The Case for an Australian Iraq War Inquiry is Compelling

The release of the Chilcot Report into the circumstances under which the United Kingdom took part in the invasion and occupation of Iraq in 2003 has raised fresh questions of how Australia came to join the unfortunately named “coalition of the willing.”

Initial reactions to the Chilcot Report came from John Howard, Australian Prime Minister at the time of the formal announcement of the decision to become part of that coalition. Howard essentially argued that it was the “right” decision, taken on the basis of the best available intelligence at that time.

The current Foreign Minister Julie Bishop has expressed similar views. Both Howard and Bishop are lawyers, although that is not immediately obvious from their expressed views. Neither seems to have even a basic grasp of the principles of international law, or indeed even the law of evidence.

Successive Australian governments of both major political persuasions have refused to conduct a formal inquiry into the circumstances under which Australia joined the Iraq invasion and occupation. This is probably because both major parties are culpable in ignoring both the law and the evidence.

It is therefore important to look at the origins of Australia’s involvement, not only because of the Chilcot Report, but because what we now know about the decision making process discredits the protestations about “faulty intelligence” and good faith claims about ridding the world of an “evil dictator”, all designed to bring peace and democracy to the Middle East.

The legal starting point is Article 2 of the United Nations Charter, a document that Australia was instrumental in formulating. Article 2(3) of the Charter provides:

“All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”

Article 2(4) further provides:

“All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State.”

These two provisions are rarely cited in the context of Iraq and were completely ignored in the legal opinion provided to the Australian government.

The Charter does of course provide an exception to the general prohibition on the use of force, and that is in the self-defence provisions of Article 51. A nation may of course act in self-defence if attacked by another State. As is well settled law, there must be an actual or imminent threat of an armed attack; the use of force must be necessary; and the force used must be proportionate.
No sensible argument can be mounted that Australia was threatened by Iraq, either directly or indirectly. Claims to the contrary, made in early 2003 by the Australian government do not withstand scrutiny.

A decade of sanctions had enfeebled Iraq’s military capacity as well as exacting a devastating toll upon its civilian population. An estimated 500,000 Iraqis, mainly women, children and older persons, died as a direct result of the sanctions. Former US Secretary of State Madeleine Albright callously described those deaths as “worth it” to dismember Iraqi society.

The post-invasion death toll is well in excess of a million people. Again, it is a measure of the callous indifference to the truth about the invasion’s consequences that the Australian media persistently refer to the death toll as “more than 100,000”. While literally true the effect is to dramatically understate the true human costs of the invasion.

The only operative provision of Article 51 therefore is that force may be used pursuant to a resolution of the Security Council authorizing the use of force. Circumventing that restriction was in fact one of the central preoccupations of the UK and Australian governments.

In November 2002 the Security Council passed Resolution 1441 and the key issue was whether or not that Resolution constituted such an authorization. Chilcot devoted considerable space to this legal question, devoting the whole of Part 5 of the Report to the legal maneuvering that went on.

Suffice to say at this point that the overwhelming weight of international legal opinion, including the whole of the UK Foreign Office legal team, considered that it was insufficient to justify the use of force.

Prime Minister Howard set out the political argument for Australia to join the coalition attack on Iraq in an address on 4 February 2003 to the Australian Parliament. This was on the eve of US Secretary of State Colin Powell’s ill-fated address to the Security Council.

Howard assured the House that the government would not make a final decision to commit to military conflict (although troops had already been deployed to the Middle East) “unless and until it is satisfied that all achievable options for a peaceful resolution have been explored.”

This is to be contrasted with one of the central conclusions of the Chilcot Report that the diplomatic alternatives to war had not been pursued as far as was possible. The reasons for this will become obvious.

Howard further made the unequivocal statement that “the Australian government knows that Iraq still has chemical and biological weapons and that Iraq wants to develop nuclear weapons.” The presumed evidential basis for this bold assertion was apparently British and US intelligence. Again, the Chilcot Report refers to the opposite conclusion. The views of the intelligence agencies were much less forthright than the political spin put on them by the British Prime Minister. The same was equally true of Howard’s claims.

Howard even went so far as to repeat the discredited claim that “uranium has been sought from Africa (sic) that has no civil application in Iraq.” This was essentially an echo of George Bush’s infamous 16 words in the State of the Union address in January 2003. In fact, the 2002 US National Intelligence Estimate described that “intelligence as ‘highly suspect.”

This followed an investigation on behalf of the US intelligence agencies by Ambassador Joseph Wilson in February 2002, a year before Howard’s statement to Parliament that concluded that reports of Saddam Hussein seeking uranium or Yellow cake were “unequivocally wrong.”

Undeterred by the real evidence, the Howard government introduced a resolution into the House on 18 March 2003 to seek authorization for Australian military action in Iraq. The resolution relied in part on assertions about Iraq’s continued possession and pursuit of weapons of mass destruction in defiance of Security Council Resolutions. The resolution before the Australian parliament also claimed that resolutions 678, 687 and 1441 provided “clear authority for the use of force against Iraq.”

In support of this extraordinary claim, Howard tabled in the House the legal advice upon which the government purportedly relied. He said that the advice was consistent with that provided to the UK government by its Attorney-General Lord Goldsmith.

At best, that was a partial truth. In fact, the terms of Resolution 1441 provided that should Iraq be found to be in material breach of its obligations, then the matter was to be returned to the Security Council for its assessment and consideration. There was nothing in Resolution 1441 that expressly or impliedly authorized the resort to force
without further consideration by the Security Council.

This was known to the UK Government because in February 2002, more than a year before the invasion, all 14 members of the Foreign Office legal team had advised the government that in their opinion Iraq could not be attacked without a specific further authorization from the Security Council.

This was also the view of the UK Attorney General Lord Goldsmith. He provided Tony Blair, the then UK Prime Minister with a detailed analysis, which reached the same conclusion. As the Chilcot Report makes clear, Blair did not provide his Cabinet with a copy of Goldsmith’s opinion. To do so would have undermined the propaganda campaign then in full swing.

Blair was not prepared to seek a resolution from the Security Council authorizing force because he knew he could not command the necessary support from the Council, even discounting the likely French and Russian vetoes. It is logically contradictory to claim, as Howard did, that the Security Council resolutions authorized force, and refuse to test that as Goldsmith had advised was the prudent course because one knows that such authorization would not be forthcoming.

Instead of confirming what the legal opinions had advised, both Blair and Howard continued to make unequivocal statements that Saddam Hussein was defying Security Council resolutions, concealing weapons of mass destruction, and pursuing a nuclear weapons program.

Chilcot again found that there was no proper basis for these statements, including the evidence of the two independent inspectors, Mohammed al-Baradi and Hans Blix that they could find no evidence of any weapons or weapons program, and that Saddam Hussein was co-operating with the inspection teams.

Goldsmith’s detailed opinion was finally provided to the Cabinet on 7 March 2003. It was clearly not what Blair and the others intent on war wanted to hear. Goldsmith was therefore sent to the United States where he conferred with Bush’s legal advisers.

Goldsmith duly returned to the UK and in a written answer to a question in the House of Lords in 337 words reversed the position he had carefully set out over 12 pages of legal argument only ten days earlier. Goldsmith’s answer said in effect that the alleged material breaches by Iraq of Resolution 678 (which dealt with the ceasefire after the first Gulf War in 1991) “revived” that resolution.

Professor Vaughn Lowe, professor of International Law at Oxford University has written, “there is no known doctrine of the revival of authorizations in Security Council resolutions” (2).

Apart from Professor Lowe, the overwhelming weight of legal opinion was that Goldsmith’s new position was untenable. A 551-page report from a Dutch Commission of Inquiry headed by a former President of the Dutch Supreme Court reported on 9 October 2010 that the 2003 invasion of Iraq “had no basis in international law.” That Dutch Report received very little coverage in the Australian media.

Sir Michael Wood used almost identical words in his evidence to the Chilcot Inquiry. Sir Michael was the Senior Legal Adviser at the foreign Office at the time of the invasion. He told the Inquiry:

“I considered that the use of force against Iraq in March 2003 was contrary to international law.” Sir Michael went on to say: “In my opinion, that use of force had not been authorized by the Security council, and had no other basis in international law.”

Whether John Howard knew about the unanimous opinion of the Foreign Office’s legal team, or Goldsmith’s detailed analysis of 7 March 2003 is not known. If he did, he did not mention it. Howard told the Australian parliament that the advice he had received was “consistent with” the UK advice. He could only be referring to Goldsmith’s 337-word parliamentary answer, because manifestly Howard’s legal advice, tabled at the same time, did not reflect either Goldsmith’s original advice, the Foreign Office legal advice, or the weight of world legal opinion.

Although the Chilcot Report did not state a specific legal view on the issue, it is clear from a reading of Part 5 of the Report where 169 pages are devoted to detailing the processes by which the legal positions were pursued, concealed from the Cabinet, modified and ultimately misrepresented, that 1441 could not operate as an authorization for the use of force, much less the “revival” of earlier resolutions.

Other critics have been less reticent. Professor Phillipe Sands QC, professor of international law at University College London said in June 2010 that documents disclosed at the Chilcot Inquiry showed that Goldsmith had a 180
degree turn in his opinion between 7 March and 17 March 2003 “in the total absence of any new facts or legal considerations.” (3)

Lord Alexander, a former head of the Bar Council of England and Wales thought Goldsmith’s 17 March 2003 answer was “risible” and said so publicly on 14 October 2003. (4)

So where did John Howard obtain legal advice so against the weight of authority? Unlike in the UK where the government at least sought the advice of its most senior legal adviser, the Attorney General, the Howard government instead obtained an opinion from two middle level public servants.

Their opinion does not acknowledge that the weight of legal opinion differed from theirs. Their interpretation of the Security Council resolutions was plainly wrong, “risible” to borrow Alexander’s terminology. They provided no evidence for concluding that Iraq was in material breach of Security Council resolutions as Howard had asserted. They also accepted the doctrine of “reactivation” when such a notion, as noted above, is unknown in international law.

As former Commonwealth Solicitor-General Gavan Griffiths wrote:

“The Australian and UK legal advises are entirely untenable. They furnish no threads for military clothes. It is difficult to comprehend that the fanciful assertions (they are not arguments) of the two advices have been invoked by Australia and the UK to support the invasion of another State.” (5)

In both the UK and Australian cases, seeking legal opinions was in reality no more than window dressing, a fig leaf of attempted respectability. The decision to go to war against Iraq had been made early in 2002.

The Cheney Task Force, with its maps dividing up Iraq’s oil riches among western oil companies was one motive for waging an unjustified and illegal war of aggression. Meeting the wishes of the Israelis as set out in the 1982 Yinon Plan was another. Saddam Hussein’s decision to trade oil in other than US dollars was also a crucial factor.

At one time, Saddam Hussein had been a US ally. The British and Americans had supplied the weapons of mass destruction he used during the war with Iran in the 1980s. Once their objectives differed Saddam Hussein became expendable, and ‘regime change’, a much favoured and practiced American option became the policy.

Further confirmation of this, were it needed, comes from the report of the head of MI6, Sir Richard Dearlove, following a visit to the US. What is now known as the Downing Street Memo was written on 23 July 2002, eight months before the invasion, and well before legal opinions, UN Inspector’s Reports, or parliamentary debates.

The Memo stated in part:

- Military action was now seen as inevitable.
- President Bush wanted to remove Saddam Hussein through military action, justified by a conjunction of terrorism and weapons of mass destruction.
- Intelligence was being fixed around the policy.

The facts did not matter. A policy decision had been taken and nothing could be allowed to divert the policy objective of invading Iraq and stealing its resources.

It is a reasonable inference that the Australian government was fully aware of this. Precisely what they knew and when they knew it must await the establishment of a proper inquiry. We do know however, that the views of the two ignoring the major foreign intelligence agencies, the Defence Intelligence Organisation (DIO) and the Office of National Assessments (ONA) were disclosed in a report of the parliamentary joint committee in December 2003.

The DIO and ONA had concluded:

1. The threat from Iraq’s weapons of mass destruction was less than it had been a decade earlier (1991)
2. Under sanctions that prevailed at the time, Iraq’s military capability remained limited and the country’s infrastructure was still in decline.
3. The nuclear program was unlikely to be far advanced. Iraq was unlikely to have obtained fissile material.
4. Iraq had no ballistic missiles that could reach the US.
5. There was no known chemical weapons production.
6. There was no specific evidence of resumed biological weapons production.
7. There was no known biological weapons testing or evaluation since 1991. 
8. There was no known Iraq offensive weapons research since 1991. 
9. Iraq does not have nuclear weapons. 
10. There was no evidence that chemical weapon warheads for missiles had been developed. 
11. No intelligence had accurately pointed to the location of weapons of mass destruction.

Ignoring the evidence (not an honest belief as pleaded then and now) and an overt willingness to join US foreign policy misadventures has led to one of the greatest policy debacles in Australian foreign policy history. It has resulted in the deaths of more than a million Iraqis and millions more displaced and their lives destroyed.

It has given rise to the threat of Islamic terrorism that plagues countries throughout the Middle East, North Africa and as recent events have shown in France and other European nations.

The Nuremberg and Tokyo Tribunals following World War 2 called a war of aggression “the supreme international crime differing only from other crimes in that it contains within itself the accumulated evil of the whole.”

That the principal perpetrators of the Iraq War, Bush, Blair and Howard, have thus far escaped accountability for waging a war of aggression is unconscionable. Australia must have a Chilcot type inquiry and judicial processes must follow their inevitable conclusions.

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