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# "Unjust" War, wrongful justification, and international humanitarian law

## The findings of the Chilcot Report provide sufficient grounds for prosecution by the ICC

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**Abstract**

The potential exists for charges of war crimes and crimes against humanity against the perpetrators of the invasion of Iraq, namely, former Prime Minister Tony Blair and his entourage. The findings of the Chilcot Inquiry in 2016 do not rule out the International Criminal Court taking action, and this article argues that it is plausible for those leaders who took the UK to war to be prosecuted for breaching international human rights law and international humanitarian law. This is because, first, the UNSCR 1441 was not respected by the British government that gave UN inspectors more time to investigate if Iraq possessed weapons of mass destruction (WMD), and, second, there is a measure of personal responsibility for those who gave the order for the invasion that has led to catastrophic consequences both in terms of human casualties and material damage in its aftermath.

**Keywords:** War crimes, human rights, Iraq, justice

### Introduction

The UK was, along with the US, the main participant in the second Gulf War and its consequences led to the commissioning of an inquiry whose terms of reference looked to the cause and effect of the decision to wage war. Its findings have implications for international law because it is a denouement of the political leadership of Britain that gave the signal for the invasion.[2] The Chilcot Report into how the UK went to war in 2003 has raised three main issues: first, the military action was taken before all peaceful methods of disarmament were used; second, that there was no imminent threat from Iraq; and finally, that a high level of certainty regarding the presence of weapons of mass destruction was promoted at a time when there were insufficient facts to support this conclusion. These key factors are the focal point of this discussion, as well as a comparative analysis of international human rights and humanitarian law in armed conflict, and the inference in the finding that the indictment of suspected war criminals may be possible at the International Criminal Court.

The findings of the Chilcot Report or the "Report" was critical of the procedures adopted by the then-British government for taking the UK into the war against Iraq. It dealt with the issue of any clear and imminent threat, the judgment of Attorney General Lord Goldsmith on advising Prime Minister Blair on the legality of the war, and the intelligence about weapons of mass destruction that was used as a pretext for the invasion. The Report

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concluded: "The judgments about the severity of the threat posed by Iraqi's weapons of mass destruction – WMD – were presented with a certainty that was not justified".[3]

There is no doubt expressed in the conclusion that there was an absence of legal authority for the conflict expressed in these terms: "In the absence of a majority in support of military action, we consider that the UK was in fact undermining the Security Council's authority. We have, however, concluded that the circumstances in which it was decided that there was a legal basis for UK military action were far from satisfactory".[4] While the Inquiry has not expressed a view on whether military action was legal it has affirmed that the suspicion of illegality, authorship, and complicity in war crimes could "of course, only be resolved by a properly constituted and internationally recognised Court".[5]

The Report implied that there was "compromising" advice from Lord Peter Goldsmith, the Attorney General: "In mid-January 2003, told Mr Blair that a further Security Council resolution would be necessary to provide a legal basis for military action", but he did not advise No. 10 until the end of February that, while a second resolution would be preferable, a "reasonable case" could be made that resolution 1441 was sufficient. He set out that view "in written advice on 7 March". The military and the civil service both asked for "more clarity" on whether force would be legal. Lord Goldsmith then advised that the "better view" was that there was, on balance, a secure legal basis for military action without a further Security Council resolution. In March, he asked Mr. Blair to confirm that Iraq had committed further material breaches as specified in resolution 1441. Mr. Blair did so the next day. However, the precise basis on which Mr. Blair made that decision "is not clear".[6]

This has to be set in the context of international law which has established principles about the legality of invading another country which can only occur (1) with UN Security Council (UNSC) sanction, (2) if the country to be invaded has attacked or acutely threatens to attack, or (3) if the government of that country invites invasion and this can only happen after extensive discussion. The Report concedes on that point, as stated at the outset of its findings: "We have concluded that the UK chose to join the invasion of Iraq before the peaceful options for disarmament had been exhausted. Military action at that time was not a last resort".[7]

The issue that this article addresses is the presumption of guilt that arises from the Chilcot Report's findings, which has repercussions in terms of accountability for British ministers in the Blair government (1997–2006) for war crimes. The inquiry was not a means of redress, but it has determined the culpability and is very damning of the political leadership who took the UK to war. This provides the basis for action on grounds of breaching international humanitarian law. The argument here is that in the absence of domestic trying of those accused of war crimes there is a legal framework provided by the International Criminal Court (ICC) to raise indictments against all those who are implicated in the decision to invade a country which the UN body responsible for investigating WMDs confirmed it had no "smoking gun".

### *Status of Geneva Conventions and invasion*

The invasion of Iraq by the US–UK Coalition forces was executed on 19 March 2003. The military attack was conducted without a UN mandate and did not have a Security Council resolution that would have sanctioned war.[8] Moreover, the governments sanctioning the invasion disregarded the findings of the Hans Blix Report which had concluded that there were no "smoking guns" in Iraq.[9] The question arises if this places the UK, one of the two main components of the Coalition Authority (CA), to operate outside the rules of international law once it has determined that it has to carry out an invasion based on its political interests. It is necessary to consider the scope of the Geneva Conventions to determine the potential liability of the political leaders who took the UK to war.

The Geneva Convention of 1949 set out the "necessary scope of territorial control ought to be evaluated in light of parties' different obligations toward combatants and non-combatants

under international humanitarian law". There are some fundamental rights, incorporated in 1977 such as "restrictions against indiscriminate murder which are enforceable regardless of whether the nonstate actor has achieved a satisfactory level of territorial control under Additional Protocol II".[10] The Additional Protocols comprise flexibility in evaluating territorial control based on the scenario in which "urban centers remain in government hands while rural areas escape their authority" – that is, incomplete control – may suffice, but there must be "some degree of stability in the control of even a modest area of land".[11]

Common Article 3 that is generic to all four Geneva Conventions and which states "(1) Persons taking no active part in the hostilities, – shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria"; and "(2) An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict". Common Article 3 is based on a negative description: it is applicable in the case of armed conflicts "not of an international character". Armed conflicts "not of an international character" are armed conflicts where at least one party is not a state.[12]

Under customary international law, the "use of lethal force must respect the legal principles of military necessity, distinction, [and] proportionality".[13] In executing a proactive, offensive and retributive doctrine the British forces were bound under international humanitarian law (IHL) not to cause "indiscriminate and disproportionate attacks"[14] and to "observe a series of precautionary rules in attack, aimed at avoiding or minimizing incidental harm to civilians and civilian objects".[15]

There are two Additional Protocols that have been added to the Geneva Conventions in 1977 which cover armed conflict which is a Non-International Conflict (NIC). These are the Additional Protocol (AP) I and II and while the former defines armed movements involving the "right to self-determination of colonized people as international armed conflicts, bringing, in some respects, guerrilla warfare and state responses to it within the protection ambit of IHL".[16] The latter was "specifically adopted to cover situations of NIC, thereby bringing a situation of armed conflict occurring on the territory of a country within the framework of international humanitarian law".[17]

However, the invasion by the UK led to an international conflict and this determines the law relating to the conflict, namely: the rules found in the Geneva Conventions; the First Additional Protocol to the Geneva Convention; and additionally this brings a wider scope of war crimes under Article 8(2) of the Rome Statute of the International Criminal Court. The consideration of the position under international law reference must be made to the United Nations Charter to which the UK government is a signatory.[18]

Under Article 2(4) of the Charter:

> 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, or in any other manner inconsistent with the purposes of the United Nations.

It is also important to highlight that this article is accepted as *jus cogens* by virtue of its status and this means it is binding over all states and that there are no legal grounds for derogation from its rules.[19] The reference in the Charter of the United Nations Security Council (hereafter, UNSC) provides jurisdiction under matters where it decides that there has been a "threat to the peace, breach of the peace or act of aggression" and will make recommendations or decide the measures to be taken to "maintain or restore international peace and security".[20] From this list, "act of aggression" would be the most appropriate ground to take forward. The term "aggression" is satisfied when an international state is acting in an aggressive manner – having been defined in 2010 as:

> the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.[21]

The broad nature of this definition means the next step is therefore to consider whether this has been breached by the actions of the coalition governments. First, when beginning to analyze this definition we must look at what constitutes "force" in this context. There are several important – but separate – sources from where such a definition can be found, nonetheless attention must be drawn to the fact that the resolutions of the UNSC have been intentionally broad as to its definition.[22] However, there is a consensus between states in practice that the agreement specifically covers armed force.[23]

*Pre-emptive action and culpability*

The Chilcot Report arrived at the conclusion that all peaceful methods of disarmament had not been exhausted before the invasion commenced. The Report's treatment of the legality of the war and the steps that were taken in an attempt to find a legal justification, offers an opportunity to explore the inquiry's self-restraint in not explicitly stating that it was illegal. The introduction states that the inquiry "has not expressed a view on whether military action was legal".[24] With no lawyer among its members, and no legal counsel to assist it, the inquiry chose to sidestep this delicate matter, claiming it was best "resolved by a properly constituted and internationally recognized court".[25] Notwithstanding its reticence, the Report assigns much of its inquiry to matters of legality and in distinguishing between substance and process, the inquiry concludes that "the circumstances in which it was decided that there was a legal basis for UK military action were far from satisfactory".[26]

Under the UN Charter, the Security Council may "decide what measures not involving the use of armed force are to be employed to give effect to its decisions",[27] and only if the Council finds that the measures "provided for in Article 41 would be inadequate or have proved to be inadequate", can it "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security".[28] Article 41 expressly states that if the UNSC finds an "act of aggression" in this case – in order for armed force to be justified, there must have been an exhaustion of all non-violent methods of restoring international peace. Under international law, it can be assumed that the use of armed force is not justified in this set of circumstances. The examination of the self-defense concept in Article 2(4) and the relevant aspects of the Chilcot Report, it would appear the UK's involvement in the war in Iraq is itself a potential breach of international law.

The waging of war on Iraq led to the commission of acts in the course of war that amounted to gross violations of human rights. The legal cases that have come before the courts show quite categorically the imposition of collective punishments by British personnel of Iraqi civilians during the interrogation process as a direct consequence of the war. The Baha Moussa Inquiry, which investigated the violent death of a hotel worker who had been arrested by the British forces, chaired by Right Hon. Sir William Gage Report established that there was a breach of jus cogens in the torture of an Iraq civilian in this recorded incident of a war crime.[29]

The UN Convention against Torture 1984 binds states to the norms of international law. It has been adopted in UK law and is effective in terms of regulating the authorities in their conduct at home and abroad.[30] This has been adopted into the legal framework of the UK and it has within its ambit the hierarchy of command up to the head of government who at the time was Tony Blair. In *R v Bow Street Stipendiary Magistrate; Ex parte Pinochet Ugarte,*[31] which was regarding the criminal liability of an ex-head of state was considered by the House of Lords, the issue was if a former head of state could claim immunity from criminal proceedings for systematic torture allegedly committed when he was in power between 1973–1988. This case concerned the repatriation to a foreign court of General Pinochet to be tried under crimes against humanity and the issue arose if there was a justiciable case against him to be tried in an international court.[32]

The House of Lords ruled unanimously that he could be tried for torture under the CJA 1988 Section 134. This is an important ruling because it takes into its ambit the immunity of a foreign executive who headed the chain of command of a military government. A former executive who is at the apex of the command in any breach of *jus cogens* may be exposed to the rules of international law when they step outside their own jurisdiction.

This principle reverts to the concept of an aggressive established under the auspices of the Nuremberg Tribunal interpreted the rules that effectively required that those crimes be traced to an international armed conflict and be linked to state action. This manifested itself in cases before the German Supreme Court in the British Occupied Zone where Nazi officials were prosecuted for crimes against humanity even when their actions were in accordance with and supported by state policy. The term "crimes against humanity" at Nuremburg was given content for prosecution to take place for war crimes.[33]

The presence of *jus cogens* is now a fundamental principle of international derived from the judgments of the tribunals established to hear war crimes trials.[34] It is established even at a minimum that the domestic courts of all states have the power to prosecute those responsible for crimes against humanity, war crimes, genocide, and *torture*. The case for jurisdiction is made on the basis of state practice and the secondary argument that international crimes are also subject to prohibitions of the peremptory norms that lead to the exercise of universal jurisdiction.

**Grounds for an indictment for war crimes**

The grounds do exist to serve indictments for breaching the international humanitarian law principles in the invasion of Iraq. The main issue are claims of either "pre-emptive self-defence", or of a "humanitarian intervention" and there has to be consideration of Article 2(4) of the UN Charter is of "pre-emptive self-defence". The basis for the defense was the connection to a "pre-emptive self-defence" claim that was initially formulated by the US, which claimed that Iraq was complicit in the 11 September 2001 attacks on its soil.[35] Under the UN Charter, Article 51, the prohibition of the use of force does not hinder a state's "inherent right of individual or collective self-defence if an armed attack occurs".

The coalition invasion, however, raises questions, as there has been no actual attack against any state, and a claim of "pre-emptive self-defence" has no official precedent in international law. The only source of this defense comes from its express acceptance in a speech by then-Secretary General of the United Nations Kofi Annan in 2005.[36] However, the test for such a defense is strict, as the UNSCl has denounced the legality of an attack against a non-imminent threat.[37] Therefore, the claimant must be certain of their position relative to the imminence of the attack before there is justification for their actions. However, imminence has no clear legal definition, with potentially its broadest definition being found in academic writing, whereby an "imminent attack" is an:

> impending attack over which there is reasonable levels of certainty that it will occur in the foreseeable future, and must be a specific and identifiable attack.[38]

This is not compatible with the scenario as depicted in the Chilcot Report, meaning that a claim of pre-emptive self-defense could not be successfully pleaded, granting the parties no claim in declaring the invasion *bellum justum*[39] under international law.

Another potential defense that could be claimed under international law is of a "humanitarian intervention". Under Article 42, the Security Council acting through the member states may take such actions by land, sea, or air in order to maintain international peace or security. This would tie in with the coalition's intention to protect the Iraqi population from President Saddam Hussain whose regime was perceived as "oppressive" by the UK and the US. However, the main caveat for this comes expressly within the text of the article itself, where the use of force can only be justified if non-forceful measures found in

Article 41 have been exhausted.[40] This is not in accordance with the findings of the Chilcot Report, which has expressly stated that the peaceful methods of disarmament had not been expended. As a result, the humanitarian defense presumably cannot be claimed by those accused of war crimes in this set of circumstances.[41]

There is reason to believe that the UK government disregarded the advice of its own representative on the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC), Dr. David Kelly. He was one of the most prominent members of the UN Special Commission that had the mandate to investigate the manufacture of weapons of mass destruction in Iraq. He had suggested that the British government had "sexed up" the case for an invasion of Iraq. Prior to the invasion, he died a violent death on 13 July 2003 which was termed a suicide. There was speculation that he was murdered because there was only a government inquiry chaired by Lord Hutton, former Attorney General of Northern Ireland into his death that absolved the authorities of any wrongdoing.[42]

However, investigative journalists have questioned as to why there has been no Coroner's Inquest into his death until now that would have considered the independent evidence and expert reports. They have relied on such shortcomings as

> Why incomplete evidence concerning Dr Kelly's whereabouts during the last week of his life was given to the Hutton Inquiry; Why the forensic pathologist who conducted the post-mortem claimed Dr Kelly was 2st lighter than he actually was; Why a police search helicopter with thermal imaging equipment, which had flown three hours before over the wood where his body was eventually found, did not detect it – despite the fact that his body temperature would have been warm enough at the time to register on the helicopter's search system.[43]

It is also important to note that the coalition forces did not claim self-defense at the time of the invasion,[44] which also raises the question of whether the US and UK had any faith in this defense when first considered as a possible defense against the charge of armed aggression in breach of international law. Therefore, by evaluating the defenses available to the proposed breach, it is also possible that, should a breach of the Charter be found, there would not be a defense applicable under international law to the invasion.

In *Prosecutor v. Tadić*,[45] there was a determination that the rules of international humanitarian law apply and they are applicable "even if the state of war is not recognized by one or by any of the parties". This includes any armed confrontation between states, whatever its scale and its duration, whether it is a "war", considered as a comprehensive military confrontation, or any military clash "short of war".[46] The court stated that criteria have been formulated into two elements: intensity and organization that is, in order for a situation to be classified and the violence must reach a certain level of intensity and the nonstate parties must display a certain level of organization. It ruled:

> there is a resort to armed force between States or protracted armed violence between governmental authorities and organized groups, or between such groups within a State.[47]

The judgment emphasized that these determinative elements should only be used "as a minimum" to distinguish armed conflicts, which commence the application of international humanitarian law and distinguishes them from internal disturbances. The terms "intensity" and "organization" were the ratio of the ruling but it appears it is not established given that "protracted" in the authoritative French text of the judgment uses the word *prolongé* ("prolonged"), which refers only to the length of time. However, the temporal meaning is eliminated when substituted by the qualitative term "intensity", in the ruling that has established the standard definition of international Conventions which applies to an armed conflict.

The application of facts in the context of an invasion by the coalition governments against the troops of the state of Iraq, is evident from the precedent established in *Tadic*[48]

Therefore, the reference to this principle as the criteria of when armed force is used may be applied in the invasion of Iraq. Given that the conflict happened between the coalition states and Iraq, the first issue related to Article 2(4) is fulfilled, meaning this can be classified as an international conflict under the UN Charter. The definition of "force" has been left intentionally broad by the Security Council, and so the 2003 invasion could be viewed as "armed force" by reading Article 2 alongside the definition in the *Tadic* case. This also covers a "direct use" of force as was established in *United States of America v Nicaragua*,[49] where a military intervention constituted this same definition and the right of self-defense cannot be claimed to justify larger reciprocal attacks under the justification of self-defense, following a smaller scale attack or "frontier incident". In order to establish the bar, set by the *de minimis* threshold of this defense, the level can be found by looking at the scope and the consequences of the actions.[50]

However, by following international precedent this qualification does not require a high level of severity in order to be above its threshold.[51] Nonetheless, there is no real precedent for a "pre-emptive attack", meaning this is not a recognized concept of international law. The events leading up to the invasion of Iraq were of sufficient severity to render them above the threshold of any imminent attack. A further fundamental question that arises from the reading of Article 2(4) is the consequence of the use of force. The justification under Article 2(4) exists only if an attack is "against the territorial integrity or political independence" of the victim state. While the principle of territorial integrity is intended primarily to prevent changes to borders or the advancement of secessionist movements, the conclusion of the 2003 invasion was an eight-year occupation by UK and coalition forces, meaning that this can clearly be shown to have affected the "political independence" of the state of Iraq. This will render any justification to be a breach of Article 2(4) of the UN Charter.

There are several ways that an obligation binds the states to exercise those accused of war crimes under its domestic jurisdiction under the rules of customary international law that are a source for the prosecution of international crimes. These offenses are considered as *erga omnes*, which means that an obligation is owed to the international community to uphold the law.[52] The secondary linked argument that can be put forward is that to the extant international crimes are also subject to *jus cogens* prohibitions, which could lead to the exercise of universal jurisdiction[53] As *jus cogens* norms involve *egra omnes* obligations there is a compelling argument for the advancement of the principle that war crimes are punishable under universal jurisdiction.[54]

*Breach of jus cogen norms and international law*

The waging of war on Iraq cannot be justified by sovereign immunity or by granting the personnel of the UK armed forces any state immunity. These were acts committed in the course of war and consisted of gross violations of human rights. The Chilcot Inquiry estimated the Iraqi deaths under Coalition Occupation (circa 150,000) as explained in Section no 17 of the Report.[55] The 150,000 estimate derives from Iraqi Body Count which relied on media and government reports an evaluation criticized by the top medical epidemiologist and medical journal. The Lancet whose expert polling results underpin the estimate of 1.5 million violent Iraqi deaths in the post-invasion period.[56] The UN Population Division 2006 data of 0.8 million under 5-year-old Iraqi infants dying under Coalition Occupation as evidence of an immense US Coalition war crime in gross violation of Articles 55 and 56 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War which demand that an Occupier supplies food and medical requisites to "the fullest extent of the means available to it".[57]

The behavior and actions of the Coalition forces toward the civilian population of Iraq when under occupation has to come under Part IV of the AP II on Civilian populations and General Protections of the Civilian Population states in Article 13 as follows:

> 1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
> 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
> 3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.[58]

There is a further charge on the indictment possible which is the destruction of the archeological treasures of Babylon by the Coalition authorities. The US had not signed the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954 to prevent damage to cultural treasures before it went to war.[59] The US Secretary for Defence at the time of the invasion Donald Rumsfeld responded in a press briefing casually dismissed the episodes of museum vandalism under the occupation forces by his comment "Stuff happens" and that the looting was "part of the price for freedom and democracy". He transferred the blame on the "pent-up feelings from years of oppression" under the rule of deposed President Saddam Hussein.[60] The UK had also not ratified the 1954 Hague Convention and only agreed to ratify it in 2015.[61]

The international humanitarian law that exists in the form of the protection of cultural property is now covered by the 1998 Rome Statute for the International Criminal Court which includes the destruction of cultural property as a war crime. Article 8(2)(a) sets out that war crimes covered by the Geneva Conventions IV of 1949 that protects civilians also includes under (iv) the extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

The main charges of waging an illegal war, war of aggression, and crimes against humanity must also include the destruction of cultural property among its offenses. The was caused not only human casualties but also "collateral" damage on a colossal scale. It led to the destruction of a state but also of a civilization and those who have been accused by implication in the Chilcot Report should be made to face an indictment at the ICT to respond to these charges.

The norms of *jus cogens* are not included specifically as being a "formal" source of international law but these norms can be properly placed among the "formal" sources and there is has an evolution as a legal concept and the extent of international recognition of its existence. There is a process of recognition of the concept of *jus cogens* in international law[62] and the theoretical acceptance of the concept received codification by the Vienna Convention of 1969 on Treaties.[63]

In *Jurisdictional Immunities of the State (Germany v Italy)*,[64] the International Court of Justice (ICJ) held that the *jus cogens* rule had not been breached by its affirmation of the principle of state immunity because the latter flowed from sovereign immunity. The ICJ emphasized that recognizing the immunity of a foreign state does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule. The Court was acting on the Italian state's application that there was a breach of *jus cogens* in the German occupation of 1943–1945 and it should be paid compensation. The ICJ analyzed national legislation and case law to determine that "even on the assumption that the proceedings in the Italian courts involved violations of jus cogens rules, the applicability of the customary international law on State immunity was not affected" – a *jus cogens* norm cannot displace state immunity.[65]

The ICJ held

> To the extent that it is argued that no rule which is not of the status of jus cogens may be applied, if to do so would hinder the enforcement of a jus cogens rule, even in the absence of a direct conflict, the Court sees no basis for such a proposition. A jus

> cogens rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess jus cogens status, nor is there anything inherent in the concept of jus cogens which would require their modification or would displace their application.[66]

The breach of jus cogens in the invasion and conflict in Iraq will be governed by the Geneva Conventions of 1949 I, II, and III that establish the framework for the application of international humanitarian law that governs the law of armed conflict. This makes it binding as a rule of law and it applies to all states and is the basis for the adoption of mechanisms available in international law to prosecute those responsible for crimes against humanity. Article 2 relates to all cases of international armed conflicts and applies to all cases of armed conflict between two or more signatory nations, even in the absence of a declaration of war. Article 1 of Protocol I of 1977 further clarifies that armed conflict against colonial domination and foreign occupation also qualifies as an *international* conflict. When the criteria of international conflict have been met, the full protections of the Conventions are considered to apply.[67]

The instrument that has a bearing on the conduct of states is the International Criminal Court which confers by treaty a binding obligation of *aut dedere aut judicare*, which means to prosecute the alleged offender or to extradite them.[68] The Rome Statute of the International Criminal Court, which came into effect in 2002, unambiguously provides for individual criminal liability for future war crimes in international and internal armed conflicts.[69] It established under Article 5 jurisdiction over four core international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. Under Article 29 those crimes are not subject to any statute of limitations. Article 12 allows dispensation to the ICC when an offense occurred on the territory of a state that has ratified the court's statute or where the suspect is a national of such a state. Practically, therefore, the court's jurisdiction will be limited to consenting states and to those in conflict zones that are referred to by the UN Security Council.

The International Criminal Court Act 2001 in the UK incorporates the offenses in the Rome Treaty of the ICC into domestic law, so that the authorities in England can investigate and prosecute any crimes committed in the UK, or committed overseas by a British national, a UK resident, or a person subject to such jurisdiction.[70] Section 51(1) to the ICCA, incorporates the Rome Statute by setting out a) the crime of genocide; b) crimes against humanity; c) war crimes; d) the crime of aggression (Article 5(1), Rome Statute of International Criminal Court 2001). The signatory states or those ratifying the Geneva Conventions are obliged to implement the provisions of these Conventions.[71] These articles give rise to liabilities irrespective of the circumstances of international or civil wars.

The crime which appears the most relevant to any prosecution of Blair or members of his war cabinet is that of "aggression", which is set out in Article 8*bis* of the Rome Statute. The crime is the planning, preparation, initiation, or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state of an act of aggression which, by its character, gravity, and scale, constitutes a manifest violation of the UN Charter. An act of aggression is defined as the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state. The difficulty with a prosecution for the crime of aggression is that its inclusion in the Rome Statute took place on 11 July 2010, well after the invasion of Iraq. It has come into force but it has not been ratified by the UK.

However, this does not necessarily mean that Blair or members of his government will avoid prosecution for war crimes. There are offenses that may be relevant to the facts as found by the Chilcot Report in particular, the war crime of "Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to

civilians . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" (Article 8(2)(b)(iv)).

As there is now a widely accepted definition, and a suitable reason for raising the case, the issue can move on to litigation.[72] In referring the purported war criminals to the ICC the rules established by its Statute will have jurisdiction over the crimes of genocide, crimes against humanity, war crimes, or the crime of aggression.[73] Furthermore, only states can be parties to an action,[74] and such an action can be raised only in three ways: by the UNSC; by the public prosecutor; or by the state itself.[75] If raised by either of the two latter parties, there is an additional criterion that the incident must have occurred on the territory, or by a national of a state that is a party to the Rome Statute.[76] Furthermore, owing to the conflict's presumed nature as an international armed conflict, the larger list of crimes under Article 8(2) of the Rome Statute shall apply, thus giving the court a greater scope as to their case. If such a party given above decides to raise a case to the ICC, they will invoke any war crimes from the list found in this article.

While it must be mentioned that the ICC only has jurisdiction where the national courts are unwilling or unable to convict.[77] At present, the Court is still in the preliminary investigative stage of its case regarding the 2003 invasion.[78] Besides the ICC the UNSC may also choose to impose sanctions on the coalition governments if it finds that there has been a breach of the UN Charter. The UNSC may determine the existence of an act of aggression, resulting in a breach of Article 2(4), and it can impose a variety of sanctions, such as economic penalties or in extreme circumstances the severance of diplomatic relations with the belligerent state. This broad reading of the powers of the UNSC is the recommended approach in the indictment to be served for a determination at the ICC that there was a breach of international humanitarian law.

## Conclusion

The Chilcot Report, which was the final inquiry conducted by the British government ostensibly to close the chapter of the UK's involvement in the invasion of Iraq has been one of the most divisive and controversial political documents released in recent memory. There are some who have called it a whitewash because of its inability to declare the war illegal *ipso facto*. Following analysis under current international law and its application in relevant cases, there are potential grounds for finding a breach of the UN Charter in its execution and conduct, and the purported defenses to this claim appear to fail in its justification.

The terms of the inquiry by the UK government considered two specific questions, namely, whether it was necessary and justified to invade Iraq in March 2003, and whether the UK could and should have been better prepared for its catastrophic effect. In relation to the first question, it was found that the UK chose to be part of the invasion of Iraq before the peaceful options for disarmament had been exhausted and, therefore, that military action was not invoked as a last resort. Secondly, the judgments of the UK government about the severity of the threat posed by Iraq's weapons of mass destruction were presented with a false dossier prepared to ostensibly justify the invasion as a pretext of self-defense. In addition, in the absence of a majority in the Security Council Blair could not take that decision that a "reasonable case" could be made that the existing resolution 1441 was sufficient.

The Chilcot Report did not express a view on whether military action was legal but stated that that could only be resolved by a properly constituted and internationally recognized Court. The findings have sufficient basis in substance and logic for there to be prosecution of Blair and his colleagues for the decision to lead the UK into an unnecessary and devastating war. However, while its findings have highlighted several breaches of international law, ultimately this matter can be decided if the ICC or the UNSC if it decides to refer the matter to the ICC to impose the relevant sanctions on the belligerent states if they do not transfer the suspected war criminals to be arraigned under the ICC jurisdiction.

## Notes

[1] LLB (Lon) LLM (Lon) Gray's Inn, He specializes in public law and public international law. His works have appeared in several leading journals on the subject.
[2] The Iraq Inquiry. The 12 volume Chilcot Report is 2.6 million words long and has a 145-page executive summary. 6 July 2016. Available at: www.iraqinquiry.org.uk/media/247010/2016-09-06-sir-john-chilcots-public-statement.pdf
[3] Ibid., at 128
[4] Ibid., at 129.
[5] Ibid., at 130.
[6] Chilcot report, Executive summary, pp. 4 and 5.
[7] Ibid., p. 1.
[8] In 2003 prior to the invasion the United States, United Kingdom, and Spain proposed a resolution on Iraq subsequent to the resolution 1441 that had successfully proposed the inspection of the country by Atomic Energy Commission Inspectors. This second resolution was to seek approval for the invasion, but it was subsequently withdrawn when it became clear that some permanent members of the Council would veto it. Kofi Annan the then Secretary General of the UN, claimed on 16 September 2004 that "I have indicated it [the invasion] was not in conformity with the UN Charter. From our point of view, from the charter point of view, it was illegal". Global trends by Martin Khor. Available at: www.twnside.org.sg/title2/gtrends/gtrends152.htm
[9] www.mideastnews.com/iraq090103.html
[10] Djamchid Momtaz, Le Droit International Humanitaire Applicable aux Conflits Armés Non Internationaux [International Humanitarian Law Applicable to Non-International Armed Conflicts], in 292 Collected Courses of the Hague Academy of International Law, 21, 50 (2002), 60. International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 1352–1353 (Sandoz et al. eds. 1987). Available at: www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf
[11] International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 1352–1353 (Sandoz et al. eds. 1987). Available at: www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf [http://perma.cc/9PYS-DPCC].
[12] Commentary of 2016. Article 3: Conflicts of Non International Character. ISRC. Available at: iht-database.icrc.org/ihl/full/GLI-Commentary/aRT3
[13] J.-M. Henckaerts & L. Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules. Cambridge: Cambridge University Press, 2005, rules 1–24, pp. 3–76.
[14] Ibid., Rules 11–24.
[15] Ibid., Rules 15–24.
[16] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
[17] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I), 8 June 1977.
[18] www.un.org/en/member-states/index.html
[19] Ibid., Article 103.
[20] Ibid., Article 39.
[21] Resolution 6, International Criminal Court, 2010.
[22] A. Randelzhofer, "Article 2 (4)", in B. Simma et al. (eds.), *The Charter of the United Nations: A Commentary*, 3rd ed. Oxford: OUP, 2012, p. 209.
[23] Ibid.
[24] The glossing over the issue of legality has drawn criticism from those who believe that the inquiry may have been elastic in its interpretation of evidence. Phillippe Sands in his book *Lawless World: Making and Breaking Global Rules* (2006) has stated that in relation to the events of 31 January 2003, when Blair met Bush at the White House. it was on 10 March 2003 that they agreed as stating that this "was when the bombing would begin". The note from David Manning, Mr. Blair's chief foreign policy adviser at the time, wrote in the memo that summarized the discussion between Mr. Bush, Mr. Blair and six of their top aides. It records that "Blair 'was solidly with the president and ready to do whatever it took to disarm Saddam', and indicates that he thought a second resolution was desirable (but by implication not necessary)". Sands argues that "as early as January Blair had committed himself to supporting a March invasion whether or not there was a further resolution. Blair was indeed with Bush, 'whatever' Bush wanted. The Chilcot Report

has the two men agreeing that the campaign 'could' begin in March, not that it 'would' begin then". Sands asserts "This tiny change – one letter, quotation marks removed – causes me to wonder whether any other changes of emphasis may have been made in respect of documents we are not allowed to see". Phillipe Sands, A Grand and Disastrous Deceit, London Review of Books, Vol 38, No 15, 2016: www.lrb.co.uk/v38/n15/philippe-sands/a-grand-and-disastrous-deceit

[25] A parallel inquiry in the Netherlands, the Davids Commission, which reported in January 2010, concluded that the war had no basis in international law. Davids, W.J.M., M.G.W. den Boer, C. Fasseur, T. Koopmans, N.J. Schrijer, M.J. Schwegman, & A.P. van Walsum. 2010. Rapport Commissie van Onderzoek Besluit- vorming Irak. Amsterdam, Netherlands: Boom. Available at: www.nrc.nl/multimedia/archive/00267/ rapport_commissie_i_267285a.pdf.

[26] Chilcot Report, p. 461.

[27] Charter of the United Nations, Article 41.

[28] Ibid., Article 42.

[29] There were 73 recommendations of which three were "There should be prompt checks on prisoners' wellbeing after a death in custody; very robust questioning, known as the harsh approach", could be banned – or if not "the approach should not include an analogy with a military drill sergeant" and military should not teach forces to "maintain the shock of capture" and "prolong the shock of capture". The Baha Moussa Public Inquiry Report, 8 September 2011. Available at: www.gov.uk/government/publications/the-baha-mousa-public-inquiry-report

[30] The UK Criminal Justice Act 1988 ("CJA") Section 134 of the CJA provides for the offence of torture as follows:
(1) A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.

[31] (No.3) [2000] 1 AC 3.

[32] Lord Millet's ruling in this case cited previous precedence in international law when there had been adjudication by domestic courts of these crimes. His Lordship quoted the principle recognized by the International Law Commission in 1954 that had incorporated the preamble of the Nuremburg War Crimes Tribunal 1946.[32] In the Draft Code of Offences Article 1 states: *Offences against the person and security of mankind as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished*. His Lordship distinguished a head of state who is a special person who is entitled to immunity as a reflection of his pre-eminence in the state, but not to the head of government. "Immunity ratione personae ... is only narrowly available ... It is not available to serving heads of government who are not also heads of state ... It would have been available to Hitler but not to Mussolini or Tojo" (p. 268 H).

[33] Article 6(c) Nuremberg Charter defines crimes against humanity as "murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the law of the country where perpetrated". However, the nexus between crimes against humanity and armed conflict was gradually dropped and customary law recognizes crimes against humanity in times of both peace and conflict; see Tadić (Interlocutory Appeal), 2 Oct. 1995, ICTY Appeals Chamber, at para. 141 and Article 7 ICC Statute.

[34] Fitzmaurice, Sir Gerald in The General Principles of International law considered from the Stand point of the Rule of Law, Recueil des Cours, 92 (1957/11) states that "Peremptory rules, as rules serving greater interests, operate in a manner, that is practically essential in all circumstances" (p. 125).

[35] National Security Strategy of the United States of America of 17 September 2002. Available at: www.state.gov/documents/organization/63562.pdf (Accessed 15 October 2016).

[36] In Larger Freedom: Towards Development, Security and Human Rights for All, UN Doc. A/59/2005, 23 May 2005, §124 (Compendium 24).

[37] *Democratic Republic of Congo v Uganda* ICJ Rep. 2005, §161

[38] N. Lubell, The Problem with Imminence in an Uncertain World, in M. Weller (ed.), The Oxford Handbook of the Use of Force in International Law. Oxford: OUP, 2015, Ch. 31, part VII.

[39] *Bellum justum* – "just war".

[40] Ibid., Article 42.

[41] *Chilcot Report*, Executive Summary, 6 July 2016.

[42] Report of the Inquiry into the Circumstances Surrounding the Death of Dr. David Kelly C.M.G., by Lord Hutton, HC 247: fas.org/irp/world/uk/hutton.report.pdf

[43] Miles Goslett, Damning new evidence that Dr. Kelly didn't commit suicide. The disturbing flaws in the official government story surrounding the death of Blair's chemical weapons inspector. Mail on Sunday. 13 January 2019. Available at: www.dailymail.co.uk/news/article-6585263/Damning-new-evidence-Dr-Kelly-DIDNT-commit-suicide.html
[44] Letters from the Permanent Representative from the UK and US dated 20 March 2003, UN Doc 5/2003/350 (UK), UN Doc 5/2003/351 (US).
[45] *The Prosecutor v Dusko Tadic* (Case No. IT-94-1-AR72; 35 ILM (1996) 32) Opinion *and Judgment (Int'l Crim. Trib. for the Former Yugoslavia 7 May 1997)*.
[46] Para.70.
[47] Para. 56
[48] Ibid.
[49] *United States of America v Nicaragua*, 1986 ICJ 14.
[50] Ibid. at 95.
[51] *Oil Platforms (Islamic Republic of Iran v United States of America),* Judgment, ICJ Reports, 2003, p. 161.
[52] In Barcelona Traction, Light and Power Company Ltd (Second Phase) 1 CJ Rep. 1970 3,32 the decision provides authority for the conclusion that jus cogens obligations would have *erga omnes* effect which include the out-lawing of the unilateral use of force, genocide and the prohibition of slavery and racial discrimination. Given the fact that these same prohibitions are widely regarded as being of a peremptory nature it follows that when an obligation is recognized from which no derogation is permitted due to its fundamental nature, and all states (and other subjects of international law) have a legal interest in its protection. New Trends in the Enforcement of Egra Omnes Obligations (2000) 4 Max Planck Yearbook of United Nations Law, p. 7; See generally on the relationship between jus cogens and egra omnes obligations Cherif Bussiouni, International Crimes in Jus Cogens and Obligations Egra Omnes (1996) 59 Law and Contemporary Problems. Durham: Duke University Press, p 63; Also see Jean-Marie Henckaerts and Louis Oswald-Beck, Customary Humanitarian Law. Vol 1 Rules 1. Cambridge: Cambridge University Press, 2005, p. 604.
[53] Prosecutor v Eurundzija Judgment, 1T 95-17/1-T, 10/12/98, Para 156; Pinochet (No3)177 (Lord Millett); M. Cherif Bassiouni. "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice" (2001) VJIL, 42(1), 28.
[54] See for ex; Maurizio Ragazzi, The Concept of International Obligations Erga Omnes. Oxford: OUP, 1997, p. 50.
[55] Chilcot Report, p. 176.
[56] Les Roberts, Riyadh Lafta, Richard Garfield, Jamal Khudhairi, and Gilbert Burnham, "Mortality Before and After the 2003 Invasion of Iraq: Cluster Sample Survey", The Lancet, 364(9448), 20 November 2004, pp. 1857–1864; Gilbert Burnham, Riyadh Lafta, Shannon Doocy, and Les Roberts, "Mortality After the 2003 Invasion of Iraq: A Cross-Sectional Cluster Sample Survey", The Lancet, 368(9545), 21 October 2006, pp. 1421–1428.
[57] Articles 55 and 56 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Available at: www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/6756482d86146898c125641e004aa3c5.
[58] Protocol Additional II to the Geneva Conventions of 12 August 1949, p. 94.
ICRC. Available at: www.icrc.org/en/doc/assets/files/other/icrc_002_0467.pdf
[59] The US only ratified the Convention in March 2009; but it has not, however, ratified either the First or the Second Protocols.
[60] "Rumsfeld on Looting, Vandalism: 'Stuff Happens'", 9 April 2003. Available at: www.historycommune.org/entity.jsp?entity=Antonia_zerbiasins_18
[61] Ratification of 1954 Hague Convention for the . . . – Parliament UK. Available at: www.parliament.uk/documents/impact-assessments/IA16-007A.pdf
[62] On the origins of the expression jus cogens, see E. Suy, The Concept of "Jus Cogens" in Public International Law published in the compilation of works presented during the Lagonissi Conference, Lagonissi Conference on International Law, Papers and Proceedings, Vol. II: The Concept of Jus Cogens in International Law (Geneva 1967) ("Lagonissi Conference"), pp. 17–77. These words were used for the first time by the International Law Commission in Fitzmaurice's Third Report, Vol. II, ILC Yearbook (1958), pp. 26–28 and 40–41 (see below).
[63] Article 53 states any Convention that is in conflict with a jus cogens is invalid.
[64] General List No 143, 3 February 2012.

[65] Para 201.
[66] Para 130.
[67] Section 1(1) of the UK Geneva Conventions Act states:
"Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of a grave breach of any of the scheduled conventions or the first protocol shall be guilty of an offence".
[68] The inception of its framework was in the General Assembly adopting Principles of International Co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity in 1973 which declared that all states were to cooperate in the prosecution of persons guilty of war crimes and crimes against humanity. Adopted by General Assembly resolution 3074 (XXVIII) of 3 December 1973.
[69] Most definitive list of war crimes and civil liability in UN Doc. A/CONE 183/9 (1998) See Appendix 11, Hereafter ICC Statute.
[70] The reference to nationality was not necessary is a matter of international law. The power to enact this legislation must be based on universal jurisdiction as subsequent acquisition of nationality cannot confer jurisdiction under the nationality principle – if it did this would fall foul of the rule against non-retroactivity, see Roger O'Keefe, "Universal Jurisdiction: Clarifying the Basic Concept" (2004) 2 Journal of International Criminal Justice, p. 735.
[71] The UK ratified the ICC Statute on 4 October 2001.
[72] Sir Arthur Watts QC in his Hague Lectures, that stated : "The idea that individuals who commit international crimes are *internationally* accountable for them has now become an accepted part of international law". "The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers". Recueil des Cours, 247(1994-III), 82.
[73] Rome Statute, International Criminal Court, Article. 5.
[74] Ibid., Article 34(1).
[75] Ibid., Article 13–14.
[76] Ibid., Article 12(2).
[77] Rome Statute, International Criminal Court, Article. 1.
[78] www.icc-cpi.int/iraq

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