provision in a static document such as the *UN Charter* itself or the constitution of a nation state. The Security Council passes a great many resolutions and regularly declares that 'it remains seized of the matter' which indicates that it will come back to the issues and deal with it by further resolution.

Nor can it be said that Member states at the time (including the US, UK and Australia) were in any doubt as to the meaning and effect of *Resolution 678*. When in 1991 the Members states had complied with *Resolution 678* by forcing Iraq out of Kuwait they ceased military action. At the time many complained that the member states should have continued on to Baghdad and disposed of the Government of Saddam Hussein. The United States and Australia both gave, as their reasons for not doing this, the fact that such action was not authorised by Security Council *Resolution 678*.

The argument that *Resolution 687* of 3 April 1991, which deals with the cease fire relative to the Iraq–Kuwait conflict, somehow authorises the use of military force by Australia today because it includes in it an obligation by Iraq to destroy weapons of mass destruction, strains credulity. No matter how much one might argue that later resolutions such as 687 might keep alive the authority to use military force as contained in *Resolution 678*, the fact remains that this authority relates only to the conflict between Iraq and Kuwait.

Proponents of the view that states are free to go off and decide when, where and why they will use military force just because the Security Council has at one time in the past authorised specific military action in relation to a specific conflict, also fail to recognize the significance of the Security Council resolving to ‘remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the region’.¹⁹ The decision to ‘remain seized of the matter’ is contained in both *Resolution 678* and *Resolution 687*. The use of this terminology by the Security Council expressly informs states, such as Australia, not to take matters into their own hands.

There is no question that Australia, the UK and the US knew that that they were not authorised by the Security Council to take military action against Iraq in the current circumstances. They also knew that under international law they were obliged to obtain this authorisation. This is why they tried so hard to secure a further resolution authorising the use of force pursuant to Article 42. They also knew that when States such as France, China and Russia expressly stated that they would not authorise the use of military force, because they wanted to give the inspection regime established under *Resolution 1441* time to work, the majority of permanent members of the Security Council expressly opposed taking military action at this time.

Article 25 of the *UN Charter* provides that States ‘agree to accept and carry out the decisions of the Security Council’. Australia by taking military action against Iraq in the present circumstances has neither ‘accepted’ nor ‘agreed to carry out the decisions of the Security Council’ and by this act stand in breach of international law.

¹⁹ *Resolution 687*, SC Res 687, UN SCOR, 46th sess, 2981st mtg, [34], UN Doc S/RES/687 (1991); *Resolution 678*, SC Res 678, UN SCOR, 45th sess, 2963rd mtg, [5], UN Doc S/RES/678 (1990).

WHETHER, IN THE CIRCUMSTANCES, THE TAKING OF SUCH MILITARY ACTION WOULD RENDER AUSTRALIAN MILITARY SERVICE PERSONNEL LIABLE TO INTERNATIONAL CRIMINAL SANCTION BECAUSE MILITARY ACTION IS UNAUTHORISED?

Legal Considerations

It is not, nor has it ever been, a war crime for soldiers or other military personnel to participate in military action. What soldiers might do during the course of armed conflict may be criminal, if for example they breach the Laws and Customs of War but this is not related to the act of participation *per se*.

Australian service personnel cannot be charged with a ‘crime of aggression’ by the International Criminal Court in The Hague because the *Rome Statute* provides that at this stage, the offence of ‘crime of aggression’ is not operative.²⁰

A ‘crime against peace’ was included in the *Nuremberg Charter*.²¹ It is arguable that this crime may have become part of customary international law, and provided it has achieved *jus cogens* status, it could be prosecuted by a nation state exercising ‘universal jurisdiction’.²² I am of the opinion however, that Australian service personnel could not be found guilty of this offence, in relation to the present conflict in Iraq.

I am of this view for at least two reasons. First, there is considerable doubt as to whether this is a crime under customary international law, and more particularly whether it has achieved the status of *jus cogens*. Secondly, no matter how much the present action by Australia could be said to be contrary to international law, it is a vast leap from this point to be able to conclude that such action is criminal. To prove beyond a reasonable doubt that an individual soldier possessed the necessary mental intent to commit this crime, the prosecution would have to show that the soldier knew, unequivocally, that his or her actions were illegal. Further the court would need to be satisfied that the act of invasion was motivated by an illegal purpose. For example, all Australian military personnel would know that an unprovoked attack upon an innocent nation state for no other reason than territorial expansion would be illegal. This is not what motivates Australia’s participation in the present conflict with Iraq. So I am firmly of the view that the taking of such military action by Australia against Iraq, would not render Australian military service personnel liable to international criminal sanction.

GRANT NIEMANN*

²⁰ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, [2002] ATS 15, art 5(2) (entered into force 1 July 2002):

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.

²¹ *Charter of the International Military Tribunal* art 6(a), annexed to the *Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945, 58 Stat 1544, 82 UNTS 280.

²² It is unlikely that a state would be able to do this without specific national legislation.

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