Don't mention the motive for war

David Whyte discusses why the Chilcot Inquiry will not hear the most readily available and concrete evidence of British government crimes.

The Chilcot Inquiry into the Iraq War set up by the previous UK Prime Minister Gordon Brown will not consider what was perhaps the most widespread allegation levelled against the British government and its coalition partners in Iraq. The Inquiry, which is due to report sometime in 2011 will not consider whether the motive for war was connected to strategic political or economic aims. In fact, the motive for war has effectively been sidelined by the Inquiry.

In this respect, the Inquiry reflects a principle of law that has historically bolstered class power: the separation of the question of motive from the question of culpability. In criminal procedure motive may come into the picture during police investigation or where the prosecution establish the events leading to the crime. It may also feature in judicial sentencing. But motive is immaterial in establishing criminal guilt. The reason that criminal law developed this principle is simple: the law needed to resolve the contradiction between the equality it was supposed to uphold in the courtroom and the inequality that increasingly threatened the social order outside the courtroom. Had motive not been fenced off in this way, a motive of alleviating poverty or hunger could mitigate the crime of theft. How, then, might a hungry poor person have been jailed or transported to Australia for theft of food? Indeed, were poverty or other social circumstances to feature in a test of guilt today, some of our prisons would be close to empty. This principle, because it excluded discussion of poverty from the courtroom, became significant in establishing a veil of 'equality before the law'.

The lack of interrogation of motive by the Chilcot Inquiry has had a different purpose, but its effect is the same: it has enabled some fundamental questions about the social order to be elided. Thus, the Inquiry will analyse *ad nauseum* what the prime minister "believed" about the existence of weapons of mass destruction, but it will inquire no further into *why* we invaded Iraq. In particular the Inquiry will remain silent on the political and economic reasons for the invasion.

There is an important paradox at work here that shields those who have come before the Inquiry. For although the Inquiry's approach to the questions it asks is analogous to principles of criminal law, it has no status in criminal law. The Inquiry does not even remotely resemble a court of law. Its members are not lawyers and judges, but members of the Privy Council. They are not trained in techniques of adversarial interrogation and are not trained to think about the legal consequences of particular decision and actions. Hardly surprising, perhaps, since, as Andrew Blick notes in this volume, the Inquiry was explicitly guided away from considering the legality of war. The Inquiry, like all other public inquiries, is captured by a paradox: it is a legally sanctioned forum that has no power of legal sanction.

Perhaps the most readily available and concrete evidence of the criminality of the British government – evidence which tells us much about the motive for war – has not been put before the Chilcot Inquiry. This evidence comes in the form of a memo from the Attorney General issued to the Prime Minister on 26 March 2003. This memo is rather different from the other memos poured over and analysed to death so far in the Inquiry. In contrast to those memos, its content has not been debated in public; the advice in it was never changed by the Attorney General; and Prime Minister Blair never denied or 'spun' his awareness or interpretation of it.

In this memo the Attorney General noted, referring to the Hague and Geneva regulations, 'some changes to legislative and administrative structures of Iraq may be permissible if they are necessary for security or public order reasons, or in order to further humanitarian objectives'. However, he noted, '...more wide-ranging reforms of governmental and administrative structures would not be lawful'. He added that this general principle 'applies equally to economic reform, so that the imposition of major structural economic reforms would not be authorised by international law' (Lord Goldsmith, 2003).

Given subsequent events this memo alone is enough to put Blair in the dock for overseeing a criminal occupation. The US, British and Australian governments took primary responsibility for the administration of the occupation, during which they illegally transformed the economy and the political system, opening the way for foreign capital to dominate the Iraqi economy, and for British and American oil companies to gain access to the oil (Wheatley, 2006; Whyte, 2007a; Muttitt, forthcoming). The British government was given clear guidance on the way that the occupation should not proceed. Profiting from war, as so many British and American companies have done so far is not permitted in law. Neither is reconstructing the economy in the image of the Washington Consensus. The memo made this clear to the British Prime Minister and his cabinet. They cannot plausibly claim they did not know that the occupation was conducted illegally.

To point this out is not merely to draw attention to a matter of legal

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Coalition Provisional Authority whistleblower Franklin Willis and two private contractors pose with $100 bill bricks of Iraqi oil revenue that circulated in a 'free fraud zone'

technicality. The devastating consequences of the occupation are, by now, well known. The Iraqi Constitution was ripped to shreds to enable neo-liberal reforms to place Iraq at the feet of international financial institutions and transnational corporations. This ended the protections for local producers and forced countless factories and farms out of business. The creation of a corrupt reconstruction economy left the heathcare and education systems – already weak after the combined effects of sanctions and war – decimated**.** According to the UN, up to 5 million Iraqis have become refugees since the occupation, and unemployment now stands at 40 per cent. Ongoing water shortages are described by Iraqi government officials as the worst since the beginning of Iraq's civilisation and agricultural food production is also at a record low. The number of deaths from contaminated water supplies and from inadequate health services and access to food is certainly more than the toll of deaths caused by the military invasion/ occupation and subsequent civil war. Add to this, the intensifying use of coalition-built security forces in torture and extra-judicial killing and the repression of opposition voices, including, as Sami Ramadani has recently pointed out, the 'liquidation' of trade unions.

Instead of handwringing about the 'failure' of the occupation to reconstruct the economy and bring liberal democracy to Iraq as the report of the Inquiry will no doubt do, we might think more constructively about what justice might look like in this context. Can we find a form of restitution for the crimes of aggression and occupation? Of course, this is another question of law that the Inquiry will almost certainly remain silent upon.

We could begin this debate by referring back to the laws of war. Article 3 of the 1907 Hague Convention stipulates that 'A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces'. The United Nations Compensation Commission (UNCC) provides a model for the type of compensation that might apply to Iraq. The UNCC was established to provide reparation for costs incurred to corporations and individuals caused by Iraq's seizure of Kuwait's assets and of private property in 1990. Under the UNCC regime claims can also be filed by governments and international organisations. There is no reason why the UNCC could not oversee a similar process of reparation for losses incurred to businesses, individuals, and the government of Iraq as a result of non-compliance with the Hague and Geneva Conventions (and, we might add, failure to comply with UNSCR 1483; Whyte, 2007b). If this seems a remote possibility at the moment, such a mechanism would be entirely consistent with how the United Nations has dealt with the crimes of Iraq's previous government. Such a case would not need to demonstrate a motive: only that losses had occurred as a result of invasion and occupation.

And yet, even if this remote possibility were achieved, it would do little to challenge fundamental inequalities that exist in the application of law – *in particular, the tendency to allow those in power to walk away unscathed*. If a compensation case were to be brought by the Iraqi people at some future date, the burden of the crimes of the British state would not fall on Blair, Brown, or any of the other cabinet ministers that took the decision to invade and occupy Iraq. This burden would fall on the British people, the largest majority of whom were resolutely opposed to the criminal acts committed in their name, had no direct involvement in the crimes, and certainly had no motive. ■

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