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OPEN LETTER - IRAQ WAR

Waging war crimes?

The initiation of a war against Iraq by the self-styled 'coalition of the willing' would be a fundamental violation of international law. International law recognises two bases for the use of force. The first, enshrined in article 51 of the United Nations Charter, is that force may be used in self-defence. The attack must be actual or imminent. The second basis is when the UN Security Council authorises the use of force as a collective response to the use or threat of force. However, the UNSC is itself bound by the provisions of the UN Charter and can only authorise the use of force if there is evidence that there is an actual threat to the peace (in this case, by Iraq) and that this threat cannot be averted by any means short of force (such as negotiation, further weapons etc).

Members of the 'coalition of the willing', including Australia, have not yet presented any persuasive arguments that an invasion of Iraq can be justified at international law. The United States has proposed a doctrine of 'pre-emptive self-defence' that would allow a country to use force against another country it suspects may attack it at some stage. This doctrine contradicts the cardinal principle of the modern international legal order and the primary rationale for the founding of the UN after the second world war: the prohibition on the unilateral use of force to settle disputes.

The weak and ambiguous evidence thus far presented to the international community by US Secretary of State Colin Powell to justify a pre-emptive strike underlines the practical danger of a doctrine of pre-emption. A principle of pre-emption would fundamentally undermine the system of collective security contained in Chapter VII of the UN Charter and return us to the pre-1945 era where might equalled right. Ironically, the same principle would justify Iraq now launching pre-emptive attacks on members of the coalition because it could validly argue that it feared an attack.

But there is a further legal dimension for both Saddam Hussein on the one hand and Messrs Bush, Blair and Howard and potential coalition partners on the other to consider. Even if the use of force can be justified, international humanitarian law imposes significant limits on the means and methods of warfare. The Geneva Conventions of 1949 and their 1977 Protocols set out these limits: for example, the prohibitions on targeting civilian populations and civilian infrastructure and causing extensive destruction of property not justified by military objectives. Intentionally launching an attack knowing that it will cause 'incidental death or injury to civilians which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated' constitutes a war crime at international law. The military objective of disarming Iraq could not justify widespread attacks on the Iraqi population, over half of whom are under the age of 15. The use of nuclear weapons in a pre-emptive attack would seem to fall squarely within the definition of a war crime.

Until recently, the enforcement of international humanitarian law largely depended on the willingness of countries to try those responsible for grave breaches of the law. The creation of the International Criminal Court last year has however provided a stronger system of scrutiny and adjudication of violations of humanitarian law. The International Criminal Court now has jurisdiction over war crimes and crimes against humanity when national legal systems have not dealt with these crimes adequately. It attributes criminal responsibility to individuals responsible for planning military action that violates international humanitarian law and those who carry it out. It specifically extends criminal liability to Heads of State, leaders of governments, parliamentarians, government officials and military personnel.

Estimates of civilian deaths in Iraq suggest that up to a quarter of a million people may die as a result of an attack using conventional weapons and many more will suffer homelessness, malnutrition and other serious health and environmental consequences in its aftermath. From what we know of the likely civilian devastation of the coalition's war strategies, there are strong arguments that an attack on Iraq may involve the commission of both war crimes and crimes against humanity.

Respect for international law must be the first concern of the Australian government if it seeks to punish the Iraqi government for not respecting international law. It is clearly in our national interest to strengthen, rather than thwart, the global rule of law. Humanitarian considerations should also play a major role in shaping government policy. But, if all else fails, it is to be hoped that the fact that there is now an international system to bring even the highest officials to justice for war crimes will temper the enthusiasm of our politicians for this war.

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