

For Stop the War website:

Reflections on the Constitutional Issues Raised by the Iraq War in light of the Chilcot Report

The Chilcot Report finally published its findings into the Iraq war on 6th July. Contrary to expectations, it criticised a range of leading political figures, including Tony Blair and ex-Foreign Secretary Jack Straw. Chilcot concluded that the war was not, as Blair had claimed, a last resort, that intelligence on which the government relied was limited yet presented as stronger, and that post-conflict planning was 'wholly inadequate'.

Such damaging conclusions have led to debate about how the Chilcot Report's findings might be used to effect concrete results. One way of translating them into action is by using the evidence gathered to seek redress against individual key players, particularly Tony Blair. A second way is to use the Iraq war to push for domestic political and legal reform so that such events are less likely to recur in the future (when the cautionary tale of Iraq may have faded from political memory).

This issue of reform requires us to consider the domestic constitutional context in which war is waged. In English law, the power to wage war vests in the Crown and is exercised by the Queen, an autocratic legal framework that has remained unchanged for centuries. In political reality (as opposed to law) the war power is now exercised by the democratically elected Prime Minister, supplemented by the constitutional convention that Cabinet undertakes informed, collective discussion and decision-making on such matters of key national importance. Further constitutional checks on the war power include the requirements that Parliament approves military action (political support) and that the Attorney General (AG) advises war is internationally lawful (a legal basis).

The Chilcot Report provides further evidence that the Blair Cabinet was marginalised and played a limited role in the lead-up to the Iraq war in March 2003. Yet the constitutional issues raised by the parliamentary vote and the AG Lord Goldsmith's legal advice were of particular significance in the Iraq war and represent areas in need of further reform.

- The Parliamentary Vote

A substantive debate on the Iraq war was held in the House of Commons on 18th March 2003, just 2 days before war started. Despite the strength of concerns and wider opposition, MPs voted overwhelmingly in favour of a motion supporting war by 412 to 149 against. Despite the outcome, the Iraq vote was widely viewed as a positive development as it was the first time a substantive debate and vote on war had been held, and it started a process of strengthened parliamentary involvement in such decisions by requiring the Prime Minister to obtain its approval for military action.

However, the Iraq vote also shows that this check on war should not be overstated and may be limited by countervailing factors. A number of such factors were relevant in the Iraq debate. For example, the Blair government enjoyed a large Commons majority and concerned Labour MPs were extensively whipped in the lead-up to the debate. Furthermore, UK troops had already been deployed to the Iraqi border ready for action and the vote was also a 'confidence vote' meaning Blair would resign if he lost. Both of these factors acted to steer MPs in favour of war and were raised in the debate. Crucially, government also enjoys a degree of control of the information on which Parliament makes its decision, and Chilcot identifies a number of questionable ministerial statements to Parliament in the lead-up to war, in addition to flawed intelligence.

As things stand, despite stronger parliamentary involvement, future prime ministers will continue to exert a major influence over taking the country to war because there has been no significant reform to the war power since the Iraq episode.

- Attorney General Lord Goldsmith's legal advice

The AG is the lead government lawyer and a minister appointed by the Prime Minister. Lord Goldsmith's legal advice was crucial in Iraq because British troops could not have been sent to war without his clear confirmation that such action was lawful. In short, the UK's engagement in the Iraq war hinged upon his legal approval.

Throughout 2002 and up until the end of January 2003 Goldsmith's clear legal view was that war, as things then stood, would not be legal in international law. He consistently set out this position despite being repeatedly discouraged from doing so, and provided written advice that war was not lawful despite the fact it had not been requested and was not welcome.

Yet on 7th March 2003 the AG provided complex final advice confirming a reasonable case could be made that force was internationally lawful, subject to various qualifications. All of the parties deny that Goldsmith was put under direct pressure to change his advice. Instead they claim the change was due to the AG being provided with information about the negotiating history of UN Security Council (UNSC) resolution 1441, and having discussions with Jack Straw and US negotiators. But, as Clare Short noted in her evidence, excluding the AG then including him at the last minute when the stakes were highest was a form of pressure.

In the following week the AG's advice was further 'firmed up' into a brief, definitive statement that war was internationally lawful. This firming up was not a result of new information or developments, but in response to the UK military's need for a clear 'green light' before troops could be deployed (to protect soldiers from charges of war crimes). Goldsmith's brief 'green light' statement was provided to both Cabinet and Parliament, and formed the basis of their respective decisions to approve war. Chilcot claims that the AG's earlier, fuller, more qualified advice should have been provided to Cabinet.

Another problem was that the AG's final advice ultimately required Blair to decide that Iraq was in 'material breach' of UNSC resolutions, an issue that would normally be decided by the UNSC itself. Chilcot is also very critical of this part of the process, claiming that Blair's basis for this judgement was 'perfunctory', not formally recorded and its precise grounds remain unclear.

It is perhaps unsurprising then that Chilcot ultimately concluded that the circumstances in which the AG decided military action in Iraq was internationally lawful were 'far from satisfactory'. Again, further reform of this area should be considered.

A further summary is available at:

<https://theconversation.com/how-tony-blair-jack-straw-and-lord-goldsmith-come-out-of-the-chilcot-report-62252>

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