Institutionalised impunity and the Iraq War

Andrew Blick assesses how 'fit for purpose' the British constitution is for dealing with crimes of aggression.

In July 2010, the UK Deputy Prime Minister, Nick Clegg, standing in for David Cameron at Prime Minister's Questions, in an exchange with the Shadow Justice Secretary, Jack Straw, described the 2003 invasion of Iraq as 'illegal'. This statement served once again to highlight a crucial feature of the controversy surrounding this military action: whether or not its execution involved a violation, by governments, of established norms. Clegg's comments referred to international law, while other critics have questioned whether national-level standards – such as the principle of collective cabinet government – were adhered to.

A No. 10 press briefing, seeking to diffuse the issue, claimed that Clegg had been expressing a personal view; and referred to the ongoing work of the Iraq Inquiry, chaired by Sir John Chilcot, in investigating the legality of the invasion. Chilcot's response was to assert that: 'The Inquiry is not a court of law, and no one is on trial' (Chilcot, 2009).

While international lawyers and assessors of global *realpolitik* may wish to explain why the legality of the Iraq War has yet to be settled by institutions such as the International Court of Justice or the International Criminal Court, this article considers the accountability mechanisms that exist at national level in the UK, and why they have similarly failed to provide any such resolution to the alleged violation of legal and other norms.

A significant complaint about the way in which the then-Prime Minister, Tony Blair, handled the Iraq War was that he bypassed cabinet and its formal sub-committee system, denying them the ability meaningfully to express their views on a basis of circulated documents, preferring to work in informal groupings more under his own control. In analysing the lead-up to the Iraq War, the Review of Intelligence on Weapons of Mass Destruction (the 'Butler Review') noted in 2004 that:

> *We received evidence from two former Cabinet members, one of the present and one of a previous administration, who expressed their concern about the informal nature of much of the Government's decision-making process, and the relative lack of use of established Cabinet Committee machinery.*

However, cabinet has no existence in statute law, which means that supposed violations of its principles are harder to challenge. The document which lays down the rules for the operation of cabinet government, the *Ministerial Code*, does not provide a thorough description of the principle of collective decision-making, making violations of it harder precisely to identify. Moreover, the *Ministerial Code* is drawn up (in conjunction with the Cabinet Secretary) by the Prime Minister, who is also the ultimate arbiter of whether or not it has been breached. Since participation in the invasion of Iraq in 2003 was driven by the Prime Minister, Blair, there was never any possibility that the handling of the decision would be found in violation of the *Code*.

In theory, governments are accountable to parliament for all they do, before, during and after the fact, with the ultimate sanction available to the House of Commons being the passing of a 'no confidence' motion. But decisions over armed conflict are carried out under the Royal Prerogative, a relic of monarchical government, control of which has largely passed to ministers (especially the Prime Minister) and officials. Courts have traditionally been reluctant to involve themselves in the conduct of the Royal Prerogative, making any ruling on the legality of the Iraq War at UK level unlikely. Another consequence of the Royal Prerogative is that parliament has no specific right to be consulted over war making. For example, there has never been a substantive vote on the UK involvement in Afghanistan; and before that, Kosovo. While the House of Commons did vote on the military action in Iraq (twice, in February and March 2003, as well as a vote the previous year on the UN process), the votes were held because the government regarded doing so as a political necessity, not because to do so was a formal requirement. It was able to exercise substantial discretion over the timing of the vote, and the way in which the question put to parliament was framed.

Parliament also lacks its own legal counsel. In assessing the legality of the conflict, it had no clear alternative to the published opinion of the Attorney General (AG), the most senior government legal adviser. Rather than being an independent figure, the AG is a party politician appointed by the Prime Minister, as a minister attending cabinet. Unless the government chooses to publish it (with the permission of the AG), the work of the AG remains confidential. While the then-AG, Lord Goldsmith, made a statement to Parliament (and before that cabinet) to the effect that the operation was legal, his earlier more equivocal views were kept from parliament (and full cabinet) at the time, and only became widely known when they were published

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during the 2005 general election campaign following a partial leak of their text.

An important vehicle for retrospective accountability is the committee system based primarily in the House of Commons. There have been more than 15 inquiries into different aspects of the Iraq War by parliamentary committees, including the Foreign Affairs Committee (FAC), Defence Committee, and International Development Committee. But parliamentary committees have a tradition of proceeding by consensus and often do not come to definitive judgments about issues of party political controversy, such as whether the government behaved in some way illegally or improperly over Iraq. There is also a particularly strong tradition of seeking consensus over foreign affairs. Moreover, the resources available to these committees are limited, making forensic investigations difficult; and they do not always receive full official cooperation with their inquiries. In July 2008, for example, the parliamentary Joint Committee on Human Rights noted that it had seemingly received inaccurate information from the military about prisoner abuse.

In addition to parliamentary activities, there have been extra-parliamentary inquiries. The Hutton Inquiry into the death of Dr Kelly in July 2003 and the Review of Intelligence on Weapons of Mass Destruction chaired by Lord Butler in February 2004.

Both of these inquiries were directed at particular issues related to the Iraq War and were not explicitly asked to rule on the violation of norms by the government (unsurprisingly, given that they were set up by Blair when he was Prime Minister). Even when, in the passage quoted from above, the Butler Review seemingly sought to convey that principles of cabinet government had not satisfactorily been adhered to, it prefaced its comments with the disclaimer:

> *We do not suggest that there is or should be an ideal or unchangeable system of collective Government, still less that procedures are in aggregate any less effective now than in earlier times.*

The Iraq Inquiry, set up in June 2009 by Blair's successor at No. 10, Gordon Brown, under Sir John Chilcot, had terms of reference far broader than those of Hutton and Butler. They were:

> *to examine the United Kingdom's involvement in Iraq, including the way decisions were made and actions taken, to establish as accurately and reliably as possible what happened, and to identify lessons that can be learned.*

There was no clear instruction to judge whether rules, legal or otherwise, had been broken. A section from the 'Frequently Asked Questions' section of the Chilcot website reads:

> *Q. Will the Inquiry say whether anybody involved in the Iraq conflict should face criminal charges? Will it be able to apportion blame?*
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> *A. The Inquiry is not a court of law. The members of the Committee are not judges, and nobody is on trial. But if the Committee finds that mistakes were made, that there were issues which could have been dealt with better, it will say so.*

The Inquiry was criticised in July 2010 by Carne Ross, the former UK diplomat, who held that it was censoring witnesses and being denied important documents.

The purpose of the Inquiry, then, is to produce a limited historical account which can inform future practice, while avoiding meaningful accountability for past events and actions.

The ultimate accountability mechanism in a democracy is the election. In the general election of 2005, the issue of Iraq played a seemingly significant part, contributing to a drop in support and seats for the Labour government and an increase in votes and Commons representation for the Liberal Democrats, the largest party to oppose the action. However, the existing government remained in office. Yet the electorate cannot be expected to vote in a general election on one issue alone. Furthermore it remains difficult for the public to develop an informed opinion when important evidence remains undisclosed, as remains the case over Iraq.

The peculiarities of the UK constitution combine to produce institutionalised impunity, which apparently becomes more pronounced over the conduct of foreign affairs. This constitutional state of affairs is founded in the longstanding principle associated with the Royal Prerogative that 'the Queen [and by implication those who wield powers technically on her behalf] can do no wrong'. The checks and balances that do exist are weak and are unable to hold government accountable for its actions.

While it would not be a panacea, a shift towards a codified UK constitution might help establish more clearly the rights and responsibilities of the institutions and individuals involved, and how they might be held to account. But for such a constitution to be effective, it would have be clearly founded upon the principle that all actors were subject to autonomous and transparent forms of accountability, and that government can, and does, 'do wrong'. ■

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References

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