THE CHILCOT REPORT AND THE LAW

Introduction

Questions of law permeate the Chilcot Report. All are shrouded in uncertainty. From the constitutional relationship between Prime Minister, his Cabinet and Parliament to the legality of going to war, the Inquiry presided over by Sir John Chilcot touched upon many controversial legal issues. It resolved none. But then, it was not a court of law or a judicial inquiry and never pretended to be. No one could have reasonably expected it to pronounce with conviction any judgement on the lawfulness of acts and decisions made by those who took the UK to war in Iraq. Instead, the Report provides information useful for those who wish to reach such judgements. Lawyers are already searching the vast document to inspire possible litigation, though that was not the concern of the Inquiry. It was supposed to determine what happened and learn lessons. Those were its very broad terms of reference.

But did the Inquiry deal effectively or properly with the legal issues which framed many of the decisions and actions it examined? In this article I look briefly at two key areas where law had particular relevance but, it is argued, received insufficient attention: the legal basis for going to war; and the conduct of the occupation after the initial hostilities were concluded. Both involve the application of international legal standards, a slippery subject for those seeking exactitude but valuable for judging the political and military leaders nonetheless.

The Law and the Decision to go to War

Sir John Chilcot said in the presentation of the Inquiry's report that he and his colleagues had examined whether it was right and necessary to go to war. But being right and necessary and being lawful are not the same thing. Why then did the legality question matter so much, to the exclusion, for many, of any moral judgement? The Chilcot Report unpicks the story.

From the moment when it became apparent that full scale military invasion of Iraq was planned, the issue of legality was central to both the war's justification and its opposition. The intricate details of international law and UN Security Council Resolutions quickly became common currency in popular debate in the protracted run-up to war. Where once international law was the preserve of a small band of lawyers talking mostly amongst themselves and rarely entering the public consciousness, now everyone was an expert. Even the Attorney General, Lord Goldsmith, was required to pronounce on the subject even though his legal experience hardly gave him the necessary expertise. A legally correct decision seemed vital, nonetheless, perhaps because the law offered a sense of objective propriety when many in the UK supported ridding Iraq of Saddam Hussein but were uncertain about how and when this could be done.

Given the very public question about the legality of any proposed intervention, the matter developed into an irritating technical barrier for those intent on war. As Chilcot makes clear, all those advocating invasion, from Tony Blair down, sought legal endorsement for their plans. The lawfulness question was never simply ignored, as it

was more effectively by the US administration. This may have been the instinctive reaction of a trained barrister, as Blair was, or prompted by clearly articulated (as Chilcot highlighted) military concerns that liability might flow from the UK's then recent acceptance of the International Criminal Court's jurisdiction. But whatever the motivation, once international law became relevant, its limits on the use of force had to be seen to be, if not actually, satisfied. These stipulated that military action against another sovereign state would only be lawful if either an act of self-defence or sanctioned by the UN Security Council. There was also a much less certain possible justification where intervention was a response to a humanitarian catastrophe, as had applied in the Kosovo action of 1996. But no one, particularly FCO lawyers, pursued this line seriously as Blair's communications with Bush made clear.[1]

Self-defence lacked credibility as well. The threat purportedly posed by the Saddam regime (directly through weapons of mass destruction or indirectly through imagined support for terrorist organisations) and presented to Parliament and the UN General Assembly (as well as the media), did not provoke UK government ministers to seek to justify war on such grounds. The arguments about deployment of weapons within 45 minutes may have entered folklore (and is given particular short shrift by Chilcot), but never gained *legal* traction in vindicating the war. No court, if any had been available to judge on the matter, would have treated such claims seriously anyway.

So, if international law was to play a part, justification had to be sought on the basis of UN Security Council resolutions. The Chilcot Report plods its way through the various machinations and arguments about reviving the original Resolution that authorised the first war against Iraq in 1990 (the 'revival doctrine').[2] As this was even less convincing than the self-defence claim, in mid to late 2002 Blair and his advisers pushed to go back to the UN and obtain a new resolution. UNSC 1441 was the result.

The story of the differing advice at home from the FCO legal advisers and those in New York engaged in the negotiations about the draft, show how uncertain the 'law' appeared even for so-called experts. But the consensus after the resolution was passed was that it too was unsatisfactory: it failed to be explicit about military intervention in the event that Saddam did not comply with the requirements to dispose of the now mythical weapons of mass destruction *and* allow UN weapons inspectors to confirm Iraq's cooperation in this endeavour. The Report emphasises the tortured path the British government followed, trying to persuade the US to go back for a second resolution to gain the explicit support of other members of the Security Council (France, Germany and Russia in particular). That proved impossible.

The Report then tells how, during this inconclusive diplomatic process, Lord Goldsmith produced various legal advices that were, at best, ambivalent and worst, self-contradictory, to remedy the apparent absence of UN sanction for an already planned invasion. Chilcot's remarks on this element of the story are themselves confusing. The Report avoids any determination (even a lay person's view) that the war may have been unlawful. It merely suggests that more definite and balanced advice should have been provided to Cabinet and Ministers immediately prior to making the final decision to invade in March 2003. Though it makes the point that war should have been the last resort and peaceful options had not been exhausted, there is no condemnation on legal grounds. The Inquiry panel were simply unqualified to make that call.

This will disappoint many who hoped the 'law,' whatever that might mean in this imprecise context, would provide an unequivocal focus for damning Tony Blair and his inner circle as a prelude to some kind of personal criminal sanction. Chilcot has given no succour to such demands. In truth he has done no more than confirm the practical unenforceability of international law in the matter of UK foreign affairs.

Presciently, that was the conclusion of a UK court which looked at the matter *before* hostilities, but does not appear to enter Chilcot's analysis. At the end of 2002, assuming that war had already been decided upon, CND brought a judicial review against the Prime Minister requesting the courts to provide an interpretation of UNSC Resolution 1441.[3] They wanted an advisory declaration stating that the UK and USA could not go to war on the terms of that resolution alone; it would instead require more explicit authorisation through a second resolution. The court refused to interfere. It concluded that it 'had no jurisdiction to declare the true interpretation of an international instrument which has not been incorporated into English domestic law'. It also declined to assess the matter on the basis that it 'would be damaging to the public interest in the field of international relations, national security or defence', and would tie the hands of the UK government in its negotiations at the UN and in its cooperation with the USA. Somewhat embarrassingly now, it concluded that '[t]here is no sound basis for believing the government to have been wrongly advised as to the true position in international law. Nor, in any event, could there be any question here of declaring illegal whatever decision or action may hereafter be taken in the light of the United Kingdom's understanding of its position in international law.' In other words, if the British government says military action is lawful, then the domestic courts are in no position to disagree.

The Chilcot Report unwittingly underpins this pessimistic reading of the force of law. In this context, law is a plaything of government. The Report may highlight the unsavoury and dubious process by which law can be (and was) practised at the heart of government, but it offers little to suggest future decisions will be and should be tested for their legality *before* being made and implemented.

Ultimately, there is no rule book which the UK government can follow without one being constructed by Parliament. In that void, there is only legal opinion and argumentation. No one, not least Lord Goldsmith, had any definitive interpretation of resolutions and circumstances that could not be challenged or spun, even now. That is a reflection on the nature of law, and particularly international law, in state practice and one which Chilcot might well have observed.

The Law and Occupation

The decision to go to war is a matter of high politics. Those involved are exclusively senior politicians, civil servants and military commanders. Lesser ranks simply do as commanded. But when it comes to the actual fighting and post-war occupation, political/military strategy and ground level actions begin to co-mingle. Strategy is supposed to shape the culture of an intervention as well as individual and unit behaviour.

Law reflects this distinction. Allegations of a crime of aggression are a command matter and treated wholly separately from how a war is conducted. Breaches of international rules governing warfare and hostile occupation (the law of armed conflict) may lead to prosecutions of individual soldiers responsible but if those breaches are widespread and frequent, commanders may also have to answer charges that they sanctioned a deliberate plan of abuse or knowing abuses were possible or occurring failed to prepare or respond adequately.

The Inquiry knew that there were multiple and serious allegations of breaches of the laws of war by UK forces in Iraq from 2003 until 2009. And yet in contrast to the detailed examination of whether a war was pursued against international law norms, the Report is complacent when it comes to assessing the issues of military conduct in Iraq.

This is only partially explained by the decision of the Inquiry to restrict its terms of reference. The Report makes clear why the Inquiry did not consider allegations of abuse of Iraqi civilian detainees by UK forces. It notes that investigations are on-going, that there have been two public inquiries into specific cases of abuse (Baha Mousa and Al Sweady), that lessons about detention and interrogation have been learned, and that any further investigation by the Inquiry would overlap and perhaps prejudice these processes.[4]

That makes sense so far as it goes. But matters of tactical operation in terms of the military policing effort after initial hostilities had ended, including the treatment of civilian detainees, are viewed as largely unconnected to post-conflict planning and operation. Perhaps there were fears that warranted expressions of deep respect for the soldiers serving in Iraq would have to be qualified should the ill behaviour of some be repeated. But the omission allows those at the heart of government and the armed forces off this particular legal hook. There is insufficient analysis of the preparations (or absence of them) to respect the fundamental principles of those conventions (of Geneva in particular) that try to limit the injurious effects of military action. Equally, there is no consideration of the possible institutional culture in the armed forces as regards its attitudes to the liberated Iraqi population. This manifests itself, as the Report reveals obliquely, in two areas: the response by the military to predictable lawlessness as war turned to occupation; and the detention and interrogation of civilians.

The former is a matter the Report does mention. It notes that the risk of lawlessness was identified by the Joint Intelligence Committee (JIC) and the Defence Intelligence Staff before the war began.[5] Tony Blair and senior civil servants ‘had recognised the seriousness of that risk.’ But no Rules of Engagement for the post-conflict occupation, dealing with lawlessness, ‘were created and promulgated before UK troops entered the country.’ There was an absence of instructions for ground troops to follow which senior military knew well. ‘Faced with widespread looting,’ the Report says, ‘after the invasion, and without instructions, UK commanders had to make their own judgements about what to do.’ The Inquiry heard from Brigadier Graham Binns that ‘“the best way to stop looting was just to get to a point where there was nothing left to loot”’.[6]

This did not reflect approaches on the ground, as reference to some of those cases that the Inquiry failed to examine would have revealed. The infamous 'Camp Breadbasket' case, where a British Army unit caught alleged looters, subjected them to humiliation and ill-treatment (stripping the men naked and forcing them to simulate anal sex and strapping others to the forks of a fork-lift truck), and photographed the scene, suggested that some army units had resorted to unlawful 'punishment' for alleged looters. Two junior soldiers were convicted for the abuse but alleged that they were acting on the orders of more senior officers.

Camp Breadbasket was not an isolated case. Other investigations, one recently conducted by the Iraq Fatalities Inquiries into the death of Ahmed Jabbar Kareem Ali, a 15 year old boy, again suspected of looting, taken by an army unit and forced into the Shatt al Arab waterway to drown as the soldiers looked on, have found evidence that such treatment of suspected looters had become an accustomed tactical method, well-known at Brigade level in Basra, for dealing with the overwhelming numbers of looters. Though lawlessness had been predicted, troops on the ground were left to deal with it without any proper guidance. It was a void that encouraged ill-treatment or at best allowed it to flourish.

Of course, such cases do not prove the existence of a policy of abusive conduct that might provoke a charge of command responsibility. But they were and are relevant to the adequacy and appropriateness of planning for post-war occupation. And at the very least they raise serious questions of the quality and character of control and command exercised over the forces sent to liberate the people (and not simply the territory) of Iraq. Given the Report's attention to the minutiae of governmental discussions, it is strange that matters directly impacting on the lives of Iraqis should be effectively ignored.

The incongruity is amplified by the topic of the treatment of detainees. There is an important difference between deciding *not* to examine this matter for good reasons (prejudicing other inquiries) and representing it in such neutral terms as to indicate no concerns need be inferred. This has the effect of erasing critique aimed at the higher echelons of decision makers. It leaves consideration of failures of planning and operations incomplete and any attendant legal responsibility unexamined.

The absence of reference in the Report to all the evidence given to the Inquiry by Kevin Hurley, Assistant Commander of the Metropolitan Police, is particularly egregious. Hurley, a senior member of the Territorial Army as well as a police officer of long standing, served two terms in Iraq between 2003 and 2004. He told the Inquiry about his experiences in Camp Bucca, a detention centre outside Basra. He said about 7000 prisoners were held 'in a dozen barbed wire enclosures... set up in the middle of the desert' with 'no running water or sewerage provision. Poisonous snakes and rats were everywhere.' The camp was run by both British and American personnel. 'It was immediately apparent to me,' Hurley said, 'that we had almost no idea why many of the prisoners were in custody.' There were young children amongst them, 10 or 11 years old. 'At one stage,' Hurley said, 'I had to intervene to have these children properly cared for. On a number of occasions I spoke with UK officers about the insensitive and arrogant way they dealt with prisoners. I had a pointed discussion with a barrister in the UK Army Legal Services who had been particularly rude and bigoted in the treatment of detainees.' Hurley's final assessment as 'a career

policeman with many years of senior investigative experience' was disappointment at 'how little thought had been given to the issues of prisoner management in terms of provision of basic rights, dignity and influencing their decision whether to talk to us. It was clear to me that the damaging impact on community confidence in the Coalition of our poor treatment of many thousands of detained persons was going to be profound.'[7]

It is the testimony of only one man, but that alone should not have seen it so easily ignored. The International Committee of the Red Cross supported the accusations against the British, as was leaked to the media as early as 2004. But if one only reads the Chilcot Report, one would be forgiven for thinking the Americans were wholly responsible for this particular debacle. The scandal of the ill-treatment of Iraqi prisoners in Abu Ghraib receives repeated mention. Reference is made to the evidence of Major General Andrew Stewart, 'one of several witnesses who told the Inquiry that the pictures of Abu Ghraib had had a "significant effect" on MND(SE), where the public began turning against Coalition Forces.'[8] The Report's Executive Summary highlights that 'the significant worsening of security, coupled with revelations of abuse by members of the US military of Iraqi detainees held in Abu Ghraib prison, led many of the Inquiry's witnesses to conclude that the spring of 2004 had been a turning point.'

British complicity in these widespread detention practices is so understated as to be easily missed. The Report notes that allegations 'of abuse of Iraqi detainees by British Service Personnel also began to emerge in early 2004' and records that '[a]lmost immediately following the Abu Ghraib revelations, on 1 May the Daily Mirror published photographs which appeared to show UK troops torturing an Iraqi detainee. It was later established that those photographs were fake.'[9] But many other allegations were not 'fake' nor were the photographs taken at Camp Breadbasket. Nor were many of the allegations then emerging from the Baha Mousa case.

The Report provides little information on these matters or the clear legal requirements for the treatment of civilian detainees under the Geneva Conventions. It mentions that in 2003 'Cabinet discussed prisoner abuse on 6 May, when Mr Blair told attendees that allegations against British troops were being investigated fully' and that later that month the Cabinet was told about the International Committee of the Red Cross's interim report on detention in Iraq which condemned the Coalition's treatment of prisoners. But this is largely the extent of revelation. No substantive comment on the failure to prepare for an obvious problem (that of general policing and also interning thousands of Iraqis and obtaining intelligence from them) appears.

Of course, this might be excused by the decision to exclude some of these matters from the Inquiry's terms of reference. But the failure to drill down to the detail of occupation as it impacted on many Iraqi civilians and what this entailed in terms of military practices in comparison with legal commitments is extraordinary. Preference is given to high level political and governmental activities, which can only ever be a part of the story when assessing the effects of the decision to invade and occupy another nation. The Inquiry may have been bereft of legal expertise (something that could have been remedied) but a lack of reference to these matters prevents judgement on the quality of the neglect (and perhaps disdain for those Iraqis who

were being saved from a human rights abusing regime) that is otherwise condemned in the Report.

Conclusion

The Chilcot Report suffered from the enormity of its task. That is clear from the years it has taken for its publication. It did not have unlimited resources and its mandate was restricted accordingly. International law, in the decision to go to war and the conduct of the military invasion and occupation, is vital in providing the standards by which the actions of those who brought this about or tried to implement decisions should be judged. The Report did not consider these matters in great depth. It leaves a distinct hole in analysis that remains to be filled.

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[1] Iraq Inquiry Report section 3.5 para 615
[2] UNSC Res 678 which authorised the use of force in the first Gulf War
[3] CND v. The Prime Minister and others [2002] EWHC 2777 (Admin) paragraph 47
[4] Iraq Inquiry Report Introduction paragraphs 26-38
[5] Iraq Inquiry Report Section 9.2 paragraph 15 et seq
[6] Iraq Inquiry Report Section 9 Report
[7] Written Evidence for the Iraq Enquiry from Kevin Hurley, Acting Commander, Metropolitan Police and Major Royal Military Police Territorial Army. 17/6/2010
[8] Iraq Inquiry Report section 10.1 "1028.
[9] Iraq Inquiry Report section 9.2 p365 para 539