

# Midnight to Dawn

## The Age and National Press club seminar

Speakers notes:  
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### Central argument:

The commitment of Australian military forces to the conflict in Iraq is contrary to International law and to Australian Criminal law.

#### ***1. International Law***

##### *Summary*

*An armed attack against Iraq is a violation of the fundamental prohibition on the use of force in Article 2(4) of the United Nations Charter and Article 1 of the ANZAS Treaty. Such a proposed use of force is not an exercise of any right of self-defense and is in the absence of Security Council authorization.*

*The legal advice from the Att. Gen's Department and DFAT, upon which the Australian government relies, is unsound and misleading.*

*The proposed 'bomb and stun' attack will be in breach of clear obligations at international humanitarian law requiring that:*

- *a distinction be made between civilian and military targets and*
- *all acts be proportional to the threat*

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The Government argues that its proposed use of force in Iraq is authorized by UN Security Council Resolution 678 and is thus authorized and valid at international law.

The question whether an attack on Iraq is valid at international law has been confined by the UK, US and Australian governments to the issue of Security Council authorization; justifications based on self defense or humanitarian intervention have not been relied upon.

The Government's legal advice upon which Security Council authorization is founded on the following arguments:

- *the failure by Iraq to give up its weapons of mass destruction immediately is a material breach of resolution 1441 September 2002.*
- *The material breach of Res. 1441, terminates the ceasefire in Res 687*
- *An end to the ceasefire "reactivates" Resolution 678 of November 1990 authorizing the use of "all necessary means to uphold and implement res. 660(1990) and all subsequent relevant resolutions and to restore international peace and security".*

The legal analysis is flawed. It is overly simple and misleading in the following ways:

- Res 678 dealt exclusively with using force to ensure that Iraq was ejected from Kuwait and with Kuwaiti sovereignty.

- The subsequent resolutions were concerned with disarmament and weapons of mass destruction, because the war had been successful and Kuwaiti sovereignty had been restored.
- Res 1441 makes it clear that any determination of whether there had been a material breach of its terms and the serious consequences of this breach were matters for the Security Council. France, Russia and China made it clear that they agreed to Res. 1441 only on the basis that there was no automatic right to use force without a further Security Council resolution.
- There is no precedent for the ‘revival’ of a right of UN members to use force without a further Security Council resolution. Indeed, the right granted by Res. 678 is rare in UN practice. The infrequent grant by the UN of a right of members to use force and the nearly 13 year gap between Res 678 and today confirm the need for a further resolution.

The use of force in the absence of a Security Council resolution is contrary to Resolution 1441 and to the entire United Nations Charter.

The illegal use of force is a breach of a peremptory norm of international law from which no derogation is possible.

## **2. Australian Criminal Law.**

### *Summary*

*War crimes, crimes against humanity and genocide are now part of Australian criminal law (rendering the decision by the Federal Court in Nulyarimma re Genocide irrelevant). For the first time, all State courts with criminal jurisdiction have the power to try those accused of international crimes. Members of the Australian government are responsible for any acts that satisfy the legal definitions of these offences.*

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On 27 June 2002, the Commonwealth enacted the *International Criminal Court Act 2002* and the *International Criminal Court (Consequential Amendment) Act 2002* in order to facilitate the ratification by Australia of the Rome Statute for an International Criminal Court. This legislation implements certain international criminal offences, (war crimes, crimes against humanity and genocide) as part of Australian domestic criminal law by amending the *Criminal Code Act (Cth)*. By this means, the provisions of the Rome Statute are now directly applicable law in this country.

When ratifying the Rome Statute, Australia stressed that it retains primacy of jurisdiction in prosecuting any person accused of war crimes. Australia has thus not only accepted the obligation to prosecute for such offences, thereby excluding the exercise of jurisdiction by the new International Criminal Court, but also it has set in place the domestic laws and procedures to do so.

The Federal Government has now committed Australian forces to the coalition attack on Iraq. It is also reported that the coalition will employ “bomb and stun” tactics to coerce the civilian population to surrender.

These facts provide the basis for concern that the Australian Government is proposing to commit the following offences under current Australian law:

### ***Crime against Humanity: Murder s 268.8: Criminal Code Act 1995.***

A person (the perpetrator) commits an offence if:

- (a) the perpetrator causes the death of one or more persons; and
- (b) the perpetrator’s conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

An unlawful attack, contrary to international law (as argued in the following part), falls squarely within the terms of s 268.8.

See also s. 268.23 dealing with other inhumane acts.

***War crimes that are grave breaches of the Geneva Conventions and of Protocol I to the Geneva Convention*** s 268.24 Criminal Code Act 1995.

- (1) a person (the perpetrator) commits an offence if:
- (a) the perpetrator causes the death of one or more persons; and the person or persons are protected under one or more of the Geneva Conventions or under Protocol I to the Geneva Conventions; and
  - (b) the perpetrator knows of, or is reckless as to, the factual circumstances that establish that the person or persons are so protected; and
  - (c) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.

Note also the additional and similar provisions in relation to "inhumane treatment" under s. 268.26 dealing with the infliction of physical or mental pain or suffering.

Note the practical requirement that prosecution depends upon the consent of the Attorney General.