

Response to a future finding by the Chilcott Inquiry Report Justifying the view that the Iraq War was illegal.

This short briefing paper addresses itself to the question as to what should be, or at least could be, an appropriate political response to the anticipated Report, expected early in this coming winter, of the enquiry under Sir John CHILCOTT into the 2003 Iraq War and its aftermath. In particular, and very narrowly, an appropriate response were that Report to make a finding or conclusion to the effect that the actions taken by the armed forces of the Crown in that conflict were, or arguably amounted to, a breach of international criminal law. In short, and as would surely be reflected in popular media in that event, that there is a strong case for concluding that the actions taken by the Blair Administration were premature. What is more that, absent any adequate legal authority, such as may have been offered by a further and clear-cut resolution of the United Nations Security Council, had the Government of the day waited to see if such a further resolution could be obtained, its involvement instead, together with the US, in an attack on and subsequent invasion of the sovereign territory of Iraq, absent such a further Resolution, amounted to a crime under international law. A 'crime of aggression' no less.

The crux of the issue, as has been long appreciated by those who have watched carefully as the arguments of the rival camps have evolved since 2003, being as to whether or not the then Prime Minister's oft repeated personal view, doubtless reflecting the view of the Government of the day, that the Iraqi Government of President Hussein was "*in breach of its obligations*" as imposed under the notorious UNSC Res 1441, amongst others, was by itself sufficient justification to take action. Action that is by way of the use of international armed force to attack, invade and occupy Iraq, for the express purpose of forcibly changing the Government of that sovereign nation state and thereby forcing such compliance. In short, whilst it is accepted for the purposes of the argument that he and the Government may have genuinely and honestly believed that intelligence established that there were good grounds for judging that the Iraqis still possessed WMD, whether that judgement was reasonable or not ; under their own terms, what in the event counted for the purposes of legally justifying their actions was the 'fact' that the Iraqi Government was "*in breach of its obligations*", whether or not they were in fact also possessed of those weapons.

Of course, the issue which Mr Blair and his supporters thereby seek to evade is as to whether or not such a belief admittedly held by him and the Government of the day, not only in the existence of the WMD, but much more significantly also in the "*breach of obligations*", was justification for the use of force, as being authorised by the UNSC resolutions in question. What is anticipated here is a finding by the Chilcott Enquiry to the effect that, those obligations having been imposed by the act of a resolution of the UN Security Council, a political body charged by the UN Charter with the political duty for the restoration and maintenance of international peace and security, the question as to whether or not Iraq had or had not complied with them, certainly to the point of justifying

action by the use of force to compel such compliance, was ultimately a political 'fact' which could only be determined by that said same political body, and not one for which the Prime Minister was legally entitled to substitute his own view or even that of the UK Government of the day.

It would inevitably follow from such a finding that the subsequent use of force by the Crown in the absence of any such legally effective UNSC finding on non-compliance was not legally justified, as claimed by the A-G in his notorious 'opinion', and that therefore this country's actions were a breach of positive customary international criminal law, amounting to no less than a crime against peace in the Nuremberg sense.

What would be the appropriate political reaction to such a finding? There would clearly be at least possible legal ramifications by way of the potential claim for compensation by the Iraqi government or affected Iraqi citizens for instance. Although, frankly the legal limitations and obstacles one can see being placed in the way of such a claim would be legion, even supposing there was the political will in Baghdad to bring such an action.

However, so far as the domestic *criminal* jurisdiction of UK courts is concerned, that issue was essentially settled by the opinion of the Law Lords in their decision in the appeal matter in *R v Jones et al* (2006), in which they found that whilst "a crime against peace" was an undoubted crime under customary international law, and has remained so since at least the 'Nuremberg Principles' were adopted by the UN General Assembly in 1946, no requisite statute incorporating that offence into UK domestic law having been since passed, it is not a crime in the UK, even under the common law. It is submitted that this wanton failure in our UK legislature, over the course of the intervening six decades, to give internal domestic effect to one of the very crimes, in whose recognition and subsequent enforcement at the conclusion of WWII by the Nuremberg Tribunal, we played such a leading role, will thus be illustrated and demonstrated in a starker light than hitherto.

It is worth recalling that Geoffrey Lawrence L.J. when rendering the judgement of the International Military War Crimes Tribunal at Nuremberg in 1946 said of this crime that :

" The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole. "

In recent years, certainly since the establishment of the International Criminal Court in the Rome Statute in 1998, the argument has been proffered by senior civil servants and many UK politicians alike, that it would itself be yet still premature and indeed counter-productive were this country to set out a definition of this crime, for internal domestic effect, before the international

community as a whole, acting through the auspices of the Assembly of States Parties to the Rome Statute for the ICC, has agreed amongst themselves, what is the correct and appropriate parameters of a definition of that crime, for the purposes of enforcement by that Court instead. Certainly at the time of the actions here in question, March 2003 and after, there was no such agreement amongst the States Parties to that Statute. Thus, whilst that Statute recognised the crime as coming within its jurisdiction, as one of the most serious crimes against the conscience of humankind, it regretfully also recognised that that jurisdiction could not be exercised unless and until such an agreement was reached in future on the definition.

Happily at the first formal Review Conference of the Rome Statute, held just this past June in Kampala, Uganda, and after long and detailed negotiation in which this country played a prominent role, agreement on just such a definition was finally reached, and a definition of the crime adopted into that Statute by unanimous consensus of the States Parties, including then also the UK.

Whilst, it is true to observe that certain diplomatic questions, as to the appropriate conditions for the future exercise of jurisdiction by the ICC, in relation to that crime, and in particular the role to be played by the UNSC in such a case, have been effectively deferred for final resolution until at least Jan 2017, there is nothing in any of that which could affect, or which now should be allowed to impose upon, the early incorporation of that internationally agreed definition, at long last, into our domestic criminal law. Thus enabling our domestic criminal law courts, not subject to such international diplomatic questions, to look to the exercise of their respective domestic or national jurisdictions instead ¹.

Accordingly, it is submitted that the foremost appropriate political response, to such a finding of the Iraq War Inquiry, as has been here contemplated, would be the early amendment of the International Criminal Court Act 2001, which statute incorporates into our domestic criminal law the crimes and their definitions as now also exist in the jurisdiction of that Court, so as to incorporate also that new internationally agreed definition of the crime of aggression. Such a response saying politically, in a way which cannot be questioned, that the present day Government of this country now recognises the importance and supreme quality of that rule of international criminal law, and pledges thereby that it shall in future be observed, upheld and enforced by the political leadership of the Government of this country, answerable to the laws of this country, as in turn we contributed in the past to its previous enforcement against the political leadership of Nazi Germany, more than six decades ago at Nuremberg. Such that henceforth no British Prime Minister could act in future, pursuant to his perception of this country's transient political interests, wholly secure in the knowledge that no British Court could thereafter ever hold him permanently

¹ At present the institution of a criminal prosecution in this country for any offence under an 'ICC crime', (i.e. *genocide, crimes against humanity or war crimes*) requires the consent of the A-G, see s.53(3) of the ICC Act 2001, as would doubtless also continue to be the case in future with respect to a crime of aggression

accountable for his actions, under the recognised supreme crime in international law.

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For and on behalf the
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Draft Bill Annexed hereto

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