A critical review of Chilcot Inquiry into the Iraq War

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英国イラク戦争調査についての一批評

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Abstract

In the absence of any specific authorisation by the UN Security Council, there was no law at the time of the Iraq War of 2003, whether international or UK, holding an individual criminally accountable for aggression. No inquest into the lawfulness of a war in the analogy of Coroner's inquest was known. The Iraq War may be better seen to be similar to a case of misuse of police powers. In this context, Sir John's modern Thucydidean fact-finding probe was a good practical step toward ensuring the disclosure of evidence and making a critical account of the relevant decision-making process, not only to the UK tax-payers, but also to the international community. Lessons include that there was a breach of duty to pursue all reasonable lines of inquiry before resorting to war and that the breach was induced partly by fear arising from the UK's past arming of Iraq.

Keywords: Iraq War, Chilcot Inquiry, aggression, misuse of military power, accountability

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国連安保理の授権なくして 2003 年のイラク戦争について侵略の罪で個人の刑事責任を問う法は当時国際法上も英国法上も存在せず、検屍の類推で戦争の違法性を問う法的手続も存在しなかった。イラク戦争はむしろ警察過誤に近いものと見た方が良いだろう。その文脈ではチルコット調査団の行った近代的ツキディデス式真相究明は、開戦決定過程について必要な証拠開示を確保し、英国納税者だけでなく国際社会の前に批判的顛末報告を行うために実際的な良策だったといえよう。教訓は、戦争に訴える前に全ての合理的な捜査線を辿る義務の違反があり、その違反は結局のところ英国の過去のイラクへの武器軍事技術輸出に起因していると思われることであろう。

キーワード：イラク戦争、チルコット調査団、侵略、武力行使過誤、顛末報告義務

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1. Purpose

This paper critically reviews the first part of the findings, as of 6 July 2016, of Sir John Chilcot's Inquiry into the Iraq War of 2003 concerning the run-up to the United Kingdom's decision to go to war.

The Iraq War was waged by the United States and the United Kingdom, despite the explicit dissent of a majority of the members of the United Nations Security Council, including a majority of its permanent members (S/PV. 4721 of 19 March 2003). The cause of their invasion, i.e. to disarm Iraq of weapons of mass destruction, turned out to be unsupported by the findings of the US-led international Iraq Survey Group (Duelfer, 2004). The United States and the United Kingdom individually instituted inquiries into the failures of their respective intelligence, as shown in the pages below. These failures as well as such disturbing consequences of the war, as will be exemplified in the next paragraph, lead to questions about the manners in which the two countries came to a conclusion that they had to wage war. So far, Chilcot Inquiry of the United Kingdom seems to be the only available official inquiry which sheds light on the relevant decision-making process.

Firstly, the resultant regime change in Iraq did not promote peace and stability in the Middle East, but created a power vacuum which has been exploited by the so-called "Islamic State" in Iraq and Syria (or, more alarmingly, the Levant), seeking to overthrow the existing international law and order by force. Secondly, the influx of refugees from Syria and spread of terrorism raise racial and religious tensions amongst Western Allies, putting their basic values of civil liberties or human rights, and democracy at risk. Thirdly, the other permanent members of the Security Council, Russia and China, in particular, tend to behave according to an apparent belief that they, too, ought to be above the law, and thus destabilising the international order under the UN Charter.

This paper firstly reviews the development of the outlawry of war, and that of international police powers, and explains why it is institutionally and procedurally impracticable to prosecute individuals on charge of aggression against Iraq. Secondly, this paper explores evidence which was made available on public domain by the Chilcot Inquiry, and analyses the domestic context in which the Inquiry was instituted; what the Inquiry tried to achieve, and how the UK leaders handled the lawfulness issue of the Iraq War. Finally, the paper discusses what lessons can be learnt from the findings.

2 (1) Development of Outlawry of War and of International Criminal Law

The Hague Peace Conferences of 1899 and 1907 sought to establish a principle that war ought to be the last resort, by establishing mechanisms of pacific settlement of international disputes. They also codified the laws governing the conduct of war (*ius in bello*) to a certain extent.

The codification of laws governing resort to war (*ius ad bellum*) turned out to be slower. The Treaty of Versailles of 1919, which established peace after the First World War, contained not only the Covenant of the League of Nations, but also penal provisions, seeking to punish the ex-Emperor of Germany "for a supreme offence against international morality and the sanctity of treaties" (Article 227). This somewhat broad description of offence represented the emerging international society's first attempt at defining a violation of *ius ad bellum*.

In 1928, a General Treaty (Kellogg-Briand Pact) was concluded among nine powers of the USA, Great Britain (Crown on behalf of Dominions), France, Italy, Japan, Germany, Belgium, Poland and Czechoslovakia, renouncing war "as an instrument of national policy in their relations with one another" (Article 1).

Following the Second World War, which was waged by Germany, Italy and Japan in manifest breach of their obligations under the Pact of 1928, both the Charter of the International Military Tribunal of August 1945 (Nuremberg Charter) and that of the International Military Tribunal for the Far East of April 1946 (Tokyo Charter), sought to punish a number of individuals on charges of "crimes against peace", "namely, planning, preparation, initiation or waging of a war of aggression [...]" (Article 6, Nuremberg; Article 5, Tokyo).

The Charter of the United Nations bans the resort to armed force by member states, except where either the Security Council authorises it under Chapter VII, or where "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" (Article 51). Therefore, unless "an armed attack occurs", no right of self-*defense* arises (in the spelling of the Charter). This formula seems to rule out any right of pre-emptive strike.

In the meantime, attempts at defining the term, "aggression", which had been initiated by the League of Nations in 1923, took generations to complete. In 1998, the Rome Statute of the International Criminal Court (ICC) listed the crime of aggression in Article 5, but failed to give any definition to it. It was not until 11 June 2010 that the Review Conference of the Rome Statute in Kampala, Uganda, where the States Parties to the Rome Statute unanimously

agreed with the definition of "crime of aggression" as "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression..." (Article 8 *bis* (1)). The term, "aggression" is defined as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State ..." (Article 8 *bis* (2)), and each of the seven acts which United Nations General Assembly resolution 3314 (XXIX) enumerated is agreed to qualify as an act of aggression, including "the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack ..." (Article 8 *bis* (2) (a)).

Therefore, in substance, excluding the procedural limitations, Tony Blair's Iraq War of 2003 appears to satisfy the constituting elements of the crime of aggression, save some defence, either Article 51 of the Charter, or the Security Council's authority. The Rome Statue's requirement that an act of aggression amount to a "manifest" violation of the UN Charter, to be punishable (Article 8 *bis* (1)) tends to afford extra defence, where the interpretation of the Security Council's authorisation of the use of force differs from one State to another, such as in the case of resolution 1441 (2002) concerning the Iraq War.

Turning to the procedural limitations, the ICC "may exercise jurisdiction with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties" (Article 15 *bis* (2)). On 26 June 2016, the requisite thirtieth event took place, as the State of Palestine[1] ratified them (ICC, 2016). So, only crimes of aggression committed after 26 June 2017 will fall within the jurisdiction of the ICC. Its exercise is still pending a decision to be taken after 1 January 2017 by a two-third majority of the Assembly of the States Parties to the Rome Statute (Article 15 *bis* (3)). In addition, the Security Council has powers to postpone the prosecution of any relevant crime (Article 15 *bis* (6), (7), (8)). Therefore, there is no prospect at all for the ICC to try Tony Blair on the charge of aggression, irrespective of the findings of the Iraq Inquiry.

Article 17 of the Rome Statute implies that the jurisdiction of the ICC is a subsidiary to primary national jurisdictions. The United Kingdom has a statute which makes the offences under Article 5 of the Rome Statute, excluding aggression, namely, genocide, crimes against humanity, and war crimes, punishable domestically: sections 1 (1) and 50 (1), International Criminal Court Act 2001 (c. 17). So far, Parliament has taken no action to make the crime of aggression punishable under the ICC Act 2001, or any other piece of legislation. So, there is no legal basis on which to put anyone on trial on the charge of aggression in the United Kingdom.

2 (2) Development of Collective Security and International Police Powers

Culminating the outlawry of war, the UN Charter imposes a duty on the Security Council of the United Nations to find, prevent and suppress breaches of the peace. A breach of the peace is an analogy of the Common Law concept of a breach of the King's peace, which is not an offence, but circumstances giving rise to the power of arrest. The concept under the Charter is wider than aggression, and authorising the Security Council to take enforcement actions.

It is assumed that the Security Council maintains international peace and security, based on the concert of the five permanent members. They have privileges of veto power, so that they are expected to lead the world by example. In particular, the USA and the UK played the leading roles in establishing the UN Charter (Simma, 1995, p. 6), such that they owe a heavier duty than the other permanent members to preserve the Charter. When they happen to mislead the world by wrong example, a thorough inquiry, at least, is warranted to make a critical account of what happened, not only to the public of the respective countries, but also to international society at large.

3. Chilcot Inquiry

3 (1) Domestic Context

On 29 May, 2003, the BBC Radio 4 programme *Today*, alleged that the Government Press Officer exaggerated the imminence of the Iraqi threat in his use of the assessments of the Joint Intelligence Committee (JIC) in a dossier on *Iraq's Weapons of Mass Destruction*, which the Government published on 24 September 2002, in particular, an assertion that Iraq had capability to make some of its weapons of mass destruction ready to fire within forty-five minutes of an order to do so. On 9 July 2003, the press alleged that the source of the BBC allegation was Dr. David Kelly, a biological warfare expert and a UN Weapons Inspector in Iraq. On 15 and 16 July, the Commons Select Committees subjected him to televised grilling. Two days later, he was found dead. The Lord Chancellor asked Lord Hutton, a judge of the House of Lords, to conduct an investigation into the circumstances surrounding the death of Dr. Kelly. On 28 January 2004, Lord Hutton concluded that Dr. Kelly committed suicide, and criticised the manner in which the BBC journalist attributed his inferences from Dr. Kelly's information to Dr. Kelly personally, clearing the Government of any wrongdoing. As the US President established, on 2 February 2004, a Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction (Executive Order 13328), the UK Foreign and Commonwealth Office, too, established a Committee of Privy Councillors on the following day, in charge of Review of Intelligence on Weapons of Mass Destruction. Lord Butler of Brockwell, a former Cabinet Secretary 1988-1998, chaired the Committee. On 14 May 2004, his Report

found that the Government publication of the dossier "in the name and with the authority of the JIC, had the result that more weight was placed on the intelligence than it could bear" (Butler, 2004, p. 114, para. 466). On 30 September 2004, the Iraq Survey Group published its final report (Duelfer, 2004), finding that Iraq had ended its nuclear programme and destroyed its chemical weapons stockpile in 1991, and abandoned its biological weapons programme in 1995. In their view, Saddam Hussein deceived his own ministers in order to mislead the USA to develop a false belief that Iraq had weapons of mass destruction, and thereby to deter the USA from attempting to topple him by force.

It seems to be fair to argue that the findings of Lord Butler's Review along with those of the Iraq Survey Group, the vehemence and sarcasm with which the Government and Lord Hutton attacked the BBC's allegation of the Government exaggeration of intelligence, in addition to the sectarian violence which persisted in Iraq after the invasion, led British taxpayers to demand accountability for such a disastrous misuse of state powers.

3 (2) Task, Composition and Style of the Chilcot Inquiry

On 15 June 2009, when the repatriation of the UK combat troops in Iraq was about to complete in fortnight, Prime Minister Gordon Brown announced the establishment of a domestic 'independent Privy Councillor committee of inquiry' into the UK's military involvement in Iraq, from the summer of 2001 to the end of July 2009, covering the run-up to the US-UK-led invasion of Iraq of 20 March 2003, and their occupation of Iraq which followed (Hansard, HC Debate, 15 June 2009, cc 23-24). Prime Minister Brown said the purpose of the Inquiry was to "learn lessons of the complex and often controversial events of the last six years".

The Chairman, Sir John Chilcot, was a former career civil servant at the Home Office, who served most recently as Permanent Secretary at the Northern Ireland Office between 1990 and 1997. He was a member of Lord Butler's Review of Intelligence on Weapons of Mass Destruction in 2004. Sir John's Committee had two historians, one diplomat, and another civil servant. But there was no qualified lawyer. Professor Lawrence Freedman was an expert of war studies, and the official historian of the Falklands Campaign. Sir Martin Gilbert was the author of the official biography of Winston S. Churchill, covering the period from 1914 to 1965, as well as many authoritative books on two world wars. Sir Roderic Lyne was the UK's ambassador to Russia between 2000 and 2004. Baroness Prashar of Runnymede was in charge of running an impartial and competitive process of appointing individuals to senior posts of the civil service and of the judiciary.

The Committee sought expert assistance from a UK judge of the International Court of Justice 1995-2009, Dame Rosalyn Higgins, as well as from a former Chief of the General Staff 1997-2000, Sir Roger Wheeler. The Committee's Secretariat included two barristers from the Serious Fraud Office, Sarah Goom, and Stephen Myers. Still, the exclusion of professional criminal lawyers from the Committee, who played leading roles in the International Criminal Court and *ad hoc* war crimes tribunals, characterised the style of the Iraq Inquiry. The Inquiry Committee took evidence directly from witnesses (Chilcot, 2009), rather than taking evidence through lawyers' examination in chief, cross-examination and re-examination. The former style saves costs and helps make the Inquiry less adversarial, and therefore, perhaps less threatening to witnesses. But the latter style was followed not only in Coroner's inquest and criminal trials, but also in many public inquiries, including the Hutton Inquiry into the death of Dr. David Kelly, as well as Sir Henry Fisher's and Sir John May's landmark inquiries into cases of miscarriages of justice of the 1970s (Fisher 1977; May 1994), which prompted major reforms in criminal procedure and criminal justice in the 1980s and the 1990s, respectively.

In his opening statement of 30 July 2009, Sir John Chilcot explained the Iraq Inquiry's approach as follows: "each member of the committee is independent and non-partisan. We are determined to be thorough, rigorous, fair and frank to enable us to form impartial and evidence-based judgements on all aspects of the issues, including the arguments about the legality of the conflict" (Chilcot, 2009).

Sir John Chilcot took the care to spell the word "judgement" with e, as opposed to "judgment", without, which refers to that of a court of law. Sir John consistently made it clear that the Inquiry was not a court of law and that nobody was on trial (Chilcot 2009). So, he was saying that the Committee was determined to form not judicial *judgments*, but non-judicial *judgements*, viz. not on the *legality* of the conflict, but on the *arguments about* the legality of the conflict.

In the closing Statement of 6 July 2016, on the day he published the Report of the Iraq Inquiry, Sir John said, "we have [...] concluded that the *circumstances* in which it was decided that there was a legal basis for UK military action *were far from satisfactory*" [emphasis added] (Chilcot, 2016a, p. 4).

In plain terms, "far from satisfactory" means a failure. The Report does not say that the war was unlawful, but the process of decision-making concerning the lawfulness of the war was flawed, as shown in subsection 3 (3) below.

The Inquiry also found that "[a]t the time of the Parliamentary vote of 18 March [2003] ... [t]he point had not been reached where military action was the last resort" (Chilcot, 2016b, p. 47, para. 339); and "...the UK's actions undermined the authority of the Security Council" (Chilcot, 2016b, p. 63, para. 439).

These findings are indeed an open invitation to inference that the UK invasion of Iraq was unlawful in the light of public international law. But the Inquiry did not really find anybody guilty of aggression, nor any use of force "unlawful". The Inquiry was neither a trial, nor an inquest into the legality of the resort to war. There was no legal basis for the Inquiry to conduct such, and the Report could not have said more. The question emerges, then, as to what the inquiry in fact amounted to, and what the utility of the Inquiry was for international criminal justice.

Times Higher Education (2016, July 21) suggested that the Chilcot Inquiry was essentially a modern "Thucydidean" fact-finding probe. In his opening statement of 30 July 2009, Sir John said that the purpose of the Inquiry was "to establish as accurately as possible, what happened and to identify the lessons that can be learned. Those lessons will help ensure that, if we face similar situations in future, the government of the day is best equipped to respond to those situations in the most effective manner in the best interests of the country" (Chilcot, 2009). This statement of purpose amply echoes that of Thucydides in writing his *Historiae* ("histories"), i.e. contemporary "witness accounts" of the Peloponnesian War, cited below:[2]

> ... as to the events of the war [...] I investigated every detail with the utmost concern for accuracy [...] my work [...] will have served its purpose well enough if it is judged useful by those who want to have a clear view of what happened in the past and what – the human condition being what it is – can be expected to happen again some time in the future in similar or much the same ways (Mynott, 2013, pp. 15-6, Book 1, para. 22).

Thucydides conceded "as to what was said in speeches by the various parties [...], it was difficult for me to recall the precise details [...]" (Mynott, 2013, p. 15). The Iraq Inquiry was assisted by modern practice and technology unavailable to Thucydides more than twenty-four centuries ago, so that the Inquiry was able to pursue accuracy even in what was said. Public speeches in Parliament are accurately recorded. The Iraq Inquiry was able to video record almost every witness to the Inquiry, and most of the relevant individuals were still alive at the time of the Inquiry's hearings, although many soldiers and Iraqi civilians, as well as Robin Cook, had died before the establishment of the Inquiry.

It is this paper's case, as shown in the subsection 3 (3) below, that the true worth of the Iraq

Inquiry appears to lie in the achievement of the disclosure and declassification of the relevant government documents, including substantial quantity of top secret material (Chilcot, 2016c, pp. 8-15). This was necessary for the Inquiry to analyse the key decision-making processes thoroughly and with rigour and fairness in order to make some constructive criticisms frankly. The Iraq Inquiry's achievement should also include the publication in its official website of the relevant written, oral and visual materials (Chilcot, 2016c, p. 8-15). Such publication is needed to enable an audience critically to study, on their own, the process of relevant decision-making and its consequences, and to draw informed conclusions (Chilcot, 2016b, cover letter).

Lord Scott told The Guardian (2016, February 15) that the Chilcot Inquiry had far less freedom of information than his 'Arms to Iraq' Inquiry. Lord Scott was a former senior judge. Between 1992 and 1996 he conducted an inquiry into "the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions" (Scott, 1996). An issue before his inquiry was whether the UK Government had, before the Iraqi invasion of Kuwait in 1990, licensed the defendant company to export to Iraq the means with which to manufacture weapons of mass destruction. Lord Scott said that he had enjoyed complete freedom to publish any material he wanted, whereas Sir John Chilcot was obliged to seek agreement of the Cabinet Secretary, who had the final say. Lord Scott believed that the disclosure could only properly be ruled by a judge, on the content of a particular piece of information at issue. He said the Whitehall (Civil Service) practice, whereby secrecy was imposed over broad classes of information, such as advice to minsters, ought to be abandoned, and described as "unacceptable" the argument that Whitehall's advice ought to be secret, so as to preserve "candour between civil servants and ministers".

Lord Scott's view that only a judge can make decisions on disclosure, sounds persuasive. If the prosecution wants to withhold certain relevant material from disclosure, they have to make an application to the judge for public interest immunity (PII). In the Matrix Churchill trial, the judge rejected the PII application with respect to the alleged government export licence for the defendant, leading to the collapse of the prosecution and Lord Scott's inquiry. But neither his Arms-to-Iraq Inquiry nor Sir John Chilcot's Iraq War Inquiry was established under the Tribunals of Inquiry (Evidence) Act 1921 (repealed in 2005), to have the power of the High Court. The prosecution sometimes discontinues the proceedings in order to avoid disclosure, and it remains uncertain as to whether they do so only after making a PII application to the judge. In criminal trials, the defence cannot be absolutely sure whether or not there is any relevant piece of information not known to them and yet to be disclosed. Disclosure depends on more than mere good faith.

Therefore, it is also arguable that because Sir John Chilcot was a senior civil servant experienced in handling very sensitive information concerning policing and counter-terrorism in Northern Ireland, he had the requisite trust and confidence among the senior members of the Civil Service, who were in control of Government documents, to persuade the latter to disclose the most sensitive categories of information, such as intelligence reports, and the Prime Minister's conversation with the President of the USA, in which most crucial decisions in the steps toward war tended to be made. In reaching agreement over the publication of material necessary for the purpose of the Iraq Inquiry, the Government stipulated that the publication of the relevant material was done in order to serve exceptional public interest around the matters the Inquiry was established to examine, and it did not involve the setting of any precedent (Chilcot, 2016c, p. 11, para. 60).

It is fair to note that Lord Scott's criticisms were made at the time when there was public anxiety concerning whether or not the Iraq Inquiry would be able to publish its report after nearly six years of work. The delay was caused not necessarily due to any resistance to disclosure, but because the Iraq Inquiry gave those who were intended to be criticised in the Report an opportunity to respond before the publication. This followed a standard practice developed after the case of *Maxwell v Department of Trade and Industry* [1974] QB 523, in which the plaintiff successfully argued that the publication of an inquiry report by the defendant department effectively committed 'business murder' of the former.

It is also fair to mention that Thucydides intended to inform an unspecified audience in indefinite future, so that his approach might be seen to be close to saying "world history is world court" (Schiller, 1784). By contrast, the Iraq Inquiry was more focused, intended to help make a future government facing similar situations better equipped to respond (Chilcot, 2009). The Chilcot Report, which amounts to 1.2 million words, three times as many as William Shakespeare's entire body of literary works, is too voluminous for any layman to read thoroughly. But its primary target readers seem to be senior members of the Civil Service, who give advice to Cabinet Ministers. Peter Hennessy (1996) defined the role of the Permanent Civil Service in the UK's Parliamentary Government in terms of a "gyroscope". The metaphor aptly describes the role of the Civil Service in providing stability, and maintaining a reference direction in the navigation of government through uncharted waters of politics, particularly in the partial absence of written constitutional norms. Therefore, there seems to have been public interests for the Civil Service in disclosing otherwise confidential materials to the Inquiry, in order to enable the future Civil Service to advise a future Government properly.

3 (3) The Decision-Making Process Concerning the Lawfulness of the War

(a) US position

On 27 January 2010, Lord Goldsmith, the Attorney General at the time of the invasion, testified before the Inquiry about the US position, which came to light in his meetings in early 2003, with a number of senior officials at the Department of State, including the Legal Adviser, William Taft IV. The following is, therefore, inadmissible hearsay in court. The US officials had never considered Security Council resolution 1441 (2002) to be necessary for the purpose of a forceful regime change in Iraq. The USA co-operated with the UK in this respect, for the sole purpose of easing the way forward for the UK to join with the USA. From the US perspective, the authorisation to "use all necessary means" under Security Council resolution 678 (1990) was merely suspended following the Operation Desert Storm, when resolution 687 (1991) imposed a ceasefire conditional upon Iraq's compliance with the obligations to disarm all chemical, biological, and ballistic missiles, and to abandon any development of nuclear weapons capabilities under international supervision. Therefore, for the USA, all that was needed was to find that Iraq had materially breached its obligations under resolution 687 (1991) and all the other relevant resolutions, which would make the authorisation to use force contained in resolution 678 (1990) operational again.

(b) The UK Attorney General's First Interpretation of Security Council Resolution 1441 (2002)

The UK Government at first thought of the matter differently, and succeeded in persuading the US Government to seek a Security Council resolution, finding Iraq to be in material breach of its obligations under resolution 687 (1991) and all the others; calling upon Iraq to comply with its obligations or to "face serious consequences", implicitly referring to the use of armed force. Resolution 1441 was adopted unanimously on 8 November 2002, to achieve these objectives. As the opportunity was given to Iraq once again to comply with its obligations, a new mechanism was set up at the Security Council to deal with any false reporting by Iraq, in operative paragraphs 4, 11, 12 and 13. Operative paragraphs 4, 11 and 12 were worded in such a way as to point toward the need for a second resolution to trigger paragraph 13, which "recalls, in that context [of paragraphs 11 and 12] that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations".

On 14 January 2003, the Attorney General returned the Prime Minister his first draft advice (Chilcot, 2016b, para. 448). Elizabeth Wilmshurst, Deputy Legal Adviser at the Foreign Office 2001-2003, recalled that the Attorney General's draft legal advice at that stage "was that a second resolution was needed" to use force (Wilmshurst, 2010, p. 13, lines 22-23).

(c) The Attorney General's Second Interpretation of Resolution 1441

On 23 January 2003, Sir Jeremy Greenstock, the UK Permanent Representative at the United Nations, told Lord Goldsmith, the Attorney General, that the French and Russian representatives at the negotiation leading to resolution 1441 had sought to make it explicit that the Security Council was required to make another decision to authorise the use of force, but that they had failed to garner the necessary support (Goldsmith, 2010, p. 19, lines 7-12). Lord Goldsmith then decided to go to the USA in order to obtain a clearer view, and met a number of senior officials of the State Department. They told him that the USA would not have conceded to the requirement of a second resolution, and that the French also acknowledged it (Goldsmith, 2010, pp. 110-111).

Subsequently, on 27 February 2003, the Attorney-General met the Prime Minister's secretaries, and told them that a "reasonable case" could be made that resolution 1441 was capable of "reviving" the authorisation for the use of force in resolution 678 (1990) without any further resolution, if there were strong factual grounds for concluding that Iraq had failed to take the final opportunity offered by resolution 1441 (Chilcot, 2016b, para. 454). That advice was made in writing on 7 March 2003. In particular, he identified the key question to be whether or not there was "a need for an assessment of whether Iraq's conduct constituted a failure to take the final opportunity to comply with [...] within the meaning of operative paragraph 4 of resolution 1441 such that the basis of the cease-fire was destroyed." He said in paragraph 26 of his written advice, "a narrow textual reading of the resolution suggested no such assessments was needed because the Security Council had pre-determined the issue [by operative paragraph 13]" (Chilcot, 2016b, para. 458-459).

(d) The Attorney-General's Third Interpretation of Resolution 1441

In paragraph 29 of the written advice of 7 March 2003, however, the Attorney-General warned the Prime Minister as follows: "in the light of the latest reporting by UNMOVIC [UN Monitoring, Verification and Inspection Commission], you will need to consider extremely carefully whether the evidence of non-co-operation and non-compliance by Iraq is sufficiently compelling to justify the conclusion that Iraq has failed to take its final opportunity" (Chilcot, 2016b, para. 463-464).

This advice was shown to the Foreign Secretary, the Defence Secretary, the Labour Party Chairman, and the Prime Minister's Chief of Staff. At the Cabinet meeting of 11 March 2003, the Prime Minister explained the Attorney General's advice in general terms. This prompted Admiral Boyce for the Armed Forces and the Treasury Solicitor for the Civil Service, to ask the Attorney General to give a clear-cut answer as to whether military action would be lawful

or unlawful (Chilcot, 2016b, para. 465, 468). On 12 March 2003, the Prime Minister and the Foreign Secretary reached the conclusion that there was no chance of securing a majority in the Security Council in support of the UK draft resolution of 7 March 2003, and there was a risk of one or more vetoes if the draft was put to vote. On 13 March 2003, the Attorney General arrived on balance at a 'better view' that the factual conditions for the revival of the authorisation to use force were met in this case, suggesting that the resort to war be taken as lawful (Chilcot, 2016b, para. 469, 471).

(e) The Prime Minister's Decision on Facts

On 14 March 2003, the Legal Secretary to the Law Officers of the Crown, acting on behalf of the Attorney-General, wrote to the Prime Minister's Private Secretary on Foreign Affairs, asking whether the Prime Minister could confirm the Attorney General's understanding that "it is unequivocally the Prime Minister's view that Iraq has committed further material breaches as specified in [operative] paragraph 4 of resolution 1441", which was, in the Attorney's view, a political judgement for the Prime Minister. On 15 March, the Prime Minister's Private Secretary wrote to the Legal Secretary, confirming the Prime Minister's unequivocal view. It is not clear on what grounds the Prime Minister reached that conclusion, and there was no involvement of any senior Cabinet Minister in the making of the decision (Chilcot, 2016b, para. 472-474).

(f) The Attorney General's Written Answer of 17 March 2003

The Attorney General prepared a written answer to a member of the House of Lords explaining the Government's position concerning the legality of military action, and that was published on 17 March 2003 (Chilcot, 2016b. para. 481-482). The Cabinet meeting on 17 March 2003 was provided with the Attorney General's written answer. It did not explain any grounds on which to conclude that Iraq had failed to take the final opportunity to comply with its obligations. The Attorney General simply told Cabinet that it was "plain" that Iraq had failed, and "as a result" the authority to use force under resolution 678 was revived. He added that there was no need for any further resolution. Cabinet members had little appetite to question the Attorney General about his legal advice (Chilcot, 2016b, para. 483, 484, 485, 490).

(g) The Prime Minister's Speech in Parliament of 18 March 2003

On 18 March 2003, the Prime Minister sought Parliamentary approval of the Cabinet decision of 17 March to go to war. This step would have been rather unnecessary if there had been an international legal authority to do so. Parliament was presented with the Attorney General's written answer of 17 March. Nevertheless, the Prime Minister went on to invoke implicitly the right of pre-emptive self-defense in order to justify the use of force in the following terms, "[t]he possibility [...] of terror groups in possession of [Iraq's] weapons of mass

destruction [...] is now in my judgment, a real and present danger to Britain and its national security" (Hansard HC Deb, 18 March 2003, c. 768). The House of Commons approved the Government's decision by 412 votes to 149 (Hansard, HC Deb 18 March 2003, c. 907). The expression, "real and present danger" clearly points to the imminence of unlawful attack on the UK. The Attorney General told the Inquiry that he had never agreed with that particular line of justification (Goldsmith, 2010, pp. 12, 21, 30, 33). Lord Goldsmith seems to have found it difficult to say at that time that the threat to the UK was so "instant, overwhelming, leaving no choice of means and no moment for deliberation", i.e. Webster's formula of self-defense in the *Caroline* case.

(h) Discussions

The following four points deserve detailed discussion.

Firstly, the Attorney General's written advice of 7 March 2003 contained the following passage in paragraph 30: "in Operation Desert Fox in 1998 and Kosovo in 1999, British forces had participated in military action on the basis of the advice from my predecessors [stet: John Morris] that the legality of the action under international law was no more than reasonably arguable" (Goldsmith, 2010, p. 169).

Operation Desert Fox involved US-UK missile attacks on Iraqi targets suspected of concealing weapons of mass destruction between 16 and 19 December 1998. The UK invoked unanimous Security Council Resolution 1205 of 5 November 1998 to justify their actions, because, in the point of view of the United Kingdom, it had given Iraq an opportunity to rescind its decision to cease co-operation with the UN before the authority to use force under resolution 678 (1990) was revived (S/PV.3939, p. 10). There was no Security Council resolution, due to the threat of Russia's veto, to authorise the armed attacks on Belgrade in response to violence in Kosovo in 1999. Still, Goldsmith's testimony contains a contradiction, because it suggests that the Government went to war in these instances *on the basis of* the legal advice that it was unlawful to do so. A correct interpretation would be that the then-Government decided to act *against* the legal advice. Such precedents of 1998 and 1999 seem to have induced the complacency on the part of the Attorney General and the Cabinet Ministers at the meeting of 17 March 2003.

Secondly, it was "a mistake" and "unusual" that the Prime Minister relied publicly on the authority of confidential expert advisers, i.e. the Joint Intelligence Service and the Attorney General, respectively, in order to support his case for war (Butler, 2004, p. 114, para. 466; Chilcot, 2016b. para. 481). Lord Butler's and Sir John Chilcot's preferred practice was that

elected ministers were held accountable to Parliament (Chilcot, 2016b, para. 482), while civil servants and experts gave confidential and therefore frank advice, which ministers were then able to accept or reject at their discretion. Such a division of labour was obscured by Tony Blair. The Attorney General reduced the question of law to the question of facts to be resolved by the Prime Minister. The Prime Minister delegated that duty back to the Attorney General who, in turn, did not examine any evidential basis of the Prime Minister's judgement, which was plainly at odds with the findings of Hans Blix, the head of UNMOVIC. In the meantime, the Prime Minister went on to invoke yet another justification, apparently the right of individual self-defense, in order to persuade Parliament to agree with the war. When his judgement on the imminence of the threat was proved to have been mistaken, he began to invoke the domestic Common Law defence of honest belief. The Attorney General had consistently disagreed with the invocation of self-*defense* under the UN Charter, let alone, self-*defence* under the Common Law, which does not require any actual occurrence of an attack before the alleged act of self-defence in question. Such an unscrupulous and evasive manner in which the justification of the war was handled by the Prime Minister suggests that he was pre-determined to wage war, no matter the law.

Thirdly, the Chilcot Inquiry highlighted the following two threads, which were interwoven into the fabric of the backdrop against which the UK government's decision to resort to war was made. The first thread was an 'ingrained belief' shared between the US administration and the UK intelligence community and Cabinet, that Saddam Hussein was tenaciously concealing and developing weapons of mass destruction. This is not a criminological essay, but their belief seems to have been ingrained partly because they had once trusted Iraq, arming it, and were subsequently betrayed. While the USA and the UK considered at first that the Iraqi risk was able to be contained, the terror attacks of 11 September 2001 completely changed their mindset. A possibility of terrorists coming by weapons of mass destruction loomed, and affected their judgement. Both US and UK leaders began to represent the remote risk as "threat" with great "urgency" and "certainty" (Chilcot, 2016b, p. 12, para. 67, p. 17, para. 104). The Iraq case was, therefore, not quite unlike a case of miscarriage of justice caused by an ingrained belief on the part of a detective inspector who had some past dealings with his suspect, i.e. a conflict of interests. The miscarriage of justice can destroy the life of an innocent individual. On the international plane, a misuse of armed forces can destroy a nation, as well as an international order.

The second thread was the UK Prime Minister's vain desire, which was shared by the UK Civil Service, to influence US decision-making from within. Such a desire also affected Blair's judgement, as exemplified by the following statements: "I will be with you whatever" [Blair's

Note to Bush of 28 July 2002] (Chilcot, 2016b, p. 15, para. 94); The Prime Minister is "solidly with the President and ready to do whatever it took to disarm Saddam [Hussein]" [Letter of Manning to McDonald, 31 January 2003, Iraq: Prime Minister's Conversation with President Bush on 31 January] (Chilcot, 2016b, p. 23, para. 159). The Inquiry concluded that influence should not be set as an objective in itself, where Sir John noted, "the exercise of influence is a means to an end" (Chicot, 2016d, p. 631). He also said, "[a] policy of direct opposition to the US would have done serious short-term damage to the relationship, but it is questionable whether it would have broken the partnership" (Chilcot, 2016b, p. 53, para. 375).

In plain terms, the Chilcot Report paints a picture of Prime Minister Blair behaving like President Bush's poodle, confirming the popular perception of their relationship at that time. The "influence" which the rest of the world had expected of the UK Prime Minister over the US President at that time seems to have been that of a senior statesman, able to listen to what the President had to say, and to encourage or warn him, in the specific instance of Iraq, to warn of the importance of pursuing all reasonable lines of enquiry before going to war. If the President decided to do otherwise, he would have had an opportunity to learn from the consequences of his own decision, and his advisers might well have become more inclined to pay attention to the advice of the UK Prime Minister in future.

Fourthly, there is one dimension which Sir John Chilcot's Inquiry did not explore, but which is of no small importance to international criminal justice. When Iraq invaded and annexed Kuwait in August 1990, the USA and the UK had an option to follow the precedents of the Second World War with respect to Germany and Japan, i.e. to go on to occupy Iraq and put Saddam Hussein on trial on charges of aggression and crimes against humanity. They could have invoked the authorities of the Nuremberg and Tokyo Charters to do so. But Douglas Hurd, the then UK Foreign Secretary notes, "no one either in the White House [...] or in Number Ten and Whitehall [...] contemplated driving on to Baghdad and deposing Saddam Hussein [...] We were acting very specifically to reverse an act of aggression" (Hurd, 2003, pp. 412-3). Nevertheless, momentum was gradually built up to follow these precedents, and the terror attacks of 11 September 2001 seem to have given a sufficient thrust to drive it into action. Its consequences demonstrated that the action was premature, underpinning the prudence of the cease-fire of 27 February 1991. That prudence accorded well with military common sense that the verdict of battle is a proportionate response to aggression.

4. Conclusions

The Chilcot Inquiry was a modern Thucydidean fact-finding probe, rather than a court of

law. Under the following constraints, however, the Inquiry seems to have been a good practical step in making a critical account of the UK's war in Iraq to the domestic taxpayers as well as to the international community at large. Firstly, there was no law, on both of the international and municipal planes, to hold any individual accountable for aggression. Secondly, there was no law to give a verdict of unlawful war in the analogy of Coroner's inquest.

The Inquiry, as such, cannot possibly help repay the wrongs inflicted upon the Iraqi people and the UN Charter. Nor can it possibly restore the loss of trust and confidence, which some quarters of the international community had, in the two English-speaking permanent members of the Security Council. Even so, the Inquiry's disclosure or exposure, in good faith, of the UK's flawed decision-making process concerning the resort to war, is hoped to be the first step towards restoring international commitment to the UN Charter. One of the important lessons which can be drawn from the findings of the Inquiry seems to be that a sovereign state owes a duty to pursue all reasonable lines of enquiry before resorting to military power. There is no space here to discuss whether or not a breach of this duty and some other findings may be sufficient to ground a civil action for misfeasance in public office against Tony Blair. But may it suffice to say that if the UK had not armed Iraq in the past, it would have been easier for the UK to fulfil the duty.

REFERENCES

Butler, F. E. R. (2004) *Review of Intelligence on Weapons of Mass Destruction, Report of a Committee of Privy Councillors*, London: Her Majesty's Stationary Office (2004-5 HC 898).

Chilcot, J. (2009) 'Statement by Sir John Chilcot, Chairman of the Iraq Inquiry, at a news conference on Thursday, 30 July 2009'. Retrieved on 19 August 2016 from http://www.iraqinquiry.org.uk/the-inquiry/news-archive/2009/2009-07-30-opening/statement-by-sir-john-chilcot-chairman-of-the-iraq-inquiry-at-a-news-conference-on-thursday-30-july-2009/

Chilcot, J. (2016a) 'Statement by Sir John Chilcot: 6 July 2016'. Retrieved on 6 August 2016 from http://www.iraqinquiry.org.uk/media/247010/2016-09-06-sir-john-chilcots-public-statement.pdf

Chilcot, J. (2016b) *The Report of the Iraq Inquiry* (2016 HC 264), London: Her Majesty's Stationary Office, The Executive Summary. Retrieved on 6 August 2016 from http://www.iraqinquiry.org.uk/media/246416/the-report-of-the-iraq-inquiry_executive-summary.pdf

Chilcot, J. (2016c) The Report of the Iraq Inquiry (HC264), Volume 1.

Chilcot, J. (2016d) The Report of the Iraq Inquiry (HC264), Volume 6.

Duelfer, (2004) *Comprehensive Report of the Special Advisor to the Director of Central Intelligence on Iraq's Weapons of Mass Destruction*. Retrieved on 18 August 2016 from https://www.cia.gov/library/reports/general-reports-1/iraq_wmd_2004/index.html

Fisher, H. (1977) *Report of an Inquiry by the Hon. Sir Henry Fisher into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait and the fire at 27 Doggett*

Road, London SE6, London: Her Majesty's Stationary Office. (1977-8 HC 90) Retrieved on 24 August 2016 from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228759/0090.pdf

Goldsmith, Rt. Hon. The Lord (2010) Transcript of Public Hearing of 27 January 2010, Iraq Inquiry. Retrieved on 18 August 2016 from http://www.iraqinquiry.org.uk/media/235686/2010-01-27-transcript-goldsmith-s1.pdf

Hennessy, P. (1996) *The Hidden Wiring: Unearthing the British Constitution*, London: Orion Publications.

Hurd, D. (2003) *Memoirs*, London: Little Brown.

Hutton, J. B. E. (2004) *Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly C.M.G.* (2003-4 HC 247) Retrieved on 21 August 2016 from http://webarchive.nationalarchives.gov.uk/20090128221546/http://www.the-hutton-inquiry.org.uk/content/report/index.htm

International Criminal Court (ICC) (2015), Press Release 1 April 2015, Retrieved on 6 August 2016 from https://www.icc-cpi.int/Pages/item.aspx?name=pr1103

International Criminal Court (ICC) (2016), Press Release 29 June, Retrieved on 6 August 2016 from https://asp.icc-cpi.int/en_menus/asp/press%20releases/Pages/PR1225.aspx

Liddell, H. G. and Scott, R. (1996) *A Greek-English Lexicon*, Oxford: Clarendon Press

May, J. (1994) *Return to an Address of the Honourable the House of Commons dated 30 June 1994 for a Report of the Inquiry into the Circumstances surrounding the Convictions arising out of the Bomb Attacks in Guildford and Woolwich in 1974, Final Report,* London: Her Majesty's Stationary Office (1994-5 HC 449).

Mynott, J. (ed.) (2013) *Thucydides: The War of the Peloponnesians and the Athenians*, Cambridge: Cambridge University Press

Schiller, F, (1786) *Resignation* in 'Thalia', Erster Band, Heft 2, S64-69, Leipzig: Georg Joachim Göschen

Schwyzer, E. (1923) *Dialectorum Graecarum Exempla epigraphica potiora*, Leipzig.

Scott, R. (1996) *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions*, London, Her Majesty's Stationary Office (1995-6 HC 115).

Simma, B. (1995) *The Charter of the United Nations: A Commentary*, Oxford: Oxford University Press.

The Guardian (2016, February 15) 'Chilcot Inquiry has far less freedom than arms to Iraq inquiry, says Lord Scott' by Richard Norton-Taylor. Retrieved on 20 August 2016 from https://www.theguardian.com/uk-news/2016/feb/15/chilcot-inquiry-lord-scott-arms-to-iraq-report-comparison

The Independent (2016, July 6) 'David Cameron refuses to say the Iraq War was 'wrong' or 'a mistake' following damning Chilcot Report' by Jon Stone. Retrieved on 6 August 2016 from http://www.independent.co.uk/news/uk/politics/david-cameron-iraq-war-chilcot-report-response-apology-refuses-live-latest-updates-a7122886.html

The Telegraph (2010, January 28) 'Iraq Inquiry is being 'gagged' after secret documents withheld' by Rosa Prince. Retrieved on 6 August 2016 from http://www.telegraph.co.uk/news/politics/7073627/Iraq-inquiry-is-being-gagged-after-secret-documents-withheld.html

The Telegraph (2016, July 6) 'Chilcot report: Tony Balir takes 'full responsibility' for Iraq war as Jeremy

Corbyn 'apogises sincerely on behalf' of Labour party' by Leon Watson, Michael Wilkinson, Danny Boyle. Retrieved on 8 August 2016 from http://www.telegraph.co.uk/news/2016/07/06/chilcot-report-2003-iraq-war-was-unnecessary-and-invasion-was-no/

Thucydides (1942) *Historiae*, Oxford: Oxford University Press.

Times Higher Education (2016, July 21) 'The Chilcot report: the longest work of academic history ever?' by Glen Rangwala. Retrieved on 15 August 2016 from https://www.timeshighereducation.com/features/the-chilcot-report-the-longest-work-of-academic-history-ever

UN News Centre (2015) 'International Criminal Court welcomes Palestine as State Party to the Rome Statute'. Retrieved on 6 August 2016 from http://www.un.org/apps/news/story.asp?NewsID=50477#.V6XzQbuyNBc

Wilmshurst, E. (2010) Transcript of Public Hearing of 26 January 2010, Iraq Inquiry. Retrieved on 18 August 2016 from http://www.iraqinquiry.org.uk/media/95214/2010-01-26-Transcript-Wilmshurst-S3.pdf

(Endnotes)

1 The State of Palestine is not a Member State of the United Nations, but an observer. It has been accepted as the 123rd State Party to the Rome Statute in April 2015 (ICC, 2015; UN News, 2015).

2 The Greek etymon of history is *F*ίστωρ with digamma, *F* at the beginning (Schwyzer, 1923, p. 491), which meant a "witness" (Liddell and Scott, 1996, p. 842).